**LAW REFORM COMMISSION OF BRITISH COLUMBIA**

# REPORT ON
# PROPERTY RIGHTS ON MARRIAGE BREAKDOWN

**LRC 111**

**MARCH 1990**

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE BUD SMITH, Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

# REPORT ON
# PROPERTY RIGHTS ON MARRIAGE BREAKDOWN

The division of family property on marriage breakdown is one of the subjects that the Justice Reform Committee identified as calling for action and recommended be referred to the Commission for examination.

We recommend that Part III of the *Family Relations Act* be amended to clarify the philosophy, or reason, for dividing family property between spouses on marriage breakdown. Changes are also recommended which will clarify the status of particular classes of property and emphasize that, as a guiding rule, the souses should be entitled to equal shares of property acquired over the course of the marriage.

# CHAPTER I THE WORKING PAPER

## A. Introduction

When a marriage ends, spouses may dispute a number of matters, not the least of which is entitlement to property. If the spouses cannot agree, the court has jurisdiction to divide their property between them. Even property owned exclusively by one spouse may be divided. The *Family Relations Act* confers upon each spouse a half interest in family assets on marriage breakdown. Moreover, a non-owning spouse who can prove contribution is entitled to an interest in business assets owned by the other spouse.

This state of affairs has only been with us since 1979, when the *Family Relations Act*[1] came into force. Before then, spouses in British Columbia were entitled to retain their separate property after the end of a marriage.[2]

## B. Justice Reform Committee

In 1987, a task force, called the Justice Reform Committee, was established under the chairmanship of the Deputy Attorney General, the Honourable E.N. (Ted) Hughes, Q.C., to review all aspects of the justice system. After a year of consideration and consultation (which involved public hearings throughout the province) the Committee's Report, *Access to Justice*, was submitted in November, 1988. The Report proposed sweeping changes to the law of British Columbia. Many of these proposals have been implemented or are being considered for implementation.

The need to review family property legislation in British Columbia was raised by the Justice Reform Committee (an extract from its Report is to be found in Appendix C). The Committee recommended that:

> Recommendation 38
>
> The Attorney General of British Columbia, after consultation with the Family Law Section of the British Columbia Branch of the Canadian Bar Association and the Law Reform Commission of British Columbia, should revise the *Family Relations Act* provisions which deal with family property.
>
> The revision should make a clear statement of the principles on which family property is to be shared by spouses or former spouses.

The Commission has been active in this field for a good part of the 1980's. *A Study Paper on Family Property*, written by Thomas G. Anderson and Michael Karton, was sponsored by the Commission and published in 1985. The Study Paper collected together and analyzed the British Columbia case law under the *Family Relations Act*, but contained no recommendations for reform. The Study Paper, however, served as a quarry, and provided the foundation for the Commission's subsequent work in the area of family property

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1. R.S.B.C. 1979, c. 121.

2. This was subject to a limited and largely unexpored jurisdiction enjoyed by the court to divide property under the *Family Relations Act*, S.B.C. 1972, c. 20. *See* further K.B. Farquhar, "Section 8 of the *Family Relations Act* - An Experiment in the Exercise of Judicial Discretion and the Distribution of Matrimonial Property," (1979) 13 U.B.C.L. Rev. 169. That Act was replaced by the *Family Relations Act*, R.S.B.C. 1979, c. 121.

legislation.[3] The Commission's deliberations on necessary revisions to family property legislation were well advanced at the time the Justice Reform Committee recommendation was made.

Following the recommendation of the Justice Reform Committee, the Attorney General requested the Commission to advise on necessary changes to the law governing property rights between spouses on the end of marriage. The importance attached to prompt action on the recommendations of the Justice Reform Committee led to an additional request by the Attorney General, on August 18, 1989, that the Commission's recommendations be made available in time for the spring 1990 session of the legislature.

In September, 1989, the Commission published a consultative document recording the state of its tentative conclusions. This was the *Working Paper on Property Rights on Marriage Breakdown*.[4] It was distributed widely and comment on all aspects of the research and directions tentatively suggested for revising the law was invited.

In the following pages, we will discuss generally the features of the current law that were identified as causing trouble, and the directions for reform that were set out in the Working Paper, as well as the comment and criticisms that were made on the Paper. But before we turn to that discussion, a few words about the process of consultation are in order.

## C. The Process of Consultation

### 1. THE NEED FOR TIMELY RESPONSE

The government's legislative agenda reshaped the course of the Commission's general methodology. At the stage when it is appropriate to publish a Working Paper for comment, the Commission will normally set aside the better part of a year to allow for public comment, particularly for a matter as important, and as sensitive, as family property. This reflects our understanding of the problems faced by groups in coming to grips with the area of law under review, and the logistics of setting up meetings where discussion can take place and views emerge.

In many cases, we will have an opportunity to discuss our correspondents' concerns with them, and pursue not only the points they have raised, but additional concerns of our own on which the comment and advice of legal experts and of the public play a crucial role in shaping recommendations for sound changes to the law.

The time available in this instance meant not only that the Commission's work had to be compressed, but that the process of consultation also had to be. We requested that comments be sent to us no later than December 15, 1989, so that we would have an opportunity to reconsider our tentative proposals and prepare a final Report to the Attorney General. We would like to record our appreciation of the efforts that were undertaken by various individuals and groups to respond to our request for advice in the short time that was available.

### 2. A DESCRIPTION OF THE PROCESS

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3. *E.g., a Report on Spousal agreements* (LRC 87) was submitted to the Attorney General in 1986.

4. The *Study Paper on Family Property* served as a point of departure for the Working Paper.

The Working Paper was published and available for circulation early in September. A mailing list was prepared for wide distribution, to bring the Working Paper to the attention of people and groups who were knowledgeable in the area or affected by changes to the law. An attempt was made, for example, to place a copy of the Working Paper in the hands of every lawyer in the province working in the field of family law.[5]

To ensure that people and groups that we did not contact directly were aware of the Commission's work, several additional steps were taken.

First, a general press release was issued on September 14, 1989. Although this did not receive the level of media attention we had hoped, the Working Paper's publication was noted by various newspapers, magazines and radio and television programs.

Also, with the assistance of the government's media and public relations specialists, we engaged consultants to prepare and distribute a summary and a brochure about the Commission's work. The brochure advised that the Commission was conducting work in this area and invited the public to request copies of the Working Paper or a summary of it. The Working Paper is a lengthy and technical document, although every effort was made in its preparation so that it was not necessary to have a legal background to come to grips with the directions for reform proposed by the Commission. Nevertheless, we realized that not everyone would be prepared to tackle the Working Paper. The five-page summary provided information on the general outlines of reform.[6]

Copies of the brochure and the summary were also distributed widely and every public library in the province received multiple copies. In addition to the copies of the Working Paper, brochure and summary that we mailed out initially, we received an additional 270 requests, with which we were happy to comply, for copies of either the summary or the Working Paper.

## 3. CONSULTATION WITH THE PROFESSION

It is not our custom to publish lists of our correspondents, nor attribute comments to specific groups. But we think that in this case it is important to give at least some idea of the varied backgrounds and viewpoints our correspondents brought to bear on the tentative proposals set out in the Working Paper, as a tribute to them, and also to reflect the broad spectrum of advice we received. A few words on this point are in order.

The thoughts of the legal profession on possible revisions to this area of the law were clearly of importance, and every effort was made to assist the profession in making their views known. Commission personnel travelled across the province and met with the New Westminster, Vancouver, Victoria and Okanagan Family Law Subsections of the Canadian Bar Association, as well as other committees of lawyers struck to consider the Commission's work.

The profession, however, did not confine its participation to the discussion and comments at these meetings. Each Family Law Section struck a special committee to consider the Commission's Working Paper, and the views of these committees were coordinated by a head committee consisting of delegates from each

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5. The Canadian Bar Association (British Columbia branch) assisted us in the mailing of copies to all members of the British Columbia Family Law Sections.

6. An excerpt from the summary is set out in Appendix A to this Report.

of the Subsections. The Commission received not only submissions from the various subsections, but a detailed and comprehensive submission on behalf of the British Columbia branch of the Canadian Bar Association. We are aware of the difficulties that had to be overcome and the heavy commitment that went into assembling the materials prepared for us, in the very short time that was available, and we wish to record our appreciation to the individuals involved in this process and their contribution to our work.

4. OTHER GROUPS

The Commission also received submissions (invariably lengthy, detailed, well considered and cogently presented) from other committees and groups. Several groups that spoke on behalf of women (notably LEAF (West Coast), (Vancouver) Status of Women, and Munro House) assisted us with their comments. We also received advice from lenders and members of the judiciary. The perspective, background and insight that we gained in this way was important and immeasurably useful. The recommendations made later in this Report were substantially reshaped as a result of the comment we received.

5. THE PUBLIC

The work of the Commission is often confined to arid, technical areas of the law that seldom excite the interest of the public. But family property is clearly an area where interest, not to mention emotions, run high and we received many letters from individuals who were anxious to comment on the Commission's proposals and to advise us of their own personal experiences with the judicial system. In letter after letter we heard of the failings of both the law and the administration of justice.

People not only wrote, but telephoned, to advise of their views. All of these submissions were of importance. We are grateful that people took the time to comment.

## D. Overview of the Report

Later in this Report are set out the comments that we received on the tentative proposals made in the Working Paper. We have been convinced by our correspondents that changes to the law governing family property must necessarily adopt a more modest scope than we at first envisaged. Nevertheless, there are matters of importance that must still be addressed.

This Report sets out first the background of the current law, against which our work has been conducted. Following that is a general discussion of the directions for reform suggested in the Working Paper, and the comments we received on our work. Finally, we make recommendations for revising the current law.

# CHAPTER II THE CURRENT LAW

## A. Introduction

Until not very long ago, in British Columbia, husband and wife were separate as to property. This meant, for the most part, that when a marriage ended the husband kept property owned in his name and the wife kept property owned in hers.

This was often unfair. During a marriage little thought might be given as to who would nominally own property and, as a matter more of social convention than anything else, the property was frequently placed in the name of the principal income earner, who was usually the husband. Unfairness arose when both spouses, as was typically the case, had contributed to the well-being of their family, according to the roles they had adopted. The law failed to give sufficient recognition to the contributions made by the partner primarily responsible for homemaking and child rearing.

Over the past twenty years, there has been a revolution in family property law, in an effort to find some way of adjusting property rights so that both spouses, when their marriage ends, leave it with a fair share of property. In 1972, British Columbia adopted a general, discretionary system, which allowed judges to adjust property rights on the end of a marriage. This was replaced in 1979 with the current law, which provided a more structured approach to the problem.

The move from an unfettered discretionary system to one which provided more guidelines was a wise one, but substantial concerns remain about the fairness of dividing certain types of property and the unpredictability in the exercise of the generous discretion still conferred upon a judge to determine what is a fair division of property having regard to the particular circumstances of the marriage.

This Chapter sets out a survey of the law of British Columbia that governs the division of family property on marriage breakdown. It is at a most general level but sufficient for our purposes to indicate some of our concerns and the possible directions for reform that we have had under consideration. Readers desiring a more detailed examination should refer to the Working Paper that preceded this Report.

## B. The Current Law

### 1. A HALF INTEREST

The British Columbia *Family Relations Act* provides that upon marriage breakdown, no matter who is listed as the legal owner, each spouse becomes entitled to a half interest as a tenant in common of family assets.[1]

### 2. KINDS OF PROPERTY

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1. S. 43. Whether or not a marriage has broken down is determined by reference to various events. The occurrence of any of the following events, set out in s. 43(1), "triggers" entitlement to family property and, for that reason, these are known as triggering events:
   (a) a separation agreement;
   (b) a declaratory judgment under section 44; or
   (c) an order declaring the marriage null and void.

Exactly what property is divisible between the spouses is subject to a process of categorization. There are three kinds of property recognized under the *Family Relations Act*. These are "family assets", "business assets," and "ventures."[2]

## 3. "FAMILY ASSETS"

The Act provides some idea of what these kinds of property are, but it is hardly definitive. Some kinds of property are specifically defined as being "family assets," including joint bank accounts, pensions and retirement savings plans. The legislation also sets out a test for determining whether particular property qualifies as a family asset:[3]

> (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.

The Working Paper examined at some length the case law in which this definition had been considered and discussed problems that had arisen in its application. What is a "family purpose?" Can assets that are infrequently used for anything in particular still qualify if sometimes used for family endeavours? What about property where only parts of it are used (such as interest from a savings account)?

Although there are questions which remain unanswered, for the most part it is usually pretty clear whether or not an asset is ordinarily used for a family purpose. The matrimonial home and the family car are two obvious examples. Problems occasionally arise in this context, but they are not overwhelming, nor reason in themselves to overhaul the *Family Relations Act*. More serious are the problems that tend to arise once it is decided that the asset in question is not ordinarily used for a family purpose.

## 4. "BUSINESS ASSETS" AND "VENTURES"

If property is not used for family purposes, is that an end of the matter? As it happens, other property owned by either of the spouses may also be divisible, if there has been contribution, in one way or another, to it.

Business assets, for example, are divisible if the non-owning spouse contributes, directly or indirectly, to the acquisition of the property or the operation of the business in which it is used.[4] Ventures are divisible if the non-owning spouse contributed, directly or indirectly, to them.[5] The legislation provides that effective management of the household or child rearing responsibilities may qualify as indirect contribution.[6]

Few problems arise in determining what qualifies as a business asset, although the case law on what

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2. Some kinds of property do not fall into any of these categories, so there is an additional group, referred to in the cases as “other property,” which, consequently, is not divisible under the Act: Underhill v. Underhill, (1983) 45 B.C.L.R. 244 (C.A.). This represents a gap in the court’s jurisdiction to divide spousal property. It is difficult to identify any policy to support this position, and it is likely that it was unintended. In some cases, courts divide such property by using a constructive trust.

3. S. 45(2).

4. Actually, s. 46(1) turns the test around. It tells us that business assets to which there has been no contribution are not divisible. It is only by implication that the legislation provides that some kinds of assets used in business are divisible.

5. S. 45(3)(e).

6. S. 46(2).

is a "venture" is vague and inconclusive. In the Working Paper, we made the following comments:[7]

> The *Family Relations Act* provides that a venture is a family asset if the non-owning spouse made contributions to [it.] No other jurisdiction distinguishes between business assets and ventures. The meaning of venture is uncertain, but probably refers to assets acquired to earn income or profit but not for use in a business. Perhaps venture is used to mean investments in stocks or bonds. If is difficult to see what is gained by treating ventures separately from business assets.

Problems in this context, however, do not arise so much from determining whether property is a business asset or venture (although such issues do arise from time to time), but whether there has been the right kind of contribution to it.

The *Family Relations Act* acknowledges that a non-owning spouse may make a direct or indirect contribution to the acquisition of property. Some doubt surrounds the concept of indirect contributions and authority is conflicting. In the Working Paper we identified five different streams of authority as to how contribution is to be treated.[8] In some cases the judge is prepared to recognize that homemaking services are adequate contribution to support entitlement to business assets and ventures. In other cases a stricter view is adopted, and a substantial link between the value of indirect contributions and the acquisition of property is required. In effect, some judges are able to use the Act to achieve results not significantly different from those under the former law which protected separate property. Other judges rely upon the Act to divide property between the spouses in the same way as if the *Family Relations Act* provided for full community of property.

However, the mainstream of judicial thought clearly lies between these two extremes, and most cases manage to strike a compromise position. Much credit must be given to the judiciary for bringing a semblance of order to legislation which fails to provide anything like guidance on relatively crucial issues that are faced time and again when determining how to divide family property. Professor Farquhar has made the following observations in this regard:[9]

> Even a cursory glance at this legislation reveals that, despite its complexity and apparent detail (and in some cases because of it), a substantial number of very important questions about the ultimate destination of matrimonial property were left unanswered by the Legislature. Many of these involved vital issues of policy with which the courts immediately had to come to grips, and it is a matter of notoriety that there was, and continues to be, a flood of litigation on property issues between husbands and wives whose marriages have broken down. In these circumstances the British Columbia Court of Appeal has been called upon to perform extraordinary service in attempting to bring some finality into the seemly endless list of questions that arise on a daily basis in the trial courts.

## 5. DIVIDING PROPERTY

Once it is determined what property may be divided, the question that must be answered is: how much of it is each spouse to get? The *Family Relations Act* says that family assets (or property divisible as family assets) is to be divided 50/50 between the spouses. But that is only a starting point, and the court is required to vary the division if it would be unfair having regard to listed criteria. Section 51 is the source of this jurisdiction:

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7. At p. 31-2.

8. *See* generally, Chapter III.

9. "Matrimonial Property and the British Columbia Court of Appeal," (1988) 23 U.B.C.L. Rev. 30, 34.

**Judicial reapportionment on basis of fairness**

> 51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage;
>
> (b) the duration of the period during which the spouse have lived separate and apart;
>
> (c) the date when property was acquired or disposed of;
>
> (d) the extent to which property was acquired by one spouse through inheritance or gift;
>
> (e) the needs of each spouse to become or remain economically independent and self sufficient; or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court ...

This section gives the court a broad discretion to fine-tune a division of property between spouses having regard to the particular circumstances of their marriage. The problem is that, while each of these factors is of significance, they can be used in different ways to achieve different views of what is fair. The Act gives no guidance on what kind of division is fair or unfair.

For example, how is property brought into the marriage to be dealt with? Under the Act, if such property has ordinarily been used for a family purpose, it is divisible in equal shares unless that would be unfair. When would an equal division of property owned before marriage be unfair? Judges have struggled with this issue for some time. Even so, it is difficult to describe the current law on this point with any precision. At one time, for example, in the context of pensions, it seemed to be settled that the portion of the pension earned before marriage was not divisible between the spouses. That position was changed by the British Columbia Court of Appeal in the *Mailhot* decision,[10] where it was held that the portion of the pension earned before marriage is, at least as a starting point, equally divisible between the spouses. The court also suggested that it will be the rare case where such property is not equally divisible. But, while the law governing pensions is relatively clear, the same cannot be said about other kinds of assets.[11]

Similar problems arise in determining whether the equal division of gifts and inheritances is unfair. Some judges feel that a gift or inheritance should rarely be divided between spouses, but will do so, for example, after a long marriage. Other judges find that this factor does not signify all that much and will, perhaps, only slightly vary an equal division in recognition of it.

The date property was acquired is another slippery factor. It is fairly easy to see how this consideration might alter a division of property received by gift or inheritance. Many might agree, for example, that a gift or inheritance received early on in a long marriage should be divided equally, while property received in either of these ways late in the marriage should not be, and some cases bear out this kind

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10. (1988) 18 R.F.L. (3d) 1 (B.C.C.A.).

11. The decision in *Mailhot* would appear to be correct in terms of Part III of the *Family Relations Act*, although, as will be discussed later, in keeping with the recommendations made in this Report the policy respecting sharing the portion of a pension brought into a marriage should be altered.

of approach. But the factor is raised in other contexts to justify other decisions in which the logic is sometimes baffling. In the *Milan* case,[12] for example, the husband purchased a car late in the marriage and the date of purchase, among others, was listed to explain why the husband received the larger share of it. But surely date of acquisition has no significance in this context, when the property used to buy the car would itself have been divisible as a family asset. If, for example, an owning spouse were, late in the marriage, to exchange all of his property for other property, that would not justify a different kind of division than would have taken place before the exchange.

In one submission on the Working Paper, we were advised that in most cases the outcome of a family dispute is predictable from the outset. If so, it must be possible to identify the principles which apply, depending upon the individual factors of the case. But we are unable to see that kind of predictability emerging from the case law and, in fact, we are not alone in acknowledging the unpredictability under the current legislation. A Family Law Committee, established by the British Columbia branch of the Canadian Bar Association to make submissions to the Justice Reform Committee, for example, wrote:[13]

> Whether initially or through the course of the file, the matrimonial lawyer is beset on the one hand by the need to provide direction and guidance to the client, and, on the other hand, to present realistic and cogent advice in order to make the client more realistic and objective. This task is made no easier by the abundance of cases which provide inconsistent answers in analogous situations. It is only in the very rarest of truly contested cases where the lawyer can, with comfort, provide a reliable prognosis. The 32-year marriage during which all assets were acquired is an obvious example. But what of the short marriage with no children where some of the assets were acquired by one spouse prior to the marriage? Where each spouse brought in some assets but not of an equal amount? Where one spouse laboured in the home and the other laboured outside of the home? ...

We will return to consider comment on the Working Paper in greater detail later in this Report. It is important, however, to recognize that the disagreement concerning reform of the law was not confined to the kinds of steps that might be taken for its improvement. There was a fundamental difference of opinion as to the kinds of problems that exist under the current legislation.

This might be putting too fine a point on the comment received. It may well be that our correspondents who commented on the level of certainty under the existing law were saying little more than that they endorsed the need for flexibility and discretion under family property legislation, and that insofar as the current legislation is concerned, the level of uncertainty that exists is within a tolerable range.

### C. Problems Under the Current Law

The Working Paper suggested that lack of certainty under the current law was reason for changing it, but that was not the only, or chief, reason identified.

Other concerns included the amount of litigation that takes place under the current legislation, the expense associated with family property disputes and the delay that is often encountered in resolving these kinds of issues. All of these problems, we felt, were attributable to two general deficiencies in the legislation. First, the *Family Relations Act* lacks a general statement of principle or policy. The Act is silent on the reason why family property is to be divided on marriage breakdown. Second, what guidelines there are for identifying divisible property, and a fair division of it, are inadequate. Even on the simplest of levels, what

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12. *Milan* v. *Milan*, (1989) 19 R.F.L. (3d) 401 (B.C.C.A.).

13. At 17.

may be divided between spouses is an open question. Most other jurisdictions provide simple rules for answering this issue. In British Columbia, what is to be divided between the spouses is often a matter left to the discretion of the courts.

### D. The Need to Revise the Current Law

The foregoing is only a general summary of a position that was discussed in detail in the Working Paper. Readers are invited to refer to the Working Paper if they wish to pursue these points. For our purposes, the foregoing summary is sufficient to identify some of the principle reasons that convinced us of the need to explore alternatives to the current law in British Columbia.

Several correspondents provided us with examples of problems they had encountered in their experience. One lawyer, for example, wrote:

> In many cases clients have to take responsibility for the cost of the litigation. Even the simplest motion can develop into a costly experience. Clients frequently tell me that they have spent $7-8,000 on a motion. The most extreme example was a young woman who advised me that she had spent $150,000 on legal fees for her family problem and she had not yet reached an initial trial.

Another correspondent advised that he had spent $200,000 in legal fees over eight years to resolve entitlement to family property after the breakdown of a two and a half year marriage.

Another case we were told of involved a dispute over property acquired during a 28-year marriage by the efforts of the spouses. Assets, worth about $65,000, consisted of equity in a home and automobiles. There was also a pension. This would seem to be a straightforward case. Members of the bar, for example, would have no trouble predicting that the property would be divided 50/50 after trial. But the dispute is now in its second year. The point is that litigation and discretion are expensive, not just for the hard case, but also for the simple, straightforward, typical case.[14]

An other correspondent wrote:

> Since that time [marriage breakdown] I have had three different lawyers -"employed by me" close to $25,000 in debt, and no further ahead than four years ago ...

The various problems identified with the existing law can basically be summarized in terms of the questions left unanswered by the *Family Relations Act*. That Act does not clearly tell us what to divide, how much of it should be divided and why it is being divided between the spouses. Instead, judges are asked to find solutions and it is not surprising to find that different judges provide different answers.[15]

The next Chapter outlines the Working Paper's response to these problems.

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14. However, it must be recognized that in some instances, the costs have no connection with the relevant legal principles, but are attributable to one or both of the spouses wanting to have a “day in court” regardless of the cost, or to a vindictive spouse who will fight every step of the way.

15. Several responses to the Working Paper pointed to the available statistics, which suggest that only 2 per cent of cases proceed to trial and observed that there was not much wrong with the law with that kind of settlement rate. Even if the statistics were reliable - a point which was pursued in Appendix C to the Working Paper - the rate of settlement does not tell us anything about the kinds of legal proceedings which took place before settlement. Avoiding trial is not always a success story.

# CHAPTER III TENTATIVE DIRECTIONS FOR REFORM - THE WORKING PAPER

## A. Guidelines

Diverse views are held concerning what principles should apply to achieve a fair result when marriage ends. If nothing else, the submissions received on the Working Paper bore this out. Responses favoured everything from complete separate property to full community of property.

Most cases decided under the *Family Relations Act* seem to adopt the perspective that property acquired during marriage should be divided between the spouses and the reason they share this property is because each has contributed more or less equally to the marriage. If the legislation set out this basic principle, all cases decided under it would proceed from a common premise or understanding. We expressed that view in the Working Paper, and we continue to hold it. This is an obvious direction for reform and one from which, it is expected, much good would result.

In the Working Paper, we suggested two means of achieving such reform.[1] The first method would be to simply add a statement of principle to the existing legislation, and clarify the status of property to which the non-owning spouse could not have contributed (property brought into the marriage and property acquired by gift and inheritance). This would accomplish most of what needs to be done.

The second method, which may be called the "Compensation Approach," was more ambitious and sought to achieve more. The method by which family property is divided, failing the agreement of the parties, is litigation. Litigation is an expensive process. Would it be possible to define a more objective approach for dividing family property which would minimize the need to litigate and, where trial was inevitable, shorten proceedings? If so, the financial costs and emotional burdens of divorcing spouses could be eased substantially. We felt that it was worth developing this second course and we did so at length in the Working Paper.

In Appendix A, the Summary we published is reproduced and will give a more complete idea of the general framework of the "Compensation Approach." For an in depth analysis, please refer to the Commission's *Working Paper on Property Rights on Marriage Breakdown*.

In the Working Paper, a point form summary of the draft legislation proposed was provided, and it is worth reprinting, to give some idea of the dimensions of reform we contemplated:[2]

- The legislation[3] abandons the two methods, the family purpose test and contribution, by which divisible property is currently determined in British Columbia.
- The theory upon which shared rights in property depends is clarified. Unless the spouses otherwise decide, the economic side of marriage is to be thought of as a joint venture or financial partnership where each contributes equally.

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1. At 110.
2. At 113-4.
3. This is a reference to draft legislation set out in the Working Paper.

- Increases in the financial worth of the spouses occurring over the course of the marriage attributable to income they earn or changes in value of their assets should be assessed and a payment made to the spouse who has acquired less wealth over the course of the marriage in order to ensure equality between the spouses.

- No special provisions address entitlement to the matrimonial home. It is treated like all other property owned by the spouses. If concerns relating to shelter, for example, arise, these can be addressed through an order for possession ...

- No distinction is drawn between family assets and business assets.

- The manner of acquisition of property is not addressed by the court's discretion. Instead, the draft legislation is premised on the view that a non-owning spouse should not share in the value of property acquired by gift or inheritance. Increases in the value of such property, however, should be taken into account when determining the amount of an equalizing payment ...

- The value of property brought into the marriage is not divisible between the spouses, but increases in the value of such property over the course of the marriage are.

- Currently, the British Columbia legislation involves the apportionment of property between spouses. This causes a number of theoretical problems, and has the potential to prejudice third parties. The draft legislation instead proceeds on the basis that spouses have personal rights to adjust a disparity in the ownership of property that exists on marriage breakdown. Generally, rights will be balanced by the payment of money, although it is open to the courts to apportion specific items of property.

- This approach to determining divisible property dramatically reduces the role of judicial discretion in ascertaining the rights of spouses. Nevertheless, the courts retain discretion to depart from equal sharing in exceptional circumstances.

## B. Comment on the Working Paper

There were dissenting voices, but most of the submissions on the Working Paper agreed that there was a need to revise the current law and, while few endorsed the Commission's proposals as a whole, there was agreement on the general directions for reform. We will outline these later in the next Chapter. For the moment, we would like to record some of the major themes sounding in the comment we received. A detailed discussion of the submissions on the Working Paper, and a few comments of our own, are to be found in Appendix B to this Report.

Many of our correspondents agreed with the two points we stressed in the Working Paper: the need for the legislation to set out a statement of principle or philosophy clarifying why property was being divided between the spouses, and the need to clarify the treatment to be accorded classes of property, particularly that brought into the marriage or received by gift or inheritance.

As it happens, this was the direction for reform originally suggested in the Report of the Justice Reform Committee:[4]

> The problem seems to be that the [Family Relations] Act does not contain a statement of the philosophical basis for entitlement to share in family property. Until that statement is clearly made, judges will continue to apply their own ideas as to how marriage affects property rights.
>
> It will be very difficult, given the diversity of our society, to arrive at a consensus on what the marriage

4. *Access to Justice*, 60.

relationship entails. but some common ground must be found and it must be clearly state in the statute.

The cost of not doing so is too great for our justice system and for individual litigants.

Even so, various representations were made that disagreed with directions for reform we had suggested, or which raised considerations to which, it was felt, we had attached insufficient weight.

Some argued that the existing legislation should serve as the basis for new legislation. Reform should build upon the current law and not start afresh. Several reasons were put forward in support of this position, but the strongest of them seems to have been the importance attached to retaining legislation which is familiar. There is much to be gained from such an approach when dealing with legislation which, in many respects, must be subtle in concept and complex in execution. Not only the legal profession but the public have come to terms with the fundamental features of Part III of the *Family Relations Act*. They should not have to start anew with legislation that entirely replaces the existing provisions.

A related concern centered on the shift in emphasis to valuation which would, it was said, involve professional valuators to a degree beyond which they are currently required. This was a result that many argued should be avoided. The more professionals involved in the process of family property division the costlier it becomes. While we are not convinced that the darker imaginings of our correspondents would come to pass, this is an area where it is difficult to make any assertion with certainty. This concern was seen as an additional reason for keeping intact the broad outlines, and thrust, of the current legislation.

A note heard in many submissions was that the judges must retain sufficient discretion to deal with the variety of problems that arise on marriage breakdown, in order to do individual justice between the parties. While we would not go as far as some of our correspondents urged, and recommend retaining the full discretion currently enjoyed by judges, our views have altered in this regard and we can see room for a larger discretion than that tentatively proposed in the Working Paper. A point which we felt to be particularly convincing is that dividing property involves considerations which carry beyond simple questions of contribution. An additional concern is the importance that should be attached to the efforts of the spouses which, while they may not add to the sum total of wealth mutually enjoyed, protect and maintain the value of property each owns.

These kinds of considerations were perhaps most sharply expressed in one submission which urged that a distinction be drawn between the typical case, where the spouses will own only a few assets of significant value (perhaps a home, pension and automobiles) and the more unusual case, where one spouse, or both of them, will have a number of assets of significant value. The various classes of dispute, categorized by the kind and amount of wealth involved, raise issues that can be answered either by the exercise of a discretion or by devising rules which recognize the differences intrinsic to each kind of dispute. The Commission's goal of providing the courts with more guidelines, which would serve as an adequate, if not superior, alternative to a generous discretion, it was suggested, can be met only if this consideration is kept in mind. Where, for example, the spouses have little property to speak of, a discretion serves them not at all well, since in the process of dividing their financial affairs they will end up spending most of what they have. Where the spouses have a great deal of property, they can also afford a discretion which might provide a finely adjusted division that recognizes the particular circumstances of their marriage. In between these two extremes, a measure of discretion might function well, provided the general framework for the division of property is established in clear enough terms.

These were some of the main themes voiced by our correspondents, and which we found particularly convincing. They suggest the range and scope of initial steps that might be taken to redrawing the lines of

family property direction. They also suggest the outlines of more ambitious steps that might be explored (and made the subject of further consultation) in the future.

### C. Summary

This Chapter has reviewed some of the proposals for reform set out in the Working Paper, and discussed, in broad brush strokes, the kinds of comments that were received on the tentative proposals. The next Chapter sets out our recommendations for reform.

# CHAPTER IV REFORM

## A. Introduction

Family law is an area where emotions sometimes run high and where a number of irreconcilable viewpoints are held. We do not think it is possible to arrive at a position which will receive the wholehearted approval of the entire community. Nevertheless, judging by the response to the Working Paper, there are initial steps to be taken for the improvement of the current law which should prove to be not only beneficial, but largely uncontroversial. The time for more comprehensive reform must await more study and more consultation.

## B. Initial Steps

### 1. AMENDING THE CURRENT ACT

A number of submissions urged that any changes introduced to the law governing family property should build upon the existing legislation. The recommendations set out in this Chapter are based upon the current approach to dividing family property and wholly new legislation is not required. They can be implemented through amendments to Part III of the *Family Relations Act*.

### 2. STATEMENT OF PHILOSOPHY

If there is to be greater certainty in the process of dividing family property, an initial step, and one which we regard as crucial, is to include in the legislation a statement of the philosophy as to why property is to be divided. Two inconsistent justifications are often put forward. The first is that entitlement is an incident of marriage and the second is that entitlement is based upon contribution. Those holding the former view tend to believe that all property owned by the spouses should be divisible between them. Those adopting the latter hold that only property to which there can have been contribution should be divided on marriage breakdown. Which approach should be adopted? In the Working Paper, we made the following comments:

> A philosophy adopted in a number of other jurisdictions is that entitlement depends upon contribution to the well being of the family. Each spouse shares mutual obligations and responsibilities. These include child care, household management and financial provision. Each of these obligations is of equal worth to the family. Consequently, while entitlement to family property depends upon contribution, this is only a general principle. There is no direct correlation between the value of direct and indirect contributions and the interest to which a spouse is entitled. Courts, for the most part, may not consider the actual contributions of the parties when determining an appropriate division of family property. Contribution is the reason, but not the yardstick for dividing family property.
>
> Some may find it curious that a philosophy, which proclaims that rights to family property are based on spousal contribution to the acquisition of the property over the course of the marriage, does not determine entitlement by assessing the relative contributions of the parties. The approach adopted by such legislation can only be explained by acknowledging that it is a highly pragmatic response to the problems that must be resolved when dividing family property. Little is to be gained by a minute assessment of each party's contribution. Moreover, comparing the contributions of income earners and of homemakers is likely to be exceedingly difficult if not wholly impractical.

Ontario's legislation dividing family property is based on a theory of contribution. That concept is described in the Ontario legislation:

> The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties ...

The contributions of the spouses are deemed to be equal. Dividing family property by reference to the actual contributions of the spouses is a position that has been rejected in most Canadian (and, for that matter, Commonwealth) jurisdictions in favour of a position which is based on the view that each spouse contributes equally to the family unit.

Although the view that entitlement to family property is an incident of marriage was not wholly without support,[1] it was that of a minority. A majority of those who commented on the Working Paper agreed with the Commission that family property legislation should contain a statement of principle, and that the theory of contribution - which underlies most Canadian family property legislation - was an appropriate standard.[2]

Identifying the rationale for dividing property would give judges a common viewpoint and help bring a degree of consistency to decisions decided under the *Family Relations Act*. Adopting contribution as the rationale adjusts the general focus for sharing property, confining it primarily to that which was acquired during the marriage through the efforts of either or both spouses.

The Commission recommends that:

1. *A section be added to Part III of the Family Relations Act embodying the following principles:*

   *Child care, household management and financial provision are the joint responsibilities of the spouses and inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal share in family assets, subject only to the considerations set out in section 51.*

The reference to section 51 retains the court's discretion to arrive at a fair result. Section 51 empowers a judge to vary a division of family property having regard to listed criteria. As a starting point, the spouses are entitled to equal shares of property because of their contributions to the well-being of their family. If there is to be a departure from that starting point, it must be justified by reference to the considerations set out in section 51.

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1. One submission argued:
   > Prima facie entitlement after marriage breakdown to an equal share of property acquired by either spouse during marriage (except gifts and inheritances) should simply be an incident of marriage. This ... rationale is much more in line with couples' intentions in entering marriage. However unprepared, people still marry because they intend to spend the rest of heir lives together, living under the same roof, usually raising a family, entirely sharing a way of life. Where mutual sharing and support are the intention of the individuals, a division based on contribution alone is inadequate ... The fact of marriage is the basis of this model. It is more accurate to acknowledge that the state imposes a division simply because of the fact of marriage.

   This was the most eloquent of the submissions we received on this point.

2. The following comment is typical:
   > We support the Working Paper recommendations that there be an express statement of philosophy or principle underlying the division of property on marriage breakdown.
   > In our view, the Ontario legislation's statement is a sound starting point for the expression of the philosophy ...

## 3. ASSETS BROUGHT INTO THE MARRIAGE: TWO APPROACHES

Measures are also desirable to clarify the particularly troublesome and recurring issues of how the *Family Relations Act* should treat property brought into a marriage and property acquired through gift and inheritance.

Where property which is subject to division because of its character as a "family asset" was brought into the marriage by one spouse,[3] the effect of the *Family Relations Act* is that, on a marriage breakdown, that spouse's only entitlement is an undivided one-half interest in the asset, coupled with a right to apply to the court for a (discretionary) increase of that interest because an equal division is "unfair." This position is inconsistent with the view that entitlement to family property primarily depends upon contribution to the well-being of the family. There is widespread agreement that the owning spouse should have some greater entitlement with respect to an asset brought into the marriage than the current law provides. This is reflected in the submissions of a majority of those who responded to the Working Paper, the laws of other Canadian provinces,[4] and what appears to be the mainstream approach of the judges in the exercise of discretion with respect to the division of assets brought into marriage.

Given that the owning spouse should have an enhanced entitlement to an asset brought into marriage, defining the nature and extent of that entitlement, however, raises difficult issues. The most fundamental question is whether an enhanced entitlement should operate in terms of property rights or value.

One approach would be to state in legislation that where an asset brought into marriage continues its existence and, on marriage breakdown, is still owned by the same party it is not subject to division under the Act whatever changes in value it might have undergone. This approach, operating purely in terms of property rights, is enticing in its simplicity. Moreover, since the scheme of the current Act centers on the division of property rather than value, it achieves the most comfortable fit.

This approach is open to the objection that it does not require the sharing of increases in value of the asset after marriage that should be a feature of a contribution-based regime. How far contribution is relevant will depend on the nature of the asset brought in and the strength of this objection will necessarily vary from asset to asset. Even where there has been no increase in value of the asset, the approach does not easily accommodate "intangible contributions" which may have maintained or preserved its value.

These objections lead to a consideration of a second approach which centers on value. Its focus would be a legislative statement that the *value* of property brought into marriage is exempted from division.[5]

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3. Everything said respecting property brought into a marriage should also be taken to include a reference to property which is inherited by a spouse or is a gift from a non-spouse.

4. A number of Canadian provinces have addressed this principle directly in legislation. In six jurisdictions (Alberta, Manitoba, Newfoundland, Prince Edward Island, Saskatchewan and Ontario) legislation stipulates that property brought into the marriage is not divisible between the spouses on marriage breakdown. Five jurisdictions (Alberta, Manitoba, Newfoundland, Nova Scotia and Ontario) provide that property acquired by gift or inheritance is not divisible between the spouses. Other jurisdictions, including British Columbia, leave these matters to the discretion of a court.

5. An example is found in the Alberta *Matrimonial Property Act*, R.S.A. 1980, Chap. M-9:

> 7. Distribution of property
>
> (1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.
>
> (2) Property exempted from distribution - 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,
>
> ...
>
> the market value of that property

By implication, increases in value of property that occur after the marriage are to be divided. This approach is consistent with the policy we tentatively proposed in the Working Paper. Its strength is that it embodies a theory of entitlement based on contribution through the sharing of increases of wealth acquired during marriage.

The second approach is, itself, open to objections. To exempt the value of property, rather than the property itself, from division is, in the context of the British Columbia legislation, mixing two dissimilar concepts.[6] Moreover, it will require the valuation of property at the time it was brought in to the marriage, perhaps many years earlier. This was also a feature of the proposal put forward in the Working Paper and which, many of our correspondents assured us, would be a source of great expense, inconvenience and uncertainty.

We do not believe it is possible to choose between these approaches without considering the role of judicial discretion in relation to property (or its value) brought into a marriage. We now turn to that issue.

## 4. DISCRETION

Discretion, in this context, raises three issues. First, if certain property is to be exempted initially from distribution, should there be any discretion in the court to require its division? Second, if such a discretion is to exist, what should be the "test" for judicial intervention. Should the "unfairness" of a particular result trigger the discretion, as is the case under section 51 of the Act, or should there be some higher standard such as "unconscionability?" A third issue concerns the need for, and content of, guidelines in the exercise of the discretion.

Many of the submissions on the Working Paper stressed the need to retain a judicial discretion in determining appropriate shares of family property. Judges, it was said, must be able to supervise a legislated division of property and intervene when it is appropriate to do so. These correspondents saw nothing inconsistent in a regime which purports to exclude property from division while, at the same time, provides for an overriding discretion to require that it be shared where justice demands.

We continue to believe that the broad discretion conferred on judges in the current legislation is the cause of much of its unpredictability. If the legislation is amended to deal explicitly with particular assets (those brought into the marriage or acquired by gift or inheritance) in a way that recognizes the rights of the owning spouse to these assets (or their value), the range of circumstances in which the court might be called upon to exercise its discretion should be greatly reduced.

The second issue, the "test" for judicial intervention, we see as being intimately connected with the question of what exactly should be exempted from distribution - the asset itself, or its value at the time it was brought into the marriage. If the exemption were to be directed at value, we believe that a relatively high standard, perhaps an unconscionable result, should be required to trigger a court's discretion to call for a division of the value. This is because the exemption is based on a notion that increases in the asset's value occurring after marriage are subject to sharing in any event and the owning spouse should be compelled to share its original value only in extraordinary circumstances.

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(f) at the time of 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.

Saskatchewan adopts a similar approach.

6. This is not a fatal objection. S. 52 of the British Columbia *Family Relations Act* contemplates transfers of value in satisfaction of claims to property.

The same considerations, however, suggest that a much lower threshold is appropriate if the asset itself is *prima facie* exempt from sharing. It may be appropriate to provide for discretion to require a division of the asset to reflect an intangible contribution to it or share the fruits of an increase in its value. Here a much lower standard for intervention is justified as the concern is to prevent an unfair result - a standard similar to that of section 51.[7]

The options then, as we see them, are to:

(a) exclude from division the value of assets brought into marriage, with a discretion in the court to divide that value where not to do so would lead to an unconscionable result, or

(b) exclude from division the actual assets brought into marriage with a discretion in the court to divide any asset where not to do so would lead to an unfair result.

We believe that either option would work satisfactorily and, in most cases, would arrive at similar results. One or the other must, however, be adopted and our preference is for the second option. There are two reasons for this preference. First, an exemption which is stated in property terms is in greater harmony with the *Family Relations Act* in its current form. Second, adopting the option with the less strict threshold for judicial intervention opens the door to the development of rational guidelines to illuminate the exercise of the discretion. We see guidelines serving a useful function in this context.

The Commission recommends that:

2. *A section be added to Part III of the Family Relations Act which provides that no entitlement or interest arises in favour of a non-owning spouse under section 43 in an excluded asset.*

[the meaning to be given to the term "excluded asset" will be discussed in the next section]

3. *Notwithstanding Recommendation 2, the court should have a discretion to declare that the non-owning spouse is entitled to an interest in an excluded asset if a failure to include the excluded asset in the division of family property would be unfair having regard to*

   *(a) the extent, if any, to which the non-owning spouse contributed to the acquisition, management, maintenance, operation or improvement of the excluded asset,*

   *(b) the extent, if any, to which the excluded asset changed in value or form after the marriage or acquisition, and*

   *(c) the duration of the marriage.*

The approach embodied in these recommendations should achieve many of the objectives we originally set for revising legislation, in that by making decisions in advance, the ground for a family property dispute becomes more firmly fixed. Retaining a measure of flexibility to avoid unjust results meets the concerns of many of our correspondents who feared that too firm an approach would operate in an arbitrary

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7. One submission on the Working Paper urged that approach:
In our view the specific issues of pre-acquired property and inheritances can be addressed through their exclusion from division, subject to judicial discretion to adjust based on fairness under section 51 ...

fashion. It should go some way toward providing the increased level of certainty we see as desirable.

Our survey of the case law under the *Family Relations Act* demonstrated that judges, in the typical case, decline to divide property brought into the marriage or acquired by gift or inheritance or, where they divide such property, the non-owning spouse often receives only a nominal share of it. Legislation based upon these recommendations will make this position into the basic, but not immutable, rule. The treatment of these classes of property should arise as a disputed issue less frequently. The overriding discretion we recommend will serve an important function. It will ensure that in cases where there is good reason, the non-owning spouse can receive a share of property that would otherwise be excluded from division.

## 5. EXCLUDED ASSET DEFINED

In Recommendations 2 and 3 the term "excluded asset" was used without a definition. The discussion preceding them, however, made the core idea clear. An asset brought into the marriage by one spouse or acquired through gift or inheritance were the examples most frequently mentioned. They require no elaboration. One point which does require discussion is the status of assets acquired with excluded assets. The purpose of this section is to discuss this issue and provide a definition of excluded asset for the purposes of the previous recommendations.

It is often the case that property is not retained in the same form, unchanged, over the course of a marriage. Frequently it is transformed in some way or exchanged for other property. A car might be sold, for example, and the money received for it used to purchase another car. A common example is proceeds that are invested in bonds which, upon maturity, are used to purchase other bonds.

What should happen when an excluded asset is exchanged for other property? Should the new asset, or any portion of its value be exempt from division? Saskatchewan has addressed this issue in its family property legislation:[8]

> 23. (2) Property acquired as a result of an exchange of property mentioned in subsection (1) is, subject to subsection (4), exempt from distribution under this Part to the extent of the fair market value of the original property mentioned in subsection (1) at the time of the marriage.

Implicit in the Saskatchewan approach is the need to establish that property owned at marriage breakdown was acquired "as a result of an exchange" of excluded property. We think this is sound policy.

First, unless an asset acquired with an excluded asset is sheltered in some way from distribution, the legislation will encourage spouses to retain their assets in their original form to take advantage of their exempt status. In our view, it makes more sense to allow the spouses to deal with their property as they wish, in a reasonable fashion that responds to the dictates of financial prudence or their individual needs. Second, the focus of the Saskatchewan legislation, which requires some connection between the excluded property and the substitute for it, provides a reasonable limitation on the principle. If excluded property is sold, for example, there is a test to determine what later property acquired by the spouse is to be treated as excluded property. There must be some demonstrable connection between the sale of excluded property and the new property for which exemption is claimed. We think that a definition of "exempt asset" should embody this policy.

The Commission recommends that:

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8. *The Matrimonial Property Act*, S.S. 1979, c. M-61.

*4. For the purposes of legislation implementing Recommendations 2 and 3, the expression "excluded asset" should be defined to include*

*(a) an asset acquired by a spouse*

*(i) before the marriage,*
*(ii) by inheritance,*
*(iii) by gift from a third party, or*
*(iv) by the exchange of an excluded asset, or*

*(b) the part of a pension earned before marriage*

*which would, but for Recommendation 2, be subject to an interest in favour of the other spouse under section 43.*

Recommendation 4 treats pensions differently from other assets, reflecting the nature of a pension: its value depends upon contributions made over a course of years. Simply because a small pension entitlement is earned before marriage is no reason to exempt from division the remainder of the pension.[9]

## 6. CONCLUDING NOTE

It is important to note that our recommendations are intended to operate in conjunction with, but not directly to alter, other rules and tests whose application leads to a preliminary determination of whether or not a particular asset is divisible between the spouses. These preliminary rules include the family purpose test and the need for contribution to share in business assets. Recommendation 2 has effect only when the preliminary tests lead to a conclusion that an asset is amenable to division under section 43. Recommendation 3 operates only where Recommendation 2 has been invoked and it provides no authority for the division of assets which would not be permitted by the preliminary rules and tests.

We do not pretend to be wholly satisfied with this result. The family purpose test and the highly artificial distinction between business assets, ventures and other kinds of property are among the least desirable features of our system of family property. Their elimination was a major theme of the proposals we made in the Working Paper. We accept for the time being, however, that the general principles under the *Family Relations Act* which determine what may be divided, as imperfect as they may be, must be retained. A different approach to identifying what is to be divided between spouses may be called for,[10] but defining the character of that approach calls for a much more elaborate and effective process of consultation with interested persons and groups than we have been able to engage in thus far.

## C. Themes and Options for Future Exploration

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9. The Recommendation refers to the part of a pension "earned" before marriage. The courts have identified that part in many cases by simply apportioning the pension with respect to the years of marriage during which contributions were made to the pension. The fraction can be determined, *e.g.*, as years of marriage divided by years of contribution to the pension. This is a useful rule of thumb for dealing with pensions. Legislation enacting Recommendation 4 should not affect the current practice by requiring courts to adopt the more difficult and costly approach of valuing the pension as it stood on the date of marriage.

10. Moreover, a different approach may become necessary in response to social values that change as the economic position of spouses becomes more balanced.

## 1. INTRODUCTION

The Working Paper has still served some purpose as a starting point for the future process of developing a rational theory of family property and constructing a framework of rights and obligations. The need for sensitivity to the range of cases that can, and do, arise does not necessarily require the use of an unrestricted discretion.

Since the Working Paper was published a number of new and significant possibilities for reform have opened up. Most of these have emerged, directly or indirectly, from the responses to the Working Paper. We think it appropriate, in closing, to indicate some of the issues that should be addressed in any further study and consultation directed at the division of family property.

## 2. SHOULD CONTRIBUTION BE THE SOLE JUSTIFICATION FOR SHARING?

Our first recommendation in this report is that there should be a statement of "philosophy" in the *Family Relations Act* which makes it clear that contribution is a central reason for the sharing of family property. There was a general consensus about the importance of contribution. But even those who were prepared to endorse the contribution rationale most strongly were troubled that a regime based only on contribution has the potential to leave a dependant spouse with no property at the end of a marriage. Where the marriage was a lengthy one and the other spouse has ample property this was characterized as unfair. Exactly why it is unfair proved to be difficult to articulate, but clearly adequate maintenance did not alter the characterization.[11]

This view is widely-held and may explain the way in which the discretion in section 51 has been exercised in a number of cases. We confess a good deal of sympathy with it. Should the *Family Relations Act* reflect a policy that the mere fact of marriage may, in some circumstances, carry with it some entitlement to assets without contribution? Is there any way for legislation to give effect to it in some principled fashion without resorting to a judicial discretion to achieve fairness? Both questions require much further study, but the second raises some intriguing possibilities.

It would be possible to define some sort of threshold with respect to family property and call for division on contribution principles only with respect to property beyond the threshold, with the other property being divided evenly without regard to contribution. The threshold might be defined either in terms of particular assets or in terms of wealth or value generally.

An asset-oriented model could define certain "core assets" such as the family home, pensions and automobiles.[12] These core assets would be divided evenly between the spouses irrespective of which of them might have brought the asset into the marriage or contributed to its acquisition or maintenance during the marriage. Assets other than core assets (or their value) would also be divided between the spouses, but in this distribution contribution would be taken into account. The scheme described in the Working Paper might provide a model for dealing with non-core assets.

A value-oriented model could define a sum of money as the "core wealth" associated with a marriage. The core wealth would be a notional "pool" of money to which the spouses contribute, equally or unequally

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11. The unfairness was ascribed in part to the uncertainty and unreliability of awards for support and the lack of recognition for contributions of the non-owning spouses to the maintenance of the property.

12. The treatment of the matrimonial home in the Ontario legislation resembles a core asset approach.

according to their means. Core wealth would be divided evenly between the spouses. Wealth of either or both parties in excess of their notional contributions to the core wealth pool again could be dealt with as proposed in the Working Paper.[13]

### 3. HOW SHOULD DEBTS BE DEALT WITH?

The *Family Relations Act* is silent on the impact a spouse's debts should have on a division of family property. The result has been a series of *ad hoc* responses from judges from which only limited guidance can be derived. In devising a more objective scheme, debt cannot be ignored. For many purposes, simply treating a debt as "negative wealth" works well, but it is all too easy to identify examples where this leads to an unsatisfactory result. In some cases it may be unacceptable to permit a spouse to bring a particular debt into an accounting, to offset the value of an asset, in determining the spouse's net property. In other cases, the non-debtor spouse may end up having to pay a portion of the debt when that is not an appropriate result. Further study is called for.

### 4. DECLINING FORTUNE

Implicit in the contribution approach to the division of family property is the notion that the increase in wealth of each spouse which occurs during the marriage is to be shared equally between both spouses. Where, during the course of a marriage, a spouse becomes less wealthy should the other spouse be called upon to share in that decline in fortune? A majority of our correspondents accepted the sharing of increases in wealth as a fair result but many were unable to accept the application of the same idea to decreases in wealth. A number of examples were brought forward to illustrate why the spouse whose wealth has not declined should be unaffected by the ill fortune of the other. This issue also requires careful study.

### 5. PENSIONS

The division of pensions on marriage breakdown is under study by the Law Reform Commission as a separate project. Pensions have a number of unique characteristics which make it appropriate to deal with them separately from other issues relating to the division of family property.[14] Ultimately, of course, recommendations respecting the sharing of pensions must be in harmony with other aspects of family property law.

## D. Technical Matters

The implementation of our recommendations will raise a number of technical issues, such as drafting matters, the application of the legislation and the operation of the new sections with the current provisions of Part 3 of the *Family Relations Act*. These matters are pursued in Appendix E to this Report.

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13. An attractive feature of this model is that it is possible to tie the size of the core wealth associated to a marriage to its length. Core wealth might be a specific dollar figure (say $50,000) multiplied by the number of years of marriage. Thus, in a short marriage, most wealth would be divided on contribution principles but in a lengthy marriage core wealth would predominate and lead to a greater degree of sharing.

14. The difficulty with pensions is not in deciding whether they should be divisible - their treatment should be the same as for other assets owned by the spouses - but resolving the problems presented by the actual mechanics of dividing a future income stream. The technical complexities in that context are best dealt with separately from settling the general principles of family property division.

# CHAPTER V LIST OF RECOMMENDATIONS

## A. Overview

The recommendations made in this Report are designed to deal with some of the more glaring deficiencies in the current legislation. Legislation implementing our recommendations will clarify that on marriage breakdown the division of family property, as a general rule, consists of dividing equally all property acquired during the marriage. The courts, however, will retain a discretion to ensure that different arrangements can be put into place as may be appropriate in the circumstances.

Even after legislation implementing these recommendations is enacted, however, problems with the law remain and many of these were mentioned in the last Chapter and in the Working Paper that preceded this Report. Nevertheless, the next steps for the further improvement of the law must await experience with the reforms recommended in this Report as well as further study and consultation. In the meantime, we will continue to monitor the law governing the division of family property, in order to assess the impact of revising legislation as well as developments that emerge not only from the growth of experience under the legislation and the process of judicial refinement, but from changing social patterns. In the immediate future, our work on family property law will continue, but in discrete areas, such as the law governing the division of pensions on marriage breakdown.

## B. List of Recommendations

The Commission recommends that:

1. *A section be added to Part III of the Family Relations Act embodying the following principles:*

   *Child care, household management and financial provision are the joint responsibilities of the spouses and inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal share in family assets, subject only to the considerations set out in section 51.*

2. *A section be added to Part III of the Family Relations Act which provides that no entitlement or interest arises in favour of a non-owning spouse under section 43 in an excluded asset.*

   [The meaning to be given to the term "excluded asset" is set out in Recommendation 4.]

3. *Notwithstanding Recommendation 2, the court should have a discretion to declare that the non-owning spouse is entitled to an interest in an excluded asset if a failure to include the excluded asset in the division of family property would be unfair having regard to*

   *(a) the extent, if any, to which the non-owning spouse contributed to the acquisition, management, maintenance, operation or improvement of the excluded asset,*

   *(b) the extent, if any, to which the excluded asset changed in value or form after the marriage or acquisition, and*

*(c) the duration of the marriage.*

*4. For the purposes of legislation implementing Recommendations 2 and 3, the expression "excluded asset" should be defined to include*

*(a) an asset acquired by a spouse*

*(i) before the marriage,*
*(ii) by inheritance,*
*(iii) by gift from a third party, or*
*(iv) by the exchange of an excluded asset, or*

*(b) the part of a pension earned before marriage*

*which would, but for Recommendation 2, be subject to an interest in favour of the other spouse under section 43.*

A number of technical points, including transition, are addressed in Appendix E to this Report.

## C. Acknowledgments

We wish to thank all those who took the time to consider and respond to the Working Paper which preceded this Report. The comments we received were thought provoking and assisted us greatly in the preparation of this Report.

We would also like to acknowledge a number of people who helped us in the course of this project. Mary Beeching, Director, Public Affairs Division, for the Ministry of Attorney General, assisted us in the process of our consultation and oversaw all details relating to the production of the Summary and the Brochure which were prepared to advise the public of our work in this area. Kathleen Keating wrote the Summary and the Brochure in plain and clear language so that the highly technical concepts that were being addressed could be understood by non-lawyers. Jennifer Hocking provided valuable background research and was responsible to the technical editing of the Working Paper. To all of these people we would like to express our gratitude.

Finally, we wish to express our thanks to Thomas G. Anderson, Counsel to the Commission, who, subject to direction from the Commission, prepared the Working Paper and this Report.

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# APPENDIX A

## SUMMARY OF THE WORKING PAPER

*The following is an excerpt from a Summary which was published in booklet form as a companion to the Working Paper on Property Rights on Marriage Breakdown:*

When a marriage ends and husband and wife cannot agree on how to divide their property, the law steps in to do it for them.

But it does that in a way that raises questions which are difficult and expensive to resolve.

The Law Reform Commission of British Columbia has studied our family property law in detail and has produced a proposal for reform. Because this area of the law affects so many families, the Commission hopes to receive advice and comment from as many interested people as possible.

The Commission has published its proposal in a lengthy and technical working paper. This is a summary of the working paper and will give you an idea of what it contains. Even if you don't read the working paper itself, your comments on this outline of the proposal would be welcome.

Please send your comments in a letter to the Law Reform Commission of British Columbia. They will be considered in the preparation of the Commission's final recommendations.

### OUR PRESENT LAW

In 1979 a new *Family Relations Act* came into effect. This law gives each spouse the right to share in family property. Anything that qualifies as a 'family asset' is automatically shared. Anything that qualifies as a 'business asset' is shared if the non-owning spouse can prove a direct or indirect contribution to it.

These seem like simple concepts. If fact, they are often far from simple. It can be extremely difficult to determine whether a particular asset is a 'family asset' or 'business asset'.

Whether an asset qualifies as a family asset depends on a number of factors such as: Which family members used it? and: For what purpose was it used? In the case of business assets, determining what amounts to a 'contribution' can be just as difficult.

Once the assets to be divided have been identified, an important issue remains: What share is each spouse entitled to?

As a starting point, the spouses are to share assets equally. To avoid unfairness, however, a judge can order that one spouse receive any portion from zero up to 100 per cent.

### THE PROBLEM

The *Family Relations Act* recognizes that no two families are exactly alike. Any set of rules that will apply in all situations is bound to be unfair in some. So the Act says that spouses should share property equally but then gives the courts a very free hand to depart from that whenever necessary in the interests of fairness.

Unfortunately, the Act is not based on a clearly stated philosophy, so judges have only their personal views to guide them in deciding what is fair. Different judges have different views.

- Some courts lean in favour of dividing ALL property equally between the spouses;

- Other courts are prepared to divide only SOME kinds of property equally;
- Still others are reluctant to divide property at all and tend to allow the owning spouse to keep most of it.

A very broad power is being exercised without guidelines. This has serious consequences. Husbands and wives expect lawyers to tell them how a court would divide their property, but the lawyers are unable to do that. Because the outcome cannot be predicted with any certainty, spouses have no basis for reaching an agreement and so they look to the courts for an answer. A lawsuit can be ruinous, both financially and emotionally, for a family. And the pressure on an overloaded and expensive community resource - the courts - increases.

Predictability has been sacrificed for the sake of flexibility. It may be too high a price to pay.

## THE PROPOSAL

The Law Reform Commission believes that a choice must be made among the various possible approaches to dividing family property.

The approach the Commission proposes is this: the law would recognize that there are certain responsibilities that go along with family life - homemaking, financial support, and child rearing being the main ones. Each family makes its own arrangements for sharing those responsibilities. When the marriage ends, the law would assume that each spouse has contributed equally to the well-being of the family.

The natural result then is that each spouse shares equally in whatever wealth has been accumulated during the marriage.

Because entitlement is based on contribution, it follows that spouses would not share those assets to which they could not have contributed. Property which was owned by either spouse before the marriage is a good example. Anything received by one spouse as a gift or inheritance is another. Everything else would be shared equally.

Five other Canadian provinces have adopted this approach to dividing family property.

## HOW IT WOULD WORK

The key question to be asked under the proposed law would be:

- How much wealth must one spouse transfer to the other so that each will have received equal financial benefit from the marriage?

To answer this question, a balance sheet is prepared for each spouse, to measure the increase in net worth that took place during the marriage. The one that has benefitted more must make an equalizing payment to the other.

All assets, whether they be related to business, investment or domestic use, are treated the same.

## EXAMPLE:

*At the date of the marriage the husband owned assets worth $15,000.*

*When the marriage ended he owned assets worth $75,000 and had debts totalling $10,000. Therefore, he gained $50,000 during the marriage. (This is arrived at by subtracting his debts from his current assets to arrive at a current net worth of $65,000. The value of the property he owned before the marriage is then deducted, for a total of $50,000.)*

*The wife at the date of marriage owned assets worth $35,000.*

*When the marriage ended she owned assets worth $45,000.*

*Therefore, her net worth increased by $10,000 during the marriage.*

*The difference between the two is $40,000. The husband must pay the wife $20,000 (or transfer property of that value to her).*

*The result is that the economic benefit that each of them has taken from the marriage is the same: $30,000.*

Under this proposal, even though a spouse is not entitled to a share of the property that the other owned before the marriage, they do both share in any increase in that property's value that occurs during the marriage. (Inflationary increases are cancelled out by valuing property owned at the time of the marriage in today's dollars.)

## WHEN EQUAL SHARING MIGHT BE UNFAIR

It is true that no rule can be perfectly fair in every case. In few marriages do the partners always make exactly equal contributions.

But at the end of a marriage it is an expensive, destructive, and often impossible exercise to go back and try to decide exactly how much was contributed by each. If a couple decide, for example, that one of them will provide most of the family's financial support and the other will care for the children and the home, how will the law look back and decide that the contribution of one was more valuable than that of the other?

At the same time, there must be some safeguards. Seeing that the marriage is coming to an end, one spouse can quickly dispose of valuable assets, or recklessly pile up debts. There must be some protection for the other spouse's interests. Under the proposal, if there is conduct aimed directly at defeating a spouse's rights the court can intervene to protect those rights.

## IF SPOUSES HAVE MADE AN AGREEMENT

Agreements made by spouses aren't always binding. The Law Reform Commission thinks that husbands and wives should be free to make their own agreements about the economic side of marriage and that the law should require these agreements to be honoured, just as other contracts are.

Rules for the division of property should operate only when they have not made those arrangements themselves ...

# APPENDIX B

# OVERVIEW AND COMMENT ON THE RESPONSES

## A. Introduction

In Chapter III of this Report, the broad outlines of the proposals set out in the Working Paper are described as follows:

> The thrust of the Commission's proposals can be summarized in terms of two central issues: the policy issues concerning what should be divided; and the role of discretion in dividing property.

The division among our correspondents on these issues was striking. Women's groups and a majority of lawyers who commented on the Working Paper were in favour of as broad a discretion as possible. Those who had been personally involved in a family property dispute and lawyers who practiced outside of Vancouver tended to favour legislation that provided greater predictability than that offered by the current legislation as to the outcome of a family property dispute.

As to the policy of what should be divided, views emerged along the entire spectrum, from those who felt that no property should be divided on marriage breakdown, to those who felt that not only all property, but future income and income earning potential, should be divisible, and that support considerations should be fundamental in dividing property. There would appear to be no way of achieving anything like consensus on these issues. The compensation model proposed by the Commission was somewhere in the middle (one submission characterized the Working Paper proposals as being largely consistent with the general mainstream approach followed by the judiciary under the current legislation.)

As to the mechanics of dividing property, comment was varied. Few actually supported the compensation model proposed in the Working Paper. The two single most important objections were to the present value concept and to the prospect that a dependent spouse might leave a lengthy marriage without any property.

As might be expected, the comment received fell into three general categories. Some submissions focused primarily on a broad general level and confined their remarks to issues of policy. Many comments focused on specific aspects of the tentatively proposed model. Lastly, technical submissions were made relating to drafting issues. This Appendix deals primarily with comment on the Working Paper that focused on policy issues, although it also records some of the concerns voiced in various submissions on the mechanics of a compensation model of family property division.

## B. Reaction to Proposed Changes in the Law

### 1. DIFFERENCES OF PHILOSOPHY: GENERALLY

Most aspects of the law governing family property proved to be controversial, and this held true on even the problem of identifying the reason why property is divided at all.

Some correspondents denied that marriage should have any effect on property rights. Those who held this view saw rights of maintenance as a complete answer to the claims of a dependent spouse and children.

Other correspondents felt that all financial aspects of marriage were interrelated, and that reform in one area necessarily entails reform in other areas. Consequently, there was no point in revising family property law unless changes were made to the law governing maintenance.

In one submission, for example, it was urged that changes to property rights should not take place without changes in support legislation, since the policy in favour of spousal self-sufficiency must necessarily affect the way in which the very flexible rules governing the division of family property are applied.

Others who argued that all financial aspects of marriage must be considered together saw the support

needs of the dependent spouse and children as of paramount concern and favoured revising principles of family property division accordingly. Those in this camp would go further than the current law presently allows, and use property as a means of wealth redistribution in pursuit of a number of social goals, primarily offsetting the economic inequality between the sexes, remedying the economic disadvantages of marriage, and providing for the needs of children. In this context, it was argued that only a unified approach to maintenance and property can deal with these problems.

Still others felt that no aspect of the law should be altered except as a part of a general and comprehensive review and revision of all aspects of marriage breakdown, not merely those confined to financial issues, but other related matters such as custody of children of the marriage. One submission, for example, made the following observations:

> Law reform concerning dissolution of marriage should only be undertaken with a full understanding of the actual conditions of families after divorce or separation. In the following sections we will discuss the growing and authoritative literature that establishes that marriage itself disadvantages women economically and that this disadvantage shows itself most tragically after marriage breakdown in the poverty of women and the children in their custody.
>
> We are ... very concerned that the proposed legislation ignores the needs and claims of minor children and that it expresses a narrow and simplistic vision of both the factual background and the principles to be applied when dividing the fruits of marriage.
>
> In our view property division should not be considered separately from the other incidents of marriage breakdown: support, custody and access. These matters are negotiated as a package and it is clear that they impact on each other.

Nevertheless, many correspondents agreed that contributions each spouse makes to the marriage were not only a suitable justification for the division of property, but provided some guidance on deciding what property to divide and in what proportions. There also appeared to be some agreement that a distinction could usefully be drawn between property rights and maintenance issues. The division of property, however it is carried out, need not affect the principles to be applied in determining maintenance (except to the extent that the division of capital may affect the level of maintenance that needs to be ordered.) It is worth observing that changes in the law regarding property rights on. marriage breakdown are unlikely to impede changes which may eventually be introduced to deal with concerns of maintenance and support. On the contrary, clarifying property division issues should provide a stable platform from which further consideration of these issues can take place.

## 2. DIFFERENCES OF PERCEPTION: WHAT Is HAPPENING?

While some correspondents disagreed on the directions for reform, others disagreed on the need for reform at all.

One reason the Working Paper put forward for revising the law was that, in many cases, it was currently impossible to predict what a court would eventually decide, thus creating a situation where negotiations were often carried out without any real perception of the strengths of particular positions. Providing clear rules, it was reasoned, would assist spouses in resolving their disputes without recourse to litigation.

Some correspondents, however, felt that the current law, and results under it, are predictable. It was suggested that many of the examples put forward in the Working Paper were selected from cases decided in the early years of the Act and dealt with issues which have since been resolved. Moreover, problems seldom arise in identifying what property should be divided between spouses and how much each should get. It was also suggested that such problems with the current law that do exist are not attributable to the *Family Relations Act,* but to the Court of Appeal, which has failed to provide a consistent approach on family problems:

> In the estimation of senior ... counsel, the outcome of family property disputes is predictable in as many as 90 per cent of the cases they conduct. When it is remembered that only 2 per cent of family cases initiated go to full trial, the cost to society of a 10 per cent uncertainty is considerably diminished in the overall perspective.

It is perhaps useful to observe that this is the kind of response one would expect from senior members in any field who, because they are specialists, have a better feel for the law than others. Whether the same can be said of the general practitioner, the junior family law lawyer or the average person embroiled in a dispute with his or her spouse, is open to question. The Australian Law Reform Commission received similar comments in the context of their work (where they recommended a more structured approach to the general discretion which Australian legislation conferred on judges to divide family property) and this was their response:

> In their consultations, members of the Commission have been struck by the lack of understanding of the law by many people who have been parties to proceedings, and by the wide range in the quality of legal advice received by litigants. Specialists in family law develop, perhaps through trial and error, in court and in negotiations, a familiarity with the operation of the discretionary system that enables them to give advice on a more assured basis. It is understandable that some specialists, especially those who deal with affluent clients whose cases have obvious unique features, emphasize the advantages of a wide discretion. But other specialists are amongst those who call for clearer legislative guidelines, especially for the assistance of parties in that mass of cases where the property consists only of an interest in the home and a car and other domestic chattels, and for parties who do not receive specialist legal advice. A number of experienced practitioners suggested that a common reason for cases not being settled and for dissatisfaction by parties is that one or both parties have from the outset unrealistic expectations of the outcome, due to inadequate understanding of the law, sometimes combined with inexpert legal advice.

One correspondent gave a more liberal share of credit to the courts for refining the law and bringing greater certainty to family property litigation. This person was confident that the courts would eventually bring even more precision to the law. A s an example, he pointed to the decision of the British Columbia Court of Appeal in *Mailhot.*

Even so, a number of submissions on the Working Paper shared the concerns over inconsistent decisions under the *Family Relations Act,* the difficulties this presented lawyers in advising, and acting on behalf of, clients and the need for legislative intervention to put things right. For example, one group wrote:

> We agree in principle with the basic philosophy underlying the proposed changes, namely:
>
> (a) the theory of a marriage being a financial partnership (we view this as the current mainstream judicial approach);
>
> (b) the dropping of any distinction between "family" and "business" assets;
> (c) the treatment proposed for property brought into the marriage ... as well as gifts and inheritances;
> (d) that a clearer definition of the philosophy underlying the Act will go a long way toward correcting present inconsistencies;
> (e) that the present cost of litigating property issues under the Act is excessive, and that such costs can be reduced by greater certainty (despite the risk of unfairness in a given case which any "formula" entails).

## 3. DIFFERENCES OF PERCEPTION: WHAT WILL HAPPEN?

Some correspondents feared that shifting from a discretionary proprietary model to a compensation model for dividing property would have harmful results and probably not achieve all of the goals we had set for revising legislation. In this regard, two particular concerns were singled out: the impact of new legislation on the non-contentious case; and its effect on levels of litigation.

### *(a) The Non-Contentious Case*

Would a compensation model make the simple non-contentious case more complex and costly? Some correspondents feared that this might be the case. One reason for their apprehension was derived from the essential difference between the current law and the proposed model for reform: a compensation model depends less upon resolving legal issues and more upon deciding factual issues, such as the valuation of property.

It was suggested that valuators might have to be consulted in cases where there is no need for them now. One possible result would be an increase in the costs of litigation, which are a severe burden on both client and lawyer. Disbursements incurred on behalf of the non-owning spouse, for example, are usually carried by the lawyer until after trial.

How much weight should be attached to this prediction? There would probably be no need to engage a valuator in many simple cases. For one reason, valuation is equally important under the current law and yet, in most cases involving relatively modest amounts of property, the parties do not insist upon precise calculations. Pensions, which clearly should be valued, are usually divided by a simple rule of thumb (the *Rutherford* order, for example). There is no reason to believe that the family lawyer would not continue to treat these kinds of problems with common sense.

The concerns voiced in this respect seem to overlap two kinds of cases: those involving not much property and those with a great deal of property. Where the spouses own a great deal of property, presumably there will also be the money to value it. If there is not much property, the costs of valuing it will not be substantial. Suppose, for example, that the only asset is the family home, a fairly common situation. An appraiser could tell you its value in short order and at a reasonable cost.

A related concern, and one that is much more to the point, is whether a compensation model will actually help make less contentious the typical kinds of cases that arise. Some correspondents felt that a distinction could be drawn between mainstream cases, and those relatively rare disputes which involve great sums of money and unusual fact patterns. Is it possible to devise legislation which would provide the necessary tools for these two different kinds of dispute? It was said that the compensation model (proposed in the Working Paper), and its complexities, is aimed primarily at the problems that arise in cases dealing with larger amounts of property and it is insufficiently flexible to deal with issues that arise when lesser amounts of property are involved.

*(b) The Effect on Litigation*

Another reason put forward in the Working Paper as justification for changes to the current law was the view that simply too much litigation was taking place over family property disputes (something that was also attributable to the levels of uncertainty that existed about the operation of the *Family Relations Act)*.[1]

Some correspondents were of the view that, even were it true that there is too much litigation (a point which was open to question), changing the law would not reduce the current levels. In fact, there was some risk of increasing the problem.

For one reason, it was said, differences in regional experiences and such problems in this regard that exist under the current Act largely reflect the numbers of lawyers distributed throughout the province. In areas that are "underlawyered" the focus is on settlement simply because there isn't time to litigate. In areas like the lower mainland, which is possibly "overlawyered," lawyers are more likely to try to achieve the maximum recovery for their clients, and so the focus is on litigation. Changing the law will not change the demographics. For this reason, it can be expected that current levels of litigation will continue, whatever approach is adopted.

Another reason that changes in the law are unlikely to affect levels of litigation is that those who litigate do not do so because there is any doubt about the outcome of the litigation. They will choose to litigate even where counsel can tell them exactly what will be ordered at trial. The motives for litigation are more properly attributable to a desire to tell one's story. The research conducted by the Australian Law Reform Commission seems to bear this out.[2]

Two reasons were put forward for fearing that levels of litigation might increase if changes along the

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1. Evidence on this point was considered in Appendix *C* to the Working Paper. Many of our correspondents felt that there wasn't an inordinate amount of family litigation, having regard to the statistics (which, however, were generally agreed to be inconclusive).

2. *Matrimoniat Property* (Report No. 39, 1987).

lines suggested by the Commission were adopted. One submission made the following observation:

> It is believed that a fair number of family property cases which have proceeded to trial in the early to mid-80's reflect a previous generation of marriage partners (particularly husbands as the traditional primary property owners) who did not enter into marriage with an expectation of shared or community of property. In 1979, the law changed but their attitudes and expectations did not. On marriage breakdown, there has been strong emotional resistance to the concept of shared property from this generation.

These comments are based on a viewpoint shared by several who made submissions. A great deal of public education has taken place over the past decade, and people are now more or less prepared to accept that family property is divided on marriage breakdown. It was suggested that changes in the law might result in a set back, particularly if the legislation is too complicated for the public to come to grips with it.

It was also suggested that the Working Paper proposals, if implemented, might create new areas of uncertainty with respect to disputes over valuations, where valuators may arrive at results which vary by as much as 30 per cent. Currently, valuation issues are thorny and difficult to resolve and contribute greatly to the length of trials.

Lastly, it was said that concerns over litigation and its expense were misplaced. It must be recognized that any litigation is expensive.

This last point seems to miss the central issue, and is premised on the view that litigation is the only option. It is not, And the fact that litigation is generally expensive is no argument against introducing changes to particular kinds of litigation (such as family property disputes) in an effort to reduce costs.

Many would agree that expense is justified (perhaps even necessary) in the hard case, where there is a great deal of property. But that does not mean that it is justified in the simple case, where there is not much property. The current law is framed in terms of a discretion to deal with a few difficult cases. A discretionary regime is an expensive solution. The result is that most spouses, whose problems can be resolved in a fairly straightforward manner without the use of a discretion, must nevertheless shoulder their share of the expense engendered by it. This point raises larger issues, relating to the utility of a discretion generally, which are explored in greater detail in the next section.

## 4. DIFFERENCES OF POLICY

### *(a) Certainty and Discretion*

An objective scheme provides certainty, and the compensation model tentatively proposed in the Working Paper has that feature. The current law in British Columbia depends very heavily on judicial discretion for its operation. Whether the law should resolve legal disputes by rule or discretion is an issue that is not new, but one that has provided the tension in legal change over the past century. Traditional principles of law favour objective rules, in order to provide strict certainty. In some areas of the law, this approach has been gradually modified to allow greater discretion.[3] Discretion allows the courts to do justice on an individual case.

Many of the submissions on the Working Paper favoured the current discretionary regime solely because of its flexibility to do justice in individual cases. We, on the other hand, rejected a discretionary regime for two reasons: first, because if society cannot agree on what is fair, it is naive to think that judges will be able to do so. Each of our correspondents seemed to think they knew what was fair, but the views that were expressed reveal that the whole spectrum is well covered, by the public, by lawyers, and by judges. Basically, those who favour an unfettered discretion have a high degree of unrealistic expectations. Others, however, believe that there is a need to decide in advance, by rule, many of the issues that routinely arise in family property disputes.

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3. The move away from objective rules, in order to consider more fully the particular circumstances of the case before it, can be seen in the courts' treatment of the law governing the interpretation of wills and the law of contracts, as two examples.

The second reason that a discretion is an unrealistic solution is that it is expensive. No one who favoured a discretion, however, seemed to address the issue of its expense. If they did, they were unconcerned by it. One group, for example, said simply that "litigation is expensive." But of course, it is not simply a matter of cost but one of availability. A procedure which is unavailable to those who need it because it is cannot be afforded would seem to be of little use.

One correspondent, who agreed with the position set out in the Working Paper on the role of discretion, said that a discretionary regime was unacceptable because it catered to the spouse with assets, who is better placed to conduct a legal fight. This was a point mentioned in several letters from people involved in family property disputes, who advised that even after a number of years they were no closer to receiving a share of family assets. The owning spouse, once the divorce was granted, was only interested in resisting property claims, not resolving them. The current discretionary legislation allows that to happen.

One submission recommended limiting judicial discretion even further than the steps proposed in the Working Paper.

Even so, people we consulted who favoured a more objective regime such as that outlined in the Working Paper expressed concern at various unfair results that might follow. In short, although there was fairly strong support for a non-discretionary regime, many shared the feeling that a limited discretion was necessary to deal with difficult cases.

*(b) Symbolic and Practical Advantages of a Proprietary Regime*

A reason cited in the Working Paper for shifting from a proprietary model was the possibility of prejudicing the legitimate claims of third parties. One group was of the view that there was no need to change from a property to a debt based scheme in order to protect third parties, since those kinds of issues do not arise. The accuracy of this submission may be questioned. In cases of bankruptcy, for example, these kinds of issues frequently arise. Moreover, a submission on behalf of lenders, who favoured the proposed changes, saw some merit in reducing conflicts that occasionally arise between the claims of third parties and the non-owning spouse.

One correspondent said that a proprietary remedy has traditionally been regarded as the superior remedy and should be available to the non-owning spouse for that reason. The argument raised is based largely on the symbolic features of a proprietary remedy over one for debt, although it is likely that this correspondent also had in mind practical difficulties of enforcing an order made in favour of the spouse who does not own property.

Would the proposed regime increase the burden of enforcement on the non-owning spouse? Some correspondents feared that this would be the case and said that under a proprietary scheme, at the very least, a non-owning spouse is protected by becoming entitled to an interest in specific property. This is something of an overstatement of the current law, however. Whether under the current law or the compensation model, a spouse must take steps to protect his or her position against real property.[4] Moreover, even currently the courts are inconsistent in the way they deal with property, and may very well make an order for the payment of money, instead of the transfer of property. The *Misic* case is instructive in this regard.[5]

What significance is there, in terms of satisfying a court order, in shifting from a proprietary model to a compensation model for property division? Are there practical differences - in terms of enforcement - between a scheme like the current one, where the theoretical approach is proprietary but the court can make an order for the payment of money, and one where the theoretical approach is debt based but the court can make an order for the transfer of property?

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4. Claims against personal property will largely present the same kinds of enforcement issues under either model.

5. *Misic* v. *Misic*, (1989)21 R.F.L. (3d) 417 (B.C.C.A.). In *Misic*, a judgment creditor was given priority over the non-owning spouse who had filed a *lis pendens* against the other spouse's property before the creditor filed his judgement. The proprietary nature of remedies under the *Family Relations Act* clearly did not have the magical qualities ascribed to them by some of our correspondents.

It is useful to summarize the various options that are available to safeguard the non-owning spouse under the compensation model proposed in the Working Paper:

(i) a court could appropriate specific property to satisfy all or part of an equalizing payment;
(ii) a court could order security (or designate the owning spouse a trustee of property) to ensure the (eventual) payment of the equalizing payment;
(iii) a procedure called a notice of action was proposed. The notice of action, if filed in a timely fashion against the owning spouse's property, would give the non-owning spouse priority over the owning spouse's general creditors; and
(iv) the current law provides certain procedures which are of some assistance, namely the *lis pendens* and registered judgment, if the owning spouse has real property (although there are problems in this regard, as dramatized by the *Misic* case).

The arguments that turn on the advantages of a proprietary system for enforcing court orders would seem to be overstated.

*(c) Advantages ofBuilding on the Current Legislation*

A number of correspondents submitted that any reform should be based on the current legislation, (although there was some variation among the suggested kinds of changes that might be introduced to Part III of the *Family Relations Act).* A number of reasons were put forward in support of building on the current Act.

First, imperfect though it may be, the *Family Relations Act* is familiar, which is an important quality. Much about its operation has been worked out, through years of experience and judicial guidance.

At one meeting where the Working Paper was considered, the concern over abandoning the familiar arose in a slightly different context. There was some apprehension that changing the law would cause a set back because of public perceptions. Although the public doesn't fully understand the current law, husbands are now prepared to accept that "the wife is entitled to 50 per cent," something that wasn't true ten years ago. It is possible that eventually this change in attitude will be responsible for a reduction in litigation. Changing the law, particularly to something that the public might find baffling, it was feared, might undo that:

> Even if a significant number of decisions are inconsistent it should be recognized that amongst the general public there is a high measure of certainty that upon marriage breakdown property is divided on an equal basis in British Columbia. If a completely new system is adopted by the Legislature to divide family property then this will create much uncertainty amongst the public because they are already educated to the equal division concept.

A related concern was that the proposed model would be too difficult for the public to comprehend. It was one thing to think about dividing property; quite another to come to grips with the calculation of compensation for not having entitlement to property. Ironically, only lawyers predicted that the public would not understand the proposed scheme for dividing property. Members of the public wrote to say they liked the proposals precisely because they were understandable. For example, one person said:

> I am encouraged that this change in legislation has been proposed as I have found the existing legislation quite nebulous. The inability to predict outcomes with any certainty makes it almost impossible to make an informed decision regarding one's future.
>
> ... With this legislation in place, lawyers will be more likely to urge parties to settle prior to instigating legal proceedings, with or without the assistance of a mediator, as the case may be. Whereas parties involved in marriage breakdown may not agree with the legislation, they will be more likely to accept it as a matter of fact.
>
> It will greatly reduce the chance of unfair settlements being awarded due to the introduction by legal counsel of information irrelevant and inappropriate in the division of property, but which is often taken into account by the judiciary.

Nevertheless, much can be accomplished by building on the current legislation (this was identified as one

option for reform in the Working Paper).

It should be mention that some correspondents were adamantly opposed to tinkering with the existing law. For the most part, those holding these views felt that any reform must be comprehensive, and deal with all the financial aspects of marriage breakdown.

## C. Flaws in a Compensation Model

Not surprisingly, some aspects of the way in which the proposed compensation model might operate proved to be controversial. It is not wholly clear that all of those who disliked (nor, for that matter those who liked) the compensation model did so based on a full understanding of it. Some seemed to reject the proposals out of hand without much consideration of the problems it was designed to overcome, nor of how it would operate. Those who accepted it sometimes did so, it seemed, simply because they liked the idea of clarifying that property division was confined to wealth acquired during the marriage.

Some particular concerns that were identified are discussed in this section.

### 1. PRESENT VALUE

Perhaps the most controversial feature of the compensation model proved to be the proposal to adjust deductions from net family property to allow for inflation. Suppose, for example, Spouse A marries in 1970 with property worth $5000. Under the compensation model, the value of property brought into the marriage is deducted from the value of property owned at the end of marriage. Should Spouse A deduct $5000? We all know that inflation, over time, drastically alters the value of money. What 50 cents would buy ten years ago takes a dollar today.

To ensure that the calculations took inflation into account, we proposed that values should be adjusted.[6] Several reasons were advanced for rejecting this position.

First, it was felt that adjustments of this nature could end up depriving the non-owning spouse of any share of property. This is particularly clear if, for example, the actual value of the property declines over the course of the marriage:

> We are also concerned that where the value of an asset owned before marriage actually goes down, the non-owning spouse will be seriously disadvantaged by valuing that asset at its "present value." We note that there is no adjustment for inflation when valuing assets brought into the marriage in the Ontario legislation.

One person gave the example of a savings account. If inflation adjusted calculations were carried out on the value when the account was opened, the amount arrived at would exceed the money (plus interest) actually in the account. The longer the marriage, the more likely it was that an inflationary adjustment to value would arrive at a result that exceeded the actual value of the property at the time.

It was also said that there would be difficulties in identifying an appropriate rate to calculate present value. Arguably, it would be inappropriate for the same rate to apply to different regions, and different assets. For example, the Consumer Price Index differs in Prince George and Vancouver and the value of different assets has been affected in different ways by inflation. The housing boom in the lower mainland, from one perspective, is largely inflationary.

The points raised provide much food for thought and highlight some flaws in the process of adjusting the value of an asset to take into account inflation. It is not clear, however, that intricate and expensive calculations are necessarily required to adjust values to reflect inflationary changes. Present value

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6. We referred to the process as a present value calculation. One of our correspondents corrected us on that point:
The Commission proposes to use the phrase "present value" to denote what accountants customarily refer to as "price level adjusted," that is, the value of an asset adjusted for inflation ... The commonly accepted usage of the term "present value" refers to the process of reconciling two cash flows by the effects of interest and yield, not inflation.

adjustments, based on simply multiplying the value of property by a factor based on inflation, would approximate some of the features of a system where particular property was wholly exempt. It would do so in a simple fashion, however, avoiding the evidentiary issues that arise in a proprietary regime, as well as allow the spouses to share in real increases in value.[7]

The present value concept was also objected to because it was conceptually complex. Moreover, some thought, it was the kind of feature which pretended to a precision which really cannot exist in the area of marriage breakdown, something like requiring all calculations to be performed to 10 decimal points. Performing the exercise does not increase the accuracy of the calculations.

We were also advised that adjusting a value for inflation is actually a very difficult enterprise, and not simply a matter of using a multiplier, which can lead to seriously wrong answers. Perhaps so, but the result achieved by using a multiplier would be approximately fair and wrong only in the sense that it does not track exactly the impact of inflation. Must the calculations track exactly in order to achieve a fair division of property between the spouses? In other areas of the law no difficulties arise in making adjustments in calculations to approximate the consequences of various factors. The courts, for example, will adjust a damage award by an arbitrary percentage to take into account contingencies, and this is widely regarded as being fair. A similar approach to family property should be equally unremarkable.

Even so, there are some problems with the present value concept. It might be expected, for example, that a premium will be placed on valuing certain assets which are currently of no interest in a dispute over family property. An automobile brought into the marriage in 1973, for example, may have been worth $8000. Adjusted for inflation, the owning spouse would be entitled to a deduction of perhaps $30,000. The car, now worth only a few hundred dollars, is not even considered currently in a family property dispute.

Some of our correspondents objected to present value calculations on another ground. In their view, it was fair to divide inflationary increases in property brought into the marriage or, to put it another way, it was not demonstrably unfair for the non-owning spouse to share in such increases.

## 2. DIVISIBLE AND NON-DIVISIBLE PROPERTY

The proposed compensation model addressed many of the issues that exist under the current law as to what is divisible between the spouses. For example, the distinctions between family assets, business assets and ventures disappear under a compensation model. Nevertheless, decisions as to the kinds of property that would be taken into account, and that which would not be, were subject to comment.

### *(a) Property Brought Into the Marriage*

There seemed to be general agreement among those who commented on the Working Paper that property brought into the marriage should not be divided between the spouses on marriage breakdown, at least not as a starting point.[8] Many people felt, however, that there were circumstances where the non-owning spouse should have a share in such assets. These are some of the points that were raised.

It was suggested that the Commission's proposals were based on a view that the only reason for

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7. The alternatives are:
   (i) divide all property (an approach generally perceived to be unfair to the owning spouse);
   (ii) divide no excluded property (dealing in terms of specific assets, this raises problems of identifiability. Moreover, the spouses do not share in changes in real value);
   (iii) divide the value of excluded property (this raises the problem of fairness to the owning spouse. In Saskatchewan, for example, the experience has been that the exemption provides no protection for family farms whose values increased something like 8 fold over the past twenty years);
   (iv) divide the value of excluded property, after adjusting it for inflation (the Commissions proposal).

   Some of our correspondents favoured deducting the whole of the current value of excluded property. Others felt that there should be some compensation to the spouse who brings property into the marriage, but were not sure what form it should take. In the United States, some jurisdictions handle this issue by giving the owning spouse interest on the value of the property brought into the marriage. Some of our correspondents favoured this approach, probably because interest is a familiar form of compensation. An award of interest, however, would often exceed the adjustment calculation proposed in the Working Paper.

8. Some, however, did favour full community of property under which all property owned by the spouses is divided equally between them.

marriage was to acquire property. On a different view, one for example that saw the purpose of marriage to raise children, a revised approach to dividing property would be adopted. The compensation model ignored the many situations where it was fair to share property brought into the marriage. One scenario was referred to time and again: the spouses who, after a long marriage, only have the property which one of them owned when they married. Most people seemed to be of the view that after a long marriage the non-owning spouse should be entitled to a share of property however and whenever it was acquired.[9] Indeed, it was suggested that:

> Most people recognize and expect that there is a sharing of assets brought into the marriage.

Another reason for dividing property brought into the marriage (and other kinds of exempt property) is that the non-owning spouse will make direct or indirect contributions toward maintaining it. Two people suggested that an approach, based on the *Stammler*[10] decision, might be adopted to deal with these kinds of issues. Under this approach the non-owning spouse would acquire a share - such as, for example, 5 per cent - of property brought into the marriage for each year of marriage. Some lawyers, apparently, have prepared marriage agreements incorporating these principles.

It is also possible to identify other scenarios where exclusions for particular kinds of property under the compensation model will result in unfair results. The following example was put forward as a reason for dividing property brought into the marriage:

> Each spouse receives a gift of $100,000. The husband squanders his. The wife spends hers on the family. In calculating the equalizing payment, the wife ends up paying the husband half of what he has squandered.

Another concern was that if legislation does not give the non-owning spouse an interest in property brought into the marriage, and other kinds of excluded property, then trust principles will be used for that purpose, a point borne out by recent decisions emanating from Ontario. Under the *British Columbia Act*, there is enough flexibility that these issues are not being addressed in terms of, for example, the constructive trust, but as a matter of discretion exercised within the guidelines listed in section 51.

*(b) Gifts*

The compensation model also leads to questionable results when a gift is made between the spouses.

Example:

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9. In part, property must be divided in such a case to answer the economic needs of the dependent spouse. This view may be classified as an intuitive response to the general issues, based on perceptions of fundamental fairness and might explain why people are not generally hostile to some of the hocus pocus under the current legislation. The words and the reasoning of reported decisions under Part Ill of the *Family Relations Act* mean nothing, so long as the dependent spouse gets a reasonable share of property at the end of the marriage, however that is accomplished.

10. *Stammler* v. *Stammler,* (1979)14 B.C.L.R. 57, 11 R.F.L. (2d) 83 (S.C.).

On marriage, Spouse A has a home worth $100,000 ($200,000 adjusted for inflation).

Spouse B has no assets.

During the marriage, Spouse A gives Spouse B half the home. It is registered in their names in joint tenancy. On marriage breakdown, Spouse A has property worth $150,000. (Half the home, which has a market value of $200,000, plus $50,000 in other assets).

Spouse B has property worth $100,000. (Half the home).

Spouse A's net family property is - $50,000.

Spouse B's net family property is + $100,000

Spouse B must pay Spouse A $75,000.

(Spouse B leaves the marriage with $25,000. Had Spouse A not made the gift, Spouse B would have left the marriage with the same amount.)

Under the scheme proposed by the Commission, the court can vary the equalizing payment having regard to an informal agreement of the spouses, and arrangements such as this, which change property holdings, may fall into this category. The Ontario legislation specifically provides that the court may have regard to the making of such a gift, but it doesn't say how this factor is to operate when the court is considering whether to vary the payment to equalize family property.

In Alberta, this problem is dealt with by not allowing a deduction for property that has been transferred to the other spouse as a gift.[11]

It would be a fairly straightforward matter to clarify the result that is to take place under the legislation, although there may be some question as to what is the correct policy. Spouses probably do not regard the making of a gift as a division of property. Should legislation treat it as such? People probably hold quite different opinions on this issue.

*(c) Matrimonial Home*

Under the proposed compensation model, the matrimonial home was to be treated like all other property. A number of correspondents argued that it should receive special treatment. Basically, the view was advanced that the matrimonial home should always be divided equally between the spouses.[12]

Three reasons were listed. First, in this way, the matrimonial home would be preserved. It would not have to be sold, for example, to satisfy an equalizing payment. Moreover, recognizing the matrimonial home's special status would also be in line with the need to make it available for the dependent spouse, particularly where there are also children to support. F inally, it ensured that the dependent spouse would receive a measure of proper compensation. One correspondent summarized the points in this way:

> This will protect women and the children in their custody from finding themselves penniless and homeless where the husband "owns" the matrimonial home for some period of time prior to the marriage and the home is the only asset of any value in the marriage. It also recognizes the central importance and unique significance of the family home in marriage.

However, it should be recognized that this approach does not go very far in achieving any of the objectives

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11. *Harrower* v. *Harrower,* (1989)68 Alta. L.R. (2d) 97 (C.A.).

12. Under the Commission's proposals, for example, if Spouse A brought the home into the marriage, he would be entitled to a deduction for it. These correspondents felt that there should be no deduction allowed, so that the whole of its current value would be divided between the spouses.

set for it by these correspondents. Certainly, it is an approach that in some cases will make available more divisible property (that is, in those cases where the home is brought into the marriage). But the concern over adequate compensation should not be addressed in this way, but should be at the heart of any model for property division. Neither does it enhance the ability of a court to make an order of possession in favour of the non-owning spouse. Whether the court is able to make such an order depends entirely upon whether legislation specifically empowers the court to do so. Finally, treating the matrimonial home separately from other property does not safeguard it from sale. Often, particularly if the home is the only property of significance, it will have to be sold to adjust or satisfy rights between the spouses.[13]

While the Working Paper rejected special treatment of the home, some correspondents identified a different reason for treating it separately. Treating certain assets - like the matrimonial home, family automobiles and pensions - separately can simplify the mainstream case. Many people would agree that these kinds of assets should be divided equally between the spouses. Moreover, in most cases, these assets are the only ones of any value to be divided. Providing that in all cases they be equally divided between the spouses would achieve most of the goals for family property legislation identified in the Working Paper: an objective approach that would be simple in execution.[14]

## 3. THE EQUALIZING PAYMENT

The compensation model calls for a payment of money from one spouse to the other to equalize the wealth each has acquired over the course of the marriage. Two problems were raised in this context. The spouse who doesn't have enough cash, will have to sell property to acquire it. Perhaps the legislation should allow the owning spouse to transfer property directly to the other spouse, saving various transaction costs and taxes.

The second problem arose from a proposal made to allow the equalizing payment to be satisfied by instalments. A spouse who must sell property to make an equalizing payment might not be able to get the best value by selling it all at once. Allowing the spouse some time to raise the money will often be of benefit to both spouses. Some, however, felt that this provision would only operate to the prejudice of the spouse entitled to the equalizing payment.

On the first point - allowing a spouse to make an equalizing payment by transferring property - one example put forward involved a registered retirement savings plan. If the plan must be collapsed to satisfy an equalizing payment, its value is diminished. If, however, it can be transferred, the tax consequences could be rolled over with it. Revising legislation, it was suggested, should clarify that the owning spouse may pay money or money's worth when making an equalizing payment. Valuation concerns can be addressed by the court (when, for example, the owning spouse wishes to satisfy the equalizing payment by the transfer of an asset that is not readily disposable.)

While there is much in this suggestion to ponder, it is not clear that the non-owning spouse should be compelled to receive property against his or her wishes. It is possible to envisage all kinds of assets which would be unwelcome. And the safeguard suggested, court valuation, does not seem to be a complete answer, if only because it throws the burden of establishing a realistic value for the asset on the non-owning spouse.

With respect to instalment payments, it was argued that judges will tend to make such orders if allowed to do so. It makes more sense simply to require that the owning spouse pay the equalizing payment. If there isn't enough money to do that, then assets will have to be sold. The problem not met by this position is the spouse who must sell assets which represent his or her livelihood to satisfy the equalizing payment, but

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13. The experience in Ontario, where the matrimonial home is treated in the way suggested by our correspondents, bears out these observations. The Ontario approach has been criticized since results under it are inconsistent and vary solely by reason of how wealth is invested at particular times. Moreover, there is an incentive to sell the home in advance of marriage breakdown in order to have its value treated in a way more to the owning spouse's advantage.

14. Possibly the drafters of the current legislation envisaged something like this in setting up the concept of family assets. Assets used for family purposes would be divided 50/50 and there would be no room for argument, except in exceptional cases. What has happened, of course, is that discretion is brought into play in many cases where it does little except to prolong proceedings and increase the expense of the process to the spouses.

our correspondents did not seem unduly troubled by the prospect that the owning spouse would have to sell, for example, the family farm, an option which might be avoided if only he were allowed a little time to make the payments.

Another issue follows from a safeguard added to the power to order instalments. In the Working Paper it was suggested that at any rate, no order for instalments could postpone full payment beyond ten years. One submission observed that this limitation would make it difficult to satisfy an equalizing payment through a benefit split of a pension. Ontario has dealt with this by treating pensions differently from other family property. The point in this respect is that legislation should clearly allow judges to make an appropriate order for the division of a pension.

## 4. PROPERTY NO LONGER OWNED

One feature of the compensation model proposed in the Working Paper is that it is essentially blind to what actually happens to property owned by the spouses. For example, property brought into the marriage is valued as of that time. Even though it might increase in value, be sold or destroyed, changes to the property are disregarded.

The theory is that each spouse is to share and share alike in *changes* in wealth that take place over the marriage, whether wealth increases or decreases. And there is a practical advantage to this kind of approach, since the evidentiary burden of tracking down a property's history is removed.

A number of correspondents, however, felt that decreases in the value of property should not be shared by the spouses and that it was wrong in principle to allow a deduction for property brought into the marriage which no longer existed at the time of marriage breakdown, or whose value had diminished.

## 5. DEBTS AND OTHER LIABILITIES

The *Family Relations Act* does not give any indication of how debts are to be dealt with. Should they be divided between the spouses? Does the court have jurisdiction to do that? Dividing wealth is quite a different exercise from dividing debt, which presents a wholly new array of problems to be resolved.

The compensation model, on the other hand, does provide specific rules for dealing with debt. These rules, however, were felt by some to be too arbitrary. In some cases, deducting liabilities would deprive the non-owning spouse of any share in property, often an inappropriate result particularly when dealing with assets whose value fluctuates for temporary reasons.

It was also suggested that debts would likely be an area where disputes will arise, since it is in the owning spouse's interest to set the highest value on liabilities, a sometimes difficult exercise when dealing with such things as guarantees, where estimating the potential cost is a matter of guesswork.

Quite apart from the technical aspects of debt sharing under a compensation scheme, some correspondents were opposed to the concept, in the absence of the agreement of the spouses, solely as a matter of policy.

## 6. VALUATION

The heart of the compensation model of property division is valuation. Moving to such a regime from a proprietary approach shifts the emphasis from identifying what may be divided, and in what portions, to determining the values of property.

This shift in emphasis, it was hoped, would prove to be more economical than the litigation intensive system currently in place. A number of correspondents, however, predicted different results.

The valuation approach was criticized because it would be costly, complicated and difficult for clients (and lawyers) to comprehend. It was pointed out that experience currently demonstrates that valuation issues only lengthen trials. As well, it is an approach which is likely to lead to increased expense, since the valuator must value property as of two, and in some cases three, different dates (marriage, marriage breakdown and

trial). In Ontario, where they have had experience with the compensation model for several years, practitioners say evaluation costs are exceedingly high.

It was also suggested that there would be problems proving value from, say, 20 years ago, since people don't keep records that long. One person said that, in his experience, it was common for husbands in the interior to own, at the time of marriage, a small business. These are usually difficult to value in later years for various reasons. In some cases, for example, records which might have allowed an accurate valuation never existed.

The Working Paper suggested that it would be suitable to deal with valuation issues outside of the courtroom, a change in practise which might be expected to achieve significant gains in efficiency and economy. Where valuation issues arise, each spouse will usually have to engage an expert. These experts could be directed, pursuant to a formal structure set out in legislation, to agree between themselves on an appropriate value. If they were unable to do so, they would appoint an umpire who would decide matters.

An approach like this has been followed for some years in the insurance industry and experience with it has been positive. Nevertheless, the few who commented on this suggestion were opposed to it. Many were simply hostile to the idea of changing the focus from legal issues to valuation issues. One comment on the mechanics of the process itself suggested that it would not work well since few would have the qualifications to carry out the appraisals properly. It would be expected, for example, that some appraisers would not carefully distinguish between valuation issues, which were their province, and legal issues, which were not.

## D. Additional Reasons Against Adopting a Compensation Model

Arguments against adopting a compensation model fell into two further categories. It was felt that because of fairly sweeping and recent changes in the law governing maintenance, the compensation model proposed in the Working Paper would not work well. It was also said that the Ontario experience with similar legislation was unhappy and dictated against adopting a compensation model. Both of these concerns are discussed in this section.

### 1. MAINTENANCE

A spouse who has been a homemaker during the marriage will usually require financial support after the marriage ends. In many cases, the homemaker will have no job skills and it will be difficult, if not impossible, to rejoin the work force. Where the homemaker retains custody of the children, clearly there will be few opportunities to be self-supporting.

The *Family Relations Act,* however, provides that the supported spouse has an obligation to become "self sufficient in relation to the other spouse or former spouse."[15] The enactment of this provision did not seem to alter the principles upon which maintenance had been traditionally awarded and it was not uncommon to find support orders for the lifetime of the supported spouse.

In 1985, the federal *Divorce Act* was enacted and it provided that a support order "promote the economic self sufficiency of each spouse within a reasonable period of time."[16] This legislation was in line with some changes that had been detectable in practise, where the courts were making support orders for a limited time only. In many cases, these orders were aimed at giving the dependent spouse time to acquire education or job skills, in order to be self-supporting.

There are many cases where a dependent spouse can rejoin the work force. A short marriage, for example, will often have little effect on a person's job skills and marketability. Still, there are many cases

15. S. 57(2).

16. S.15(7)(d).

where a time limited support order will be inappropriate.

Some of our correspondents felt that these factors had contributed to a state of instability in the law and that maintenance orders were not always appropriate in the circumstances. One group wrote:

> ... what we see repeatedly in many other family law matters as well as property division is that there is a dire need for judges to become educated on the dynamics of social issues and the implications that their decisions have on the individuals involved. We need judges who are able to make informed decisions based on awareness of the issues not on personal views. It appears too often that the Judicial system strives to be non-biased at the cost of being uninformed.

The uncertain state of the law governing maintenance, it was suggested, was significant in two respects. First, where support awards were inadequate in the circumstances, the division of property must make up any short fall. An objective, non-discretionary system would tie the hands of judges to do so. Second, changes in the division of family property might well shift the balance between property rights and support orders. The law of maintenance might not be sufficiently flexible to respond to changes introduced by a new regime of family property.

Notwithstanding these correspondents' concerns, there is some reason to be confident that the courts will come to terms with the existing law of maintenance, and future revisions to related areas of the law. For example, the British Columbia Court of Appeal has found that because of a long marriage a dependent spouse was unable to be self-supporting and for that reason ordered lifetime maintenance.[17] The current law is not necessarily as limiting as some of our correspondents fear.

## 2. THE TRILOGY

A second change in the law of maintenance is judge made. In a trilogy of cases[18] the Supreme Court of Canada has held that the circumstances in which a consent order for maintenance will be varied are limited:[19]

> These cases confirm the trend to uphold family law agreements. They reject the commonly held view that consent orders for spousal maintenance are variable simply on the basis of the statutory right to vary an order on proof of a material change of circumstances.
>
> The trilogy establishes that the court will not take lightly a negotiated agreement ... On an application of the supported spouse under s. 11(2) of the *Divorce Act*, the court will exercise its jurisdiction to vary an order for spousal maintenance only where there has been a radical change of circumstances and the change flows from a pattern of economic dependency engendered by the marriage.

This approach makes some sense in terms of policy, since it is consistent with the view in favour of separating the spouses in all respects on marriage breakdown. Moreover, the principle adequately protects the dependent spouse whose inability to become self-supporting is a result of a lengthy marriage. But what if the problem is a debilitating illness? The principle also operates oddly if applied to the supporting spouse. Suppose the supporting spouse is fired. Can the court vary maintenance in these circumstances.

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17. *Story* v. *Story,* (unreported) January *26,* 1990, Lawyers' Weekly; *see also Hudson* v. *Hudson,* (unreported) March 7, 1989, Van, Reg. No. CA009274 (B.C.C.A.).

18. *Pelech* v. *Pelech,* (1987) 7 R.F.L. (3d) 225; *Caron* v. *Caron,* (1987) 7 R.F.L. (3d) 274; and *Richardson* v. *Richardson,* (1987)7 R.F.L. (3d) 304.

19. *Family Law Agreements Manual, Supplement 1,* (C.L.E. 1988), para. 4.6.

It is fair to say that no one can be quite sure of their ground in this area. The ability of the courts to continue to supervise the financial relationship between former spouses may now be so inflexible that problems may be anticipated, as suggested in some submissions on the Working Paper, in changing to a regime of family property division which may not give the courts sufficient room to make an appropriate order in the special circumstances of the case.

## 3. THE ONTARIO EXPERIENCE WITH A COMPENSATION MODEL

The compensation model proposed in the Working Paper drew heavily upon Ontario legislation, although there were important departures from it, both in terms of policy and the mechanics of operation. Some submissions argued that it was undesirable to follow the Ontario legislation in any respect, since it is not only largely experimental, but its introduction in Ontario has been highly controversial. These were some of the points raised in responses to the Working Paper.

It was said that in Ontario fees and disbursements (to valuators) had escalated as a result of the new legislation. Moreover, the Ontario approach has proved to be not only more expensive, but prone to more litigation, than the British Columbia approach.

It is difficult to determine whether this is in fact true and, if so, how much of the increased expense is due to the fact that Ontario is now dividing pensions and businesses, something they were not doing before 1985. Certainly, it is true that there has been litigation in Ontario that has been prompted by the new legislation, but a great deal of this has focused upon issues which are being resolved. The principles being developed will be applied in later cases. It can be expected, consequently, that much of the Ontario litigation will settle down.

In British Columbia, on the other hand, decided cases are examples of a discretion applied to particular facts, and of little use as precedent. One cannot expect a similar reduction in British Columbia cases.

Moreover, much of the (new) Ontario litigation involves issues - involving pensions and the valuation of businesses - that British Columbia courts came to grips with a decade ago. The Ontario experience in this respect, consequently, is of little practical use to predict what the experience in British Columbia would likely be.

It was also said that the Ontario legislation is under review (which is true). Since the legislation may very well be revised in the future, there is much to be gained by awaiting the product of Ontario's reexamination of the legislation. At the very least, the legislation has proved sufficiently controversial that legislation based upon it should not yet be considered in British Columbia.

What information there is about the Ontario Bar's criticisms of the Ontario legislation show that the concerns are often relate to issues that have been or shortly will be resolved. Many of the criticisms relate to pitfalls avoided or cured in the model proposed in the Working Paper, since much was learned from decided cases on the Ontario legislation. Moreover, by far the most serious objections that have been raised relate to aspects of the legislation not proposed for adoption in British Columbia (the special status of the matrimonial home and the fact that death is an event that triggers family property division).

Much of the Ontario Bar's hostility may also be attributable to a typical reaction to new legislation, much as the British Columbia Bar opposed on its introduction the current legislation which many now seem to support.

It was also said that the *Ontario Act* has led to a reduction in support payments for women. In part, this observation may relate more accurately to the changes in the law of maintenance discussed earlier.

A related concern, which was raised in some of the responses to the Working Paper, is that where there is a division of capital between the spouses, some courts award maintenance at a lower rate and for a lesser period. These courts base their decision on the view that the dependent spouse should use capital in part for self-support. This trend was detectable in British Columbia since the early part of the 80's, following the introduction of the *Family Relations Act.* It is quite possible that a similar approach is being adopted now in Ontario, given that more property is now being divided between the spouses.

# APPENDIX C

## *ACCESS TO JUSTICE -*

## Excerpt from the Report of the Justice Reform Committee

Family Property:
The Need For Legislative Change

### THE PROBLEM

In the not too distant past, it was common for wives to own an interest in the family home and nothing more. The husband earned the family's income and owned whatever other assets there were. On divorce, the wife received her interest in the home and enough maintenance to allow her and the children to live modestly at best.

In recent years, society's views of marriage - and women's expectations - have changed. We have moved toward the notion of marriage as a partnership and this brings with it the concept of 'family assets'. They might be legally owned by the husband or the wife but they belong to the family and when the family breaks up they have to be shared.

Both the federal and provincial governments have passed new laws as they try to keep up with changing times. In this Province, the *Family Relations Act* of 1972 was a step in the direction of more fairness in the division of property. But it never really came to grips with the rapid changes that were taking place in society. It was repealed and replaced.

The new *Family Relations Act* came into effect on April 1, 1979 and the new *Divorce Act* in July, 1986. They both made a serious effort to address the legal problems of the modern family and both have their defenders and their critics.

The effect of the *Family Relations Act* on family property is that as a general rule, those things that are 'family assets' are divided equally between the spouses. But, there are exceptions. It is in the application of those exceptions that the difficulty comes in. Each time a Judge considers the statute and applies it in a particular case, something is added to the law. If the system is working properly, the law evolves in a cautious but thoughtful way to respond to changes in society.

But if the statute is vague or ambiguous, or if lawyers do not properly present their cases, the law will grow less and less certain. Rather than clarifying the meaning of the statute the case law will muddy the waters. When the law is unclear lawyers cannot advise their clients as to the likely outcome of their case and so they have no basis for making an agreement. Every case could go to trial.

A recent study by the Law Reform Commission of British Columbia confirms what many lawyers told the Committee: that there is very little consistency among judicial decisions when it comes to division of family property.

### THE PROPOSAL

The problem seems to be that the Act does not contain a statement of the philosophical basis for entitlement to share in family property. Until that statement is clearly made, judges will continue to apply their own ideas as to how marriage affects property rights.

It will be very difficult, given the diversity of our society, to arrive at a consensus on what the marriage relationship entails. But some common ground must be found and it must be clearly stated in the statute.

The cost of not doing so is too great for our justice system and for individual litigants.

*RECOMMENDATION 38*

The Attorney General of British Columbia, after consultation with the Family Law Section of the British Columbia Branch of the Canadian Bar Association and the Law Reform Commission of British Columbia, should revise the *Family Relations Act* provisions which deal with family property.

The revision should make a clear statement of the principles on which family property is to be shared by spouses or former spouses.

The effect on third parties, for example, trustees in bankruptcy, legal representatives of a deceased spouse and companies, should be considered in any revisions.

# APPENDIX D

## *FAMILY RELATIONS ACT*, R.S.B.C. 1979, c. 121

## SELECTED PROVISIONS

PART 1
Interpretation and Jurisdiction

**Interpretation**

1. In this Act

"child" means a person under the age of 19 years;

"court" means the Provincial Court exercising the jurisdiction referred to in section 6, or the Supreme Court;

"guardian" means the person having all the powers and duties under section 25 respecting a child;

"guardian of the estate of a child" means the person having all the powers and duties under section 25 respecting the estate of a child;

"guardian of the person of a child" means the person having all the powers and duties under section 25 respecting the person of a child;

"parent" includes

(a) a guardian or guardian of the person of a child; or
(b) where this person contributes to the support and maintenance of a child for not less than one year,

(i) the stepmother or stepfather of the child, where a stepparent relationship is established

(A) by marriage between the stepparent and the mother or father of the child; or
(B) by the stepparent and the mother or father of the child living together as man and wife for not less than 2 years although not married to each other and the proceeding by or against the stepparent is commenced within one year after the date the stepparent last contributed to the maintenance and support of the child;

(ii) [Repealed 1985-68-36, effective April 17, 1985 (B.C. Reg. 392/85).]

"spouse" means a wife or husband and includes

(a) a former spouse for the purpose of proceedings to enforce or vary an order;
(b) where an order for dissolution of marriage, judicial separation, or dedaring the marriage to be null and void was made respecting a marriage of a person not more than 2 years before the

person applies for an order under this Act, the person making application; or

(c) except under Part 3, a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

## PART 3
## Matrimonial Property

**Equality of entitlement to family assets on marriage breakup**

43. (1) Subject to this Part, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement;
(b) a declaratory judgment under section 44;
(c) an order for dissolution of marriage or judicial separation; or
(d) an order declaring the marriage null and void respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part; or
(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after this section comes into force.

**Declaratory judgment**

44. On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

**Family assets defined**

45. (1) Subject to section 46, this section defines family asset for the purposes of this 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 subsection (2), the definition of family asset 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 the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself; or
(ii) disposed of by the 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 an 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 asset applies to marriages entered into and property acquired before or after March 31, 1979.

**Excluded business assets**

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 section 45 (3) (e) or subsection (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.

**Onus of proof**

47. The onus is on the spouse opposing a claim under section 43 to prove that the property in question is not ordinarily used for a family purpose.

**Marriage agreements**

48. (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after this section comes into force.

(2) A marriage agreement is an agreement entered into by a man and a woman prior to or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

(a) management of family assets or other property during marriage; or
(b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a

declaration of nullity of marriage.

(3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.

(4) Except as provided in this Part, where a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

(5) A minor who has capacity to marry has, with the prior consent of the Supreme Court or a County Court, capacity to enter into a valid marriage agreement.

(6) Where a minor who has capacity to marry has purported to enter into a marriage agreement without the consent required under subsection (5), the Supreme Court or a County Court may at any time order that the marriage agreement is binding on and is for the benefit of the minor.

(7) In a marriage agreement, a *dum casta* provision applicable where the spouses are living separate and apart is null and void.

(8) A provision of a marriage agreement that is void or voidable is severable from the other provisions of the marriage agreement.

(9) Where a marriage agreement provides that specific gifts made to one or both spouses are not disposable without the consent of the donor, the donor shall be deemed to be a party to the marriage agreement for the purpose of enforcement or amendment of the provision.

**Filing in land title office**

49. (1) A spouse who is a party to a marriage agreement or separation agreement may sign and file a notice in prescribed form setting out

(a) the full name and last known address of each spouse who is a party to the marriage agreement or separation agreement;
(b) a description of land to which the marriage agreement or separation agreement relates; and
(c) the provisions of the marriage agreement or separation agreement that relate to the land described in the notice in the land title office of the land title district in which land described in the notice is situated.

(2) On the filing of a notice under subsection (1), accompanied by payment of the prescribed fee, the registrar may register the notice, in the same manner as a charge is registered, against the land described in the notice.

(3) Where a notice is registered under subsection (2), the registrar shall not allow registration of a transfer, mortgage, agreement for sale or con veyance of the fee simple in the land, or lease of the land, unless each spouse or former spouse who is a party to the marriage agreement or marriage separation signs and files in the land title office a cancellation or postponement notice in prescribed form.

(4) Where a spouse or former spouse

(a) cannot, after a reasonable search is made, be located;
(b) unreasonably refuses to sign or file a cancellation notice under subsection (3); or
(c) is a mentally incompetent person, the Supreme Court may, on application, order that the registrar cancel or postpone the notice of marriage agreement or separation agreement.

(5) Where a cancellation or postponement notice is filed under subsection (3) or an order is made under subsection (4), the registrar shall cancel or postpone the registration of the notice of marriage agreement or separation agreement in the same manner as the registration of a charge is cancelled or postponed.

(6) Where a provision of a marriage agreement or of a separation agreement relates to a mobile home, this section applies

(a) for the registration of the notice described in subsection (1) as a security instrument under the *Mobile Home Act* against the mobile home; and
(b) on registration of the notice, to subsequent dealings with the mobile home and notice.

**Enforceability of interest in property**

50. (1) In this section "interest of a spouse" means the interest of a spouse arising under section 43, a marriage agreement or a separation agreement.

(2) Section 29 of the *Land Title Act* applies to an interest of a spouse in land.

(3) Where, on the acquisition of property other than land, a person does not have actual notice of the interest of a spouse in the property the interest is not enforceable against that person.

(4) Notwithstanding subsections (2) and (3), the interest of a spouse is enforceable against the other spouse from the date the interest comes into being.

**Judicial reapportionment on basis of fairness**

51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage;
(b) the duration of the period during which the spouses have lived separate and apart;
(c) the date when property was acquired or disposed of;
(d) the extent to which property was acquired by one spouse through inheritance or gift;
(e) the needs of each spouse to become or remain economically independent and self sufficient; or
(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 43 or the marriage

agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

**Determination of ownership, possession or division**

52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.

(2) In an order under this section, the court may, without limiting the generality of subsection (1), do one or more of the following:

(a) declare the ownership of or right of possession to property;
(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
(c) order a spouse to pay compensation to the other spouse where property has been disposed of, or for the purpose of adjusting the division;
(d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;
(e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;
(f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property and may order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the *Chattel Mortgage Act* or section 19 of the *Sale of Goods on Condition Act;* or
(g) where property is owned by spouses as joint tenants, sever the joint tenancy.

(3) Where the Supreme Court, on application, is satisfied that a spouse has made or intends to make a gift of property to a third person, or has transferred or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under this Part, the Supreme Court may make an order under this section to restrain the making of the gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse.

**Interim orders**

53. (1) On application by a party to a proceeding under this Part, the court shall make an order restraining another party to the proceeding from disposing of a family asset or any other property at issue under this Part until or unless the other party establishes that a claim made by the applicant under this Part will not be defeated or substantially impaired by the disposal of that family asset or other property.

(2) On application by a party to a proceeding under this Part, the court may make an order for the possession, delivery, safekeeping and preservation of a family asset or other property at issue under this Part.

(3) The court may make an order under this section before notice of the application is served on the other party or may order that notice of the application be served on the other party.

(4) On application by a party to a proceeding under this Part, the court may vary or rescind an order made under this section on terms it considers appropriate.

**Variation of marriage settlements**

54. (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, where circumstances warrant, extend the period during which an application may be made or power exercised under this section.

**Application of this Part**

55. (1) Where there is a conflict between this Part and the *Partition of Property Act,* or the *Married Woman's Property Act,* this Part prevails.

(2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

# APPENDIX E

# THE RELATIONSHIP BETWEEN THE RECOMMENDATIONS AND PART 3 OF THE *FAMILY RELATIONS ACT*

## A. Introduction

A number of questions may be raised concerning how the recommended amendments will fit in with Part 3 of the *Family Relations Act,* both on the level of legislative drafting and the procedural and substantive impact of the changes. This Appendix discusses some of these issues.

## B. Section 51(d)

Section 51 allows the courts to reapportion entitlement to family assets to avoid unfairness. The section sets out a number of factors to be considered by the court when determining the fairness of a division of family property. One of these, subparagraph (d), is the extent to which the property was acquired by inheritance or gift. This factor will no longer have any relevance, once the legislation adopts the concept of "excluded assets" since one ground for exclusion is the fact that the asset has been acquired by inheritance or gift. Section 51(d) can be safely repealed when our recommendations are implemented.

## C. Section 51 Generally

Another question relates to the relationship between the court's ability to divide excluded assets (Recommendation 3) and the courts general ability to reapportion entitlement to family assets under section 51. How will these two aspects of the legislation interrelate?

In our view, the answer is clear. Section 51 should only come into play after property rights have generally been determined. Currently, for example, when exercising their discretion under section 51, the courts have regard to property which is not being divided between the spouses, since the capital each spouse has is of significance. It makes sense, consequently, to first determine entitlement to excluded assets (where the non-owning spouse makes an application for an interest in them) before determining the division of family assets under section 51. These aspects of the legislation, consequently, would operate sequentially.

## D. Section 52

Section 52 of the *Family Relations Act* empowers the courts to make findings concerning ownership of property, as well as to make a number of listed orders varying title. Subsection (1) provides that the court enjoys this jurisdiction whenever proceedings are commenced under Part 3 of the *Family Relations Act,* or on application pursuant to section 52. For greater certainty, it also provides that the court has this jurisdiction when an application is made under section 51. It might also be useful to list the new section allowing the courts to apportion entitlement to excluded assets, although from a technical viewpoint this would be unnecessary. Since such an application would be made under Part 3 of the *Family Relations Act,* section 52 automatically would come into operation. It is an issue we raise for Legislative Counsel's consideration.

## E. Meaning of "Excluded Assets"

Under our recommendations, "excluded assets" are not divisible between the spouses as family assets, although the courts might, as a discretionary matter, divide these assets in appropriate circumstances. That is the extent to which we contemplate that such assets would be "excluded" under the *Family Relations Act.* The question arises, however, whether the special treatment of these assets might affect other aspects of practice relating to family property. We have considered two areas in particular: each spouse's obligation to advise the other of property owned; and the court's ability to allow one spouse to occupy the family residence on a temporary basis.

### 1. DISCOVERY

Currently, when court proceedings are commenced claiming an interest in family property, each spouse must deliver to the other a statement of the property owned:

> 60A (2) (a) Where an application is made, a statement of property of the applicant in Form 86 shall be delivered with the originating document.
> (b) A respondent to whom a statement of property has been delivered shall deliver a statement of his property in Form 86 with his responding document.
> (c) Where a respondent does not intend to defend an application he shall nevertheless deliver a statement of property within the time limited in these rules for the delivery of a responding document.

The statements of property are a necessary part of pursuing the claim, since one spouse can achieve little if the other is permitted to hide assets. Would a change in practice necessarily have to follow from adopting a concept of excluded assets?

Neither Rule 60A, nor the Statement of Property, which is set out as Form 86 to the Rules, makes any distinction between assets which are being divided and assets which are separate property. Even if someone were brave enough to raise it, we do not think that a court would agree with an argument that there is no obligation to list excluded assets, since a necessary part of the process of dividing family property is to know something of all of the property owned by the spouses, not just that to which claims are asserted.

Even so, for a number of reasons the Statement of Property is only a beginning of the process by which one spouse learns about the assets held by the other spouse:[1]

> The statement of property is a starting point for investigation into the assets of the spouses. The statement is only true at the date of swearing: the older it is, the less useful its contents will be to a division of assets, since the trend is to set the valuation date as close to the trial date as possible.

The next step is a process called "discovery," by which one spouse can compel the other to attend an examination under oath before trial to answer questions about all classes of property.

### 2. POSSESSION

The *Family Relations Act* provides that a court may make an order allowing one spouse to continue to live in the family residence until entitlement to property can be finally resolved:

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1. B.C. Family Practice Manual, (The Continuing Legal Education Society of British Columbia, 1989) s. 11.13.

77. (1) An order under this section is for temporary relief pending determination of the rights to the property of the spouses by agreement or by a court having jurisdiction in those matters.

(2) A court may make an order under this section respecting property that is owned or leased by one or both spouses and is or has been

(a) occupied by the spouses as their family residence; or
(b) personal property used or stored at the family residence.

(3) On application. the court may order that one spouse for a stated period

(a) be given exclusive occupancy of the family residence; or
(b) to the exclusion of the other spouse may use all or part of the personal property at the family residence.

It is not clear, on the face of the section, that the non-owning spouse needs to claim an interest in the family residence before the court may make an order for possession, but cases have interpreted the section in this way.[2]

The concern, then, is that the court may not be able to make a possessory order in cases where the family residence qualifies as an excluded asset.

It is useful to observe that our recommendations contemplate the making of a claim to an interest in an excluded asset in appropriate cases. Still, there will be circumstances where such a claim will be wholly without merit. Would this alter the current law? Probably not, since such cases would correspond generally to those currently where claims to the matrimonial home are dubious.

## F. Transition

Any change in the law raises transition issues. Should the amendments we recommend apply generally or only to cases commenced after proclamation? It is our view that the latter course is the correct one in this context. Because parties to proceedings which have been commenced have relied upon the legislation in its current form, they should be unaffected by the implementation of the recommended amendments.

2. *See, e.g., Smart* v. *Wewior,* (1986) 5 R.F.L. (3d) 20 (B.C.S.C.) where it was held that a common law spouse could make such an application provided the definition of "spouse" in the *Family Relations* Act was satisfied and a property right was claimed (in this case the property interest was claimed pursuant to a constructive trust).