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Backgrounder

LRC 111—Report on Property Rights on Marriage Breakdown

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The first section of this report provides a brief overview of the law governing the division of assets on the breakdown of a marriage. In British Columbia, at the time of the report, the *Family Relations Act* stated that on the breakdown of a marriage, no matter who is listed as the legal owner, each spouse is entitled to a half interest of the family assets. According to the Act, in order to qualify as a “family asset,” the property must be used for a “family purpose.” The Act also recognized two other kinds of property, namely, “business assets” and “ventures” This type of property, owned by either of the spouses may also be divisible if there has been a contribution, in one way or another, to it. Once it has been determined what property may be divided, the Act contains provisions setting out how much each spouse should receive. It provides as a starting point that the property be divided equally but then goes on to say that the court can vary the division if an equal split would be unfair having regard to the particular circumstance of the marriage. The Act contains a list of criteria as guidance when considering whether there should be a reapportionment of the property on the basis of fairness.

The report highlights a number of problems with the approach taken in the *Family Relations Act*. For example, the test for determining whether particular property qualifies as a family asset is hardly definitive and has resulted in considerable case law discussing what is a “family purpose.” In the context of business assets problems have arisen in assessing the right kind of contribution to it; the report notes that there are at least five different streams of authority from the case law as to how contribution is to be treated. The criteria for reapportioning property to achieve fairness also raise problems. The case law reveals that the courts have used the criteria in different ways to achieve different views on what is fair. There is no guidance within the Act on what kind of division is fair or unfair.

The report then goes on to discuss possible directions for reform drawing particularly on tentative proposals in a working paper prepared by the Commission, and sets out some of the comments received on the working paper. In general terms, the report concludes that most of the current problems are 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. The report recommends two main amendments to the Act:

1. A statement is added containing a general principle that equal contribution between spouses is inherent in the marital relationship and that as a general rule there should be equal division of the family assets. The option to re-portion the assets to take into account particular circumstances of a marriage would remain.
2. A non-owning spouse has no entitlement to an excluded asset unless this would be unfair having regard to certain criteria which is specified in the Act. An “excluded asset” is one acquired by a spouse before the marriage, by inheritance, by gift or by the exchange of an excluded asset. It would also include part of a pension earned before marriage.

Further Developments