Matrimonial Property Entitlements and the Quebec Conflicts of Law

Up until 1970 a woman who married in England had little to hope for in an English court when her marriage ended in nullity or divorce, and she sought a specific share in the assets which her husband had acquired in his own name, before or during the marriage. It did not matter that on breakdown of the marriage the wife, or the wife together with the children, would be better placed if specific assets, such as house, furniture and car, were put in her name for her to continue using as her own.

Prior to that year, the English court had power to award periodic sums for maintenance or a lump sum in lieu,[1] but that was all. It did have power to vary property settlements that had been made on the occasion of the marriage by one of the parties, both parties, or others for the parties.[2] But few young couples have very much property at all when they enter upon marriage today, and even fewer will have parents or relatives who are able to settle property upon them.

It could therefore be said that English law did little to soften the force of the status the parties acquired under that law on entering marriage, namely, that they are separate as to property. Even the grant of periodic sums might prove to give the wife nothing more than a claim against a defaulting husband, and he for his part might "skip" from English shores if the wife pressed her claims too assiduously. When the law was amended after the War[3] to permit a lump sum in lieu, a major step forward was taken, but it *was* a cash settlement, and the husband might well have to realise or mortgage assets in order to raise the money. The wife might have been better provided for if she had been given not cash, but the home together with the furniture or the car. Less disruption would be caused to already unhappy people, including the often hurt and bewildered minor children of the marriage.

In 1970, however, the *Matrimonial Proceedings and Property Act*[4] of that year gave extensive discretionary jurisdiction to the court, so

---

[1] *Matrimonial Causes Act, 1950,* 14-15 Geo.VI, c.25, s.19 (U.K.).

[2] *Ibid.,* ss.24 and 25.

[3] *The Matrimonial Causes Act, 1937,* 1 Edw.VIII & 1 Geo.VI, c.57, s.10 as am. by *Matrimonial Causes Act, 1950, ibid.*

[4] *Matrimonial Proceedings and Property Act, 1970,* c.45 (U.K.).

that on the occasion of its issuing a decree of nullity, judicial separation, or divorce, the court might order a really effective and tailor-made property arrangement. It was empowered to order the transfer of assets from one party to the other, whether the assets in question had been acquired by the party in his or her own name, or require the sale of assets so that one party might be provided for out of the proceeds. The object of this legislation, recommended by the English Law Commission, was that the court might look to the total assets owned jointly or singly by the parties; in this way adequate provision might be made for the party in greater economic need and the dependent children of the marriage. The court was expressly required by the Act to consider such factors as, for instance, each party's private income, the needs and obligations of both parties, the standard of living to which during the marriage each had been accustomed, ability because of age or health to acquire employment, and contribution of each to the welfare of the family.[5]

In other words, English law retains for married couples the status that they are separate as to property, but it gives a very wide jurisdiction to the courts to allocate and arrange the parties' several assets, so that, on the ending of the marriage or on judicial separation, as fair and equitable a property arrangement as possible is made. The provisions of the 1970 Act just described are now incorporated in the *Matrimonial Causes Act, 1973*,[6] which completely overhauled the law by introducing the right to termination of marriage on breakdown, instead of on fault. It is also important to note that all parties, who have obtained a decree of divorce, nullity, or judicial separation subsequent to the 1970 Act, are entitled to the benefit of the court's discretion, whenever those parties were married.[7]

Other common law jurisdictions have moved along the same lines in attempting to solve this thorny problem of the parties' several property entitlements on the breakdown of the marriage. In 1963 New Zealand adopted the approach of conferring discretionary powers upon the courts,[8] and within common law Canada a discretionary system has been adopted in British Columbia,[9] Saskat-

---

[5] *Ibid.*, s.5.

[6] *Matrimonial Causes Act, 1973*, c.18, s.25 (U.K.).

[7] The discretion can also be exercised when the decree was made before the enactment, but the property arrangements between the parties come before the courts after the enactment; *ibid.*, s.24.

[8] *Matrimonial Property Act*, New Zealand Statutes, 1963, No.72.

[9] *Family Relations Act*, S.B.C. 1972, c.20. See further, D.W.M. Waters, *Law of Trusts in Canada* (1974), 911.

chewan,[10] and the Northwest Territories.[11] In terms of the future, the Alberta law reform institute has recommended a role for judicial discretion, albeit of a limited nature,[12] and further developments of this kind are not unlikely. Indeed, this is an area of law in Canadian common law jurisdictions where considerable changes are imminent, and it may well be that when all the expected legislation is finally enacted, common law Canada will be found to have given a significant place to the judicial discretion.[13]

The alternative currently being canvassed is a deferred community of acquests very much like the Quebec regime,[14] but this proposal is proving to be controversial.[15] The difficulty is that as the history of the common law is associated with husband and wife each having his or her separate property, so is it endemic to the common law tradition to resort to judicial discretion when there are decisions to be made which involve a range of diverse considerations. Common lawyers instinctively dislike formulaic methods of solving problems which have that character. This is thought to be due in large part to the fact that by tradition, received from England, judges are appointed from the Bar, where they were known by the Bar and daily made the kind of decisions which the judicial discretion involves. Perhaps it is also due to the common lawyers' long familiarity with the separate jurisdiction of Equity.

Whatever the explanation, however, the statutory adoption of judicial discretion in England and other common law jurisdictions has brought about an entirely new situation. This has certain results. Suppose a couple marry in England or New Zealand — to take but two jurisdictions which have chosen judicial discretion as the manner in which to solve the proprietary problem — and they then

---

[10] *Married Women's Property Act*, R.S.S. 1965, c.340 as am. by S.S. 1974-75, c.29. The Saskatchewan Law Reform Commission has now recommended the statutory extension of this discretion, and the co-existence with this judicial discretion of a statutory co-ownership of matrimonial homes: *Report to the Attorney-General of Saskatchewan*, May, 1976, 5 *et seq.*

[11] *Matrimonial Property Ordinance*, N.W.T. 1974, 3d Sess., c.3.

[12] The University of Alberta, Institute of Law Research and Reform, Report No.18, *Matrimonial Property*, August 1975, 16.

[13] The law in England, New Zealand, and Canada on this topic is examined in detail by Professor Peter M. Jacobson in his article, *Recent Proposals for Reform of Family Law* (1975) 21 McGill L.J. 556.

[14] Arts.1266c-1267d C.C.

[15] See, *e.g.*, H.R. Hahlo, *A Note on Deferred Community of Gains: The Theory and the Practice* (1975) 21 McGill L.J. 589, and W.D. Goodman,Q.C., *A Critique of Family Property Reform* (1974) 1 Estates and Trusts Quarterly 315.

come to Quebec, take up residence here, and it is here that they petition for divorce, separation, or nullity. It is surely not enough for a Quebec court to ask whether by the law of their place of domicile at the time of marriage they became separate as to property, and to determine the rights of the parties thereafter on that basis, ignoring the discretion which is conferred upon, and always exercised by, the English and New Zealand courts.

A civilian readily thinks in terms of "rights" acquired on entering marriage. Subject to the right of the parties expressly to change their regime during marriage, whatever "rights" the parties acquire on marriage determine their position if and when the marriage later breaks down. "Rights" do not include the ability of either party to the marriage to ask a court in its discretion, on the award of a decree, to make an appropriate property arrangement between the parties. Judicial discretion is necessarily exercised when the parties have secured a decree in what may be called the discretion jurisdiction; only then for the first time, if at all, will each party acquire specific assets hitherto belonging to the other. It follows that a civilian would not even be impressed with the argument that parties were married in the discretion jurisdiction at a time when the courts of that jurisdiction already possessed the statutory authority to exercise discretion. He would conceive that to be as irrelevant as the fact that parties were married before the enactment of the discretion-conferring legislation. In both situations, he would observe, neither party was entitled to specific assets or a specific quantum of assets at the moment of the decree of nullity, judicial separation, or divorce being awarded.

The conflict of laws problem arising from the marriage of parties in one jurisdiction and the award of a decree in another is therefore set in a new light. If the domicile of the parties at the time of their marriage solves the property entitlement of the parties by providing that they shall be "separate as to property", but have the statutory right to seek the exercise of an extensive judicial discretion to allocate assets when the marriage ends, it is a total misrepresentation of that law for another jurisdiction — normally a civil law jurisdiction — to hold simply that they are separate as to property. Community of acquests is a deliberate modern attempt to place the parties in a fair and equitable position; separation as to property, accompanied by a statutory judicial discretion to allocate assets between the parties on the termination of marriage, is another. The second deserves as much respect as the first.

It would seem therefore that if a civil law jurisdiction (and I am here thinking particularly of Quebec) wishes to apply a meaningful conflicts principle, it must take into account this right to invoke the judicial discretion which the common law jurisdiction confers. It is not enough for a Quebec court to determine that, because it is only the right to ask a court to make a division or allocation, such a right is no right at all. Inevitably, it seems to me, the Quebec courts — if they are to do justice to the foreign law in question — must review the notion of what is meant by "rights" which are acquired by couples when they are married in the foreign jurisdiction. Quebec may have to see the right of the parties to seek the exercise of a discretion by the court as a "right" in the same sense as rights acquired by community of property or a marriage contract. This involves asking what is the extent of the discretion in the jurisdiction in question, and the principles upon which those courts are required to exercise it. The logical outcome is that the Quebec courts will themselves have to exercise the discretion, when the extent and the principles of it have been discovered.

Is there anything wrong with this? Or anything particularly difficult? Persons married in Quebec and then going to live in a common law jurisdiction will either be within community, partnership of acquests, or have a marriage contract which confers contractual rights upon the husband or wife. They have little or no need of, or reason to invoke, the judicial discretion of the jurisdiction in which they are living, though the courts there are still statutorily entitled to exercise that discretion. It is persons marrying in a common law domicile which confers judicial discretion, and then coming to live in Quebec, who find themselves faced with a characterisation of their property relationship which is frankly an archaic misrepresentation, and which leaves them with what can be obtained in Quebec on the basis of section 11 of the federal *Divorce Act*,[16] which is essentially another maintenance provision. In these days of the constant movement of people, this can neither be right nor, I think, justified. It certainly gives no pleasure to a member of the English Bar to be called as an expert witness on English law in a Quebec court, and, once the magic words "separate as to property" have been spoken, to see that law conceived of as if it had made no advance since 1882.[17]

---

[16] R.S.C. 1970, c.D-8.

[17] In that year the *Married Women's Property Act, 1882*, 45-46 Vict., c.75 (U.K.) was passed, introducing the full concept of separation of property.

It cannot sufficiently be underlined that the spouse who is injured by this characterisation, normally the wife because all the assets are in her husband's name, is put in a near hopeless situation if she is claiming something more than mere maintenance. She will not be in community, nor will she have a marriage contract. She cannot even argue, as could a wife in a common law jurisdiction, that there was an express or implied agreement between her husband and herself after the marriage that they would share equally all "family" assets which they acquired, such as home, furniture, car, and savings. No Quebec court would listen to such an argument; she acquired no "right" to these assets on entering marriage. And, even if it can be afforded financially, it is of no use advising the wife to go to England to seek her divorce, because — for a start — all the disputed assets are likely to be in Quebec, and this is going to create obvious difficulties in the English court.

One might say, well, why do not the parties change their regime to partnership of acquests once they are in Quebec? The answer, I suppose, is that the average common law spouse coming to Quebec is not familiar with this institution, and does not realise the mess he or she is going to be in until the eve of the divorce. Then it is too late. The last thing the hostile spouse, who has ownership of the disputed assets, is going to accept is entering community or a partnership of acquests, even if it is still possible. Nor is it right to ask of the parties, while they are yet happily married, the foresight as well as the wisdom of Solomon. Life is not like that, and in my view the law should respond to the difficulties in which the property-less spouse finds himself or herself. What is needed is a new characterisation by Quebec law of foreign matrimonial "regimes".

Donovan Waters*

* Gale Professor of Law, McGill University; of Lincoln's Inn, England, Barrister-at-Law.