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Backgrounder

LRC 87—Report on Spousal Agreements

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The *Family Relations Act* recognizes that when a marriage breaks down irretrievably, spouses have often entered into agreements concerning the division of their property and payment of maintenance. However, the courts retain power under the Act to vary such agreements in certain circumstances. The law in this area has proved to be uncertain and confusing, with the result that it is often difficult to predict what effect a spousal agreement will have and how the courts will determine what is an appropriate division of property.

Nowhere is the confusion more evident than in the various types of agreements characterized in the Act. Spouses may arrange their respective rights to property in a “marriage agreement,” a “separation agreement,” or an “ante or post nuptial agreement.” The term “marriage agreement” is defined but separation agreements and ante or post nuptial agreements are not. However, separation agreements are characterized in the Act as either a marriage agreement or an ante nuptial settlement depending on what formalities were observed in attending to execution of the agreement. The report concludes from its review of the case law that courts have often experienced difficulties in characterizing the nature of an agreement to determine the source of their jurisdiction. A recommendation is therefore made that the reference to different types of agreement should be removed from the Act and replaced with a single type of agreement, known as a “spousal agreement.”

The existing requirement of having to decide which type of spousal agreement has been entered into has an added importance because the courts have different powers of variation depending on the type of agreement. If an agreement is characterized as a marriage agreement the courts may reapportion a division of property if the terms of the agreement are unfair having regard to set criteria. If the agreement is an ante or post nuptial agreement the court has an unfettered discretion to vary the terms but the jurisdiction is narrower in that it only applies to family assets mentioned in the agreement in question. The report is critical of the fact that courts have different jurisdiction depending on the nature of the agreement and recommends that the court should have the same powers whatever agreement is before it.

Confusion and uncertainty are also apparent when examining how courts have interpreted the word “unfair” on applications for variation of a marriage agreement. Some courts have interpreted “unfair” broadly and intervened where the agreement does not correspond with the division they would have ordered. Other courts have interpreted “unfair” more narrowly and will only intervene where factors such as unequal bargaining power, fraud, or undue influence are involved. The report favours the latter interpretation and recommends that the courts should not have jurisdiction to vary a division of property agreed by the spouses unless the agreement itself was not freely entered into.

The *Family Relations Act* has an unfettered jurisdiction to vary agreements for maintenance. As with agreements relating to property, the report takes the view that it is undesirable for courts to be able to ignore the maintenance provisions of agreements freely entered into, although it recognizes that there may be exceptional circumstances where a court should have jurisdiction. A recommendation is therefore made that a court order that is inconsistent with an agreement on maintenance should only be made in extraordinary circumstances, or if the agreement was not freely entered into.

The report also addresses several other issues in the Act. It highlights the uncertainty that presently exists as to whether an agreement needs to be in writing in order to be valid and recommends that as a minimum, the agreement should be in writing and signed by the parties. Where an agreement does not refer to all the assets, courts have often taken different approaches in distributing these assets. It is proposed therefore that, subject to a contrary intention, property that is not referred to in the agreement should be deemed to belong to its owner. Finally, a recommendation is put forward that spouses be able in an agreement to waive rights they have under the *Estate Administration Act* and the *Wills Variation Act*.

Further Developments

The report’s recommendations have not been implemented by legislation.