Recent Proposals for Reform of Family Property Law in the Common Law Provinces

Peter M. Jacobson*

Introduction

For a number of years the system of family property in common law jurisdictions has been criticized by academics, practitioners and women's groups. In 1973 and 1974 the call for reform in Canada came to a head with the almost notorious decision of the Supreme Court in *Murdoch*[1] and the publication of studies by three provincial law commissions.[2] The Ontario Law Reform Commission's Report on family property law contains an exhaustive study of the law and

---

* Associate Professor, Faculty of Law, McGill University.

[1] *Murdoch* v. *Murdoch* [1975] 1 S.C.R. 423, (1973) 41 D.L.R. (3d) 367. But *cf.* the more recent decision of the Alberta Supreme Court, *Fiedler* v. *Fiedler* (1974) 6 W.W.R. 320. However, that decision was reversed on February 24, 1975 by the Appellate Division of the Alberta Supreme Court; [1975] 3 W.W.R. 681. It should be noted that the Ontario Legislature has recently enacted the *Family Law Reform Act, 1975,* S.O. 1975, c.41 which is intended, *inter alia,* to ameliorate the effect of the *Murdoch* case. However the question of the spouses' title to marital property is not dealt with by the legislation.

[2] Ontario Law Reform Commission, *Report on Family Law: Part IV, Family Property Law* (1974), (hereinafter called Ontario Commission, *Report on Family Law*); The University of Alberta, Institute of Law Research and Reform, Working Paper, *Matrimonial Property* (1974), (hereinafter called Alberta Institute, *Working Paper*); Law Reform Commission of Saskatchewan, Third Working Paper, *Tentative Proposals for Reform of Matrimonial Property Law* (1974), (hereinafter called Saskatchewan Commission, *Third Working Paper*). (Since this article was written, the university of Alberta Institute of Law Research and Reform released its *Report on Matrimonial Property,* Oct. 1975 which superceded the Working Paper.)

Since the completion of this article, the Law Reform Commission of Canada has produced its Working Paper No.8, *Family Property* (1975). The Paper goes no further than the work of the other Commissions and it would not seem useful to refer to it again. It might be noted that in so far as the Paper describes the existing state of the law with regard to the kind of contribution which the non-titled spouse must make in order to establish a beneficial title (at 10), it ignores the effect of decisions such as *Trueman* v. *Trueman* (1971) 18 D.L.R. (3d) 109 (Alta S.C.A.D.); *Falconer* v. *Falconer* [1970] 3 All E.R. 449 (C.A.) and *Hazell* v. *Hazell* [1972] 1 All E.R. 923 (C.A.). Moreover, the Paper's analysis of important questions, such as the effect of the *Murdoch* case, concentrates on non-legal issues (at 2-3).

"recommends legislative changes . . . that will at times involve radical departures from contemporary arrangements".[3] The Alberta Institute of Law Research & Reform has circulated a comprehensive working paper, and the Saskatchewan Commission completed two mini-working papers, followed by a third working paper which makes tentative proposals for reform. This article offers an evaluation of the three studies which will be compared with the views of the British Law Commission and with some aspects of the matrimonial regimes under the law of Quebec.

From the Commissions' studies three possible areas of reform emerge. They are legislation conferring a judicial discretion to alter property rights in disputes between spouses, the creation of a principle of co-ownership of the matrimonial home, and the establishment of a matrimonial regime similar to Quebec's partnership of acquests.[4] In order to understand the proposed reforms it will first be necessary to look briefly at the present law and the criticism levelled against it.

The Existing Law

As the Ontario Commission observed, "[i]t is, of course, impossible to convey the richness and intricacy of this body of law in anything less than a full treatise",[5] but a number of salient points must be noted.

Under the ancient common law doctrine of unity of legal personality, the wife lacked the capacity to own property and make contracts so that she was completely dependent on her husband, upon whom was imposed the duty of maintaining her.[6] If the husband failed to provide for his wife, she was entitled to pledge his credit for necessaries such as food and clothing.[7] She was also given an inchoate right of dower, which was a life estate in one third of her deceased husband's lands.[8] This right was intended to protect the married woman if she were widowed.[9]

During the sixteenth century, the married woman's proprietary incapacity was partially overcome by the development, in the Court of Chancery, of the doctrine of the wife's separate estate. This enabled

---

[3] Ontario Commission, *Report on Family Law, supra,* f.n.2, 3.

[4] S.Q. 1969, c.77; arts.1266c-1267d C.C. For an extended discussion, see the article by Freedman in this Special Issue of the McGill Law Journal.

[5] Ontario Commission, *Report on Family Law, supra,* f.n.2, 17.

[6] *Bromley's Family Law* 4th ed. (1971), 401.

[7] *Ibid.*

[8] *Ibid.*, 348.

[9] Ontario Commission, *Report on Family Law, supra,* f.n.2, 26.

her, with the interposition of trustees, to hold and dispose of property as if she were a *femme sole.*[10] The necessity for the creation of a trust was removed by the Married Women's Property Acts of the late nineteenth century[11] which virtually destroyed the unity of legal personality and established the norm of separation of property in Anglo-Canadian common law.[11a] It should be emphasized that this legislation was designed mainly to protect the earnings and inherited wealth of married women, and no one had considered what effect marriage should have on the husband's property or on property acquired by the spouses through their joint efforts.[12] This shows the fundamental difference between the common law system of separation of property, which has not been altered since the Married Women's Property legislation, and the Civil Law approach of the *régime matrimonial.* Under the common law, marriage does not affect the ownership of property between the spouses,[13] but in Civil Law jurisdictions marriage has a direct effect on the property rights of the parties.[14]

Thus in the common law provinces, separation of property places each spouse in the position of a single person for the purpose of acquiring and dealing with property, including property relations with third parties. This has significant advantages because it safeguards the freedom and independence of the spouses and facilitates business transactions. However, if the marriage breaks down, the system of separation of property tends "to treat the husband and wife as strangers within an abstract economic unit that is being wound up".[15] The erstwhile advantage of the spouses' proprietary independence then has the paradoxical effect of negating a fair division of family property, for the norm of separation correlates ownership of property with the establishment of legal title.[16] Since in Canadian

---

[10] Bromley, *supra,* f.n.6, 351.

[11] *E.g., Married Women's Property Act, 1882,* 45-46 Vict., c.75, s.1(2) (U.K.); *Married Women's Property Act,* R.S.O. 1970, c.262.

[11a] The *Family Law Reform Act, 1975,* S.O. 1975, c.41, continues the same policy by affirming that married persons have separate legal personalities for all purposes of the law of Ontario, except for determination of domicile and for the wife's right to pledge her husband's credit for necessaries which is preserved.

[12] Kahn-Freund, *Recent Legislation on Matrimonial Property* (1970) 33 M.L.R. 601, 601-602.

[13] It creates only the duty of support and the inchoate right of dower.

[14] Civil Code Revision Office, *Report on Matrimonial Regimes* (1968), 2.

[15] Ontario Commission, *Report on Family Law, supra,* f.n.2, 6.

[16] *Pettitt* v. *Pettitt* [1970] A.C. 777 (H.L.); *Gissing* v. *Gissing* [1971] A.C. 886 (H.L.); *Thompson* v. *Thompson* [1961] S.C.R. 3; *Murdoch* v. *Murdoch, supra,* f.n.1.

society the husband usually contracts for the purchase of the substantial and durable assets, he thereby gains the legal right of ownership.[17] The principles of separation of property seem to require the non-titled spouse to establish a proprietary right through direct financial contributions to the purchase, without taking into account any indirect contributions, whether in the form of money or labour.[18] Furthermore, the role of manager of the household, which is usually filled by the wife, gives no beneficial interest in property acquired by the other spouse.[19] Yet in the oft quoted aphorism of Sir Jocelyn Simon "[t]he cock can feather the nest because he does not have to spend most of his time sitting on it".[20] It may therefore be said that while separation of property achieves for each spouse a theoretical equality of power to acquire property, "the usual division of labour within a majority of marriages results in the husband being the breadwinner",[21] and there is accordingly an unequal opportunity to exercise the power.[22]

The common law responded to this economic dependence of the wife by adding to the somewhat ineffectual remedy of the wife's agency of necessity,[23] a statutory foundation for the husband's obligation of maintenance.[24] This had the effect of allowing the wife a "suppliant's request for maintenance"[25] rather than the proprietary share of a partner in the marriage. As one distinguished commentator has observed:

> The link between the law of matrimonial property and the law of matrimonial maintenance is as close today as ever it was, but how can one

---

[17] Ontario Commission, *Report on Family Law, supra,* f.n.2, 13.

[18] *Murdoch* v. *Murdoch, supra,* f.n.1. *Cf. Trueman* v. *Trueman* (1971) 18 D.L.R. (3d) 109 (Alta S.C.A.D.). But the common division of labour between husband and wife and their inevitable intermingling of assets led the British Law Commission to conclude that the present law is both unfair and uncertain; see The Law Commission, *First Report on Family Property: A New Approach* (1973), no.52 (hereinafter called Law Com. no.52), 7 and 9.

[19] *Pettitt* v. *Pettitt, supra,* f.n.16, 794 *per* Lord Reid; *Rooney* v. *Rooney* (1969) 68 W.W.R. 641 (Sask. Q.B.).

[20] Quoted by Lord Hodson in *Pettitt* v. *Pettitt, supra,* f.n.16, 811.

[21] Ontario Commission, *Report on Family Law, supra,* f.n.2, 5.

[22] The Law Commission, Published Working Paper No.42, *Family Property Law* (1971), 7.

[23] Bromley, *supra,* f.n.6, observes that "tradesmen were naturally reluctant to give credit to a man who had deserted his wife and left her penniless". The doctrine of agency of necessity was abolished in England by the *Matrimonial Proceedings and Property Act, 1970,* c.45, s.41(1).

[24] *E.g., The Judicature Act,* R.S.O. 1897, c.51, s.34 as extended by R.S.O. 1970, c.228, s.2; *The Matrimonial Causes Act,* R.S.O. 1970, c.265; *The Deserted Wives' and Children's Maintenance Act,* R.S.O. 1970, c.128.

[25] Ontario Commission, *Report on Family Law, supra,* f.n.2, 6.

> seriously assert that the supply by a husband of the means to cover these elementary needs can be an equivalent to the wife's economic contribution (in whatever form) where a large part of the contribution is destined for the acquisition of durable goods, and especially of a home for the family?[26]

Moreover, the inadequacy of the law of maintenance is compounded by its discriminatory nature. Firstly, with the exception of the *Divorce Act*,[27] only the wife is entitled to obtain maintenance.[28] Secondly, again excepting the *Divorce Act*,[29] the wife who has been guilty of adultery is precluded from an award of maintenance,[30] so that "the law adds an element of financial coercion based upon individual behaviour or 'worthiness' that is applied only against the wife".[31] Even the agency of necessity is barred where the wife has committed adultery or desertion [32] and she may also lose her dower rights.[33]

The foregoing summary, with the exception of dower, deals only with the law applicable during marriage. It is also necessary to refer briefly to the laws of succession since many marriages are terminated by the death of a spouse. In that respect, the common law provinces have generally made adequate provision for widows. Where the husband dies intestate, the wife receives a preferential share of a substantial portion of the estate [34] together with at least one third,

---

[26] Kahn-Freund, *supra*, f.n.12, 606.

[27] R.S.C. 1970, c.D-8, s.11(1) entitles the court to award payment of maintenance by either husband or wife. A wife was so ordered in *Cohen* v. *Cohen* (1971) 16 D.L.R. (3d) 241 (Ont. C.A.).

[28] *E.g., The Deserted Wives' and Children's Maintenance Act*, R.S.O. 1970, c.128, s.2(1). On the other hand in British Columbia and Alberta, both husbands and wives are eligible for alimony and maintenance; see *Family Relations Act*, S.B.C. 1972, c.20, ss.12, 15(e) and 18 and *Domestic Relations Act*, R.S.A. 1970, c.113, ss.16, 18 and 23 as am. by *The Attorney General Statutes Amendment Act, 1973 (No.2)*, S.A. 1973, c.61. See also Civil Code Revision Office, *Report on the Family* Part I (1974) (hereinafter called C.C.R.O., *Report on the Family*), 439-440, 443-444.

[29] *Supra*, f.n.27.

[30] *E.g., Deserted Wives' and Children's Maintenance Act, supra*, f.n.28, s.2(4); *The Matrimonial Causes Act, supra*, f.n.24, s.2(1). This bar is not found in the legislation of British Columbia and Alberta; see *Family Relations Act, supra*, f.n.28, ss.5, 12 and 25(1)(b) and *Domestic Relations Act, supra*, f.n.28, s.23.

[31] Ontario Commission, *Report on Family Law, supra*, f.n.2, 6.

[32] Bromley, *supra*, f.n.6, 402.

[33] *The Dower Act*, R.S.O. 1970, c.135, s.8.

[34] In Ontario the surviving spouse obtains a preferential share of the first $50,000 of the estate; see *The Devolution of Estates Amendment Act*, S.O. 1973, c.18. In Alberta, the widow's preferential share is $20,000; see *The Intestate Succession Act*, R.S.A. 1970, c.190, s.3(1); in Saskatchewan it is $10,000; see *The Intestate Succession Act*, R.S.S. 1965, c.126, s.4(1).

and at most the whole of the balance, depending on the jurisdiction and whether there are surviving children.[35] However, the law has not imposed any fixed entitlement for the widow where her husband dies leaving a will.[36] This reflection of the principle of freedom of testation theoretically allows a husband to disinherit his wife, but the provinces have enacted legislation which entitles a spouse to apply to the court when the testator has not made adequate provision in the will for maintenance of the survivor.[37] Once this is established, the court "may make an order charging the whole or any portion of the estate . . . with payment of an allowance sufficient to provide such maintenance".[38] While this may be criticized as mere maintenance rather than a share of the capital, it should be noted that through its power to award lump sum settlements,[39] the court can effectively alter the capital provisions of the will.

Nevertheless, as the Ontario Law Reform Commission stresses, there is "a statutory penalty for adultery or desertion by married women"[40] which may remove the benefits conferred by the succession legislation.[41] There is no parallel disentitlement against husbands so that once again, a form of economic discrimination based on chastity is perpetrated on married women.

In sum:

> The law must be changed ... primarily because the social and economic assumptions that furnish its foundations are becoming increasingly obsolescent and its results are often unjust. The need is not only for a rational system, but also for one that is fundamentally fair.[42]

The most serious injustices relate to the law of ownership of property where, as shown above, the courts' reliance on rigid property principles to the exclusion of any concept of the property of the family unit[43] has made remedial legislation an imperative.

---

[35] See the *Devolution of Estates Act*, R.S.O. 1970, c.129; *The Intestate Succession Act*, (Alta), *ibid.*; *The Intestate Succession Act*, (Sask.), *ibid.*

[36] Both the British Law Commission and the Ontario Commission have recommended against the introduction of fixed rights of inheritance; see Law Com. no.52, *supra*, f.n.18, 15 and Ontario Commission, *Report on Family Law*, *supra*, f.n.2, 171.

[37] *E.g.*, *The Dependants' Relief Act*, R.S.O. 1970, c.126, ss.1(b) and 2(1).

[38] *Ibid.*, s.2(1).

[39] *Ibid.*, s.2(2).

[40] Ontario Commission, *Report on Family Law*, *supra*, f.n.2, 31.

[41] *The Dependants' Relief Act*, *supra*, f.n.37, s.9; *The Dower Act*, R.S.O. 1970, c.135, s.8. The widow also loses her preferential share and distributive share of real property under the *Devolution of Estates Act*, *supra*, f.n.35; see *MacWilliams* v. *MacWilliams* (1962) 32 D.L.R. (2d) 481 (Ont. C.A.).

[42] Ontario Commission, *Report on Family Law*, *supra*, f.n.2, 15.

[43] *Infra*, f.n.48.

Proposals for Reform

1. *Judicial Discretion*

During the nineten fifties and sixties the English Court of Appeal engrafted upon s.17 of the *Married Women's Property Act*[44] a judicial discretion to create and vary property rights between spouses.[45] The courts were therefore able to do justice for the parties by avoiding the rigid property law requirement that title depends upon proof of a direct financial contribution. The principles which the courts enunciated were these:

> First, that cases between husband and wife ought not to be governed by the same strict considerations ... as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and, secondly, that the old-established doctrine that equity leans toward equality is peculiarly applicable... .[46]

This came to be known as the doctrine of "family assets" because the principles were applied only to "things intended to be a continuing provision for them [the spouses] during their joint lives, such as the matrimonial home and the furniture in it".[47] While the doctrine may have achieved a just solution of family disputes, it attempted to create property rights without regard to the strict principles of property and trust law; it was therefore rejected by the Supreme Court of Canada and the House of Lords.[48]

Nevertheless, the judicial demise of the "family assets" doctrine was quickly followed in England by legislation which reinstated and expanded the basis of the approach.[49] Similar legislation has

---

[44] *Supra*, f.n.11. For the statutory equivalent in Ontario, see *The Married Women's Property Act, supra*, f.n.11, s.12(1) which provides that:

> "In any question between husband and wife as to the title to or possession of property, either party ... may apply in a summary way to a judge of the Supreme Court ... and the judge may make such order ... as he thinks fit... ."

[45] See, *e.g.*, *Rimmer* v. *Rimmer* [1952] 2 All E.R. 863; *Fribance* v. *Fribance* [1957] 1 All E.R. 357; *Hine* v. *Hine* [1962] 3 All E.R. 345.

[46] *Rimmer* v. *Rimmer, ibid.*, 870 *per* Lord Romer.

[47] *Fribance* v. *Fribance, supra*, f.n.45, 359.

[48] *Thompson* v. *Thompson, supra*, f.n.16, 14; *Murdoch* v. *Murdoch, supra*, f.n.1; *Pettitt* v. *Pettitt, supra*, f.n.16; *Gissing* v. *Gissing, supra*, f.n.16.

[49] *Matrimonial Proceedings and Property Act, 1970*, c.45, ss.4 and 5 (U.K.). See now *Matrimonial Causes Act, 1973*, c.18, ss.24 and 25 (U.K.). However, it should be realised that proceedings cannot be instituted unless they arise in the context of divorce, nullity or judicial separation. See generally, Lesser, *The Acquisition of inter vivos Matrimonial Property Rights in English Law* (1973) 23 U.of T. L.J. 148, 185.

existed in New Zealand since 1963.[50] The Saskatchewan Commission recommends, in addition to other reforms, that its legislature confer discretionary powers on the courts,[51] but the Alberta Commission, despite careful analysis of the possibility, has not reached a final opinion.[52] The Ontario Commission preferred to by-pass any discussion of the discretionary approach and opted for a more far-reaching reform through creation of a matrimonial regime.[53]

Reform by way of judicial discretion is well illustrated in the English *Matrimonial Causes Act, 1973*.[54] Section 24 empowers the court to make orders for the transfer or settlement of property in relation to the grant of a decree of divorce, nullity or judicial separation. Section 25 requires the court to exercise its discretion having regard to all the circumstances of the case including a series of specified factors.[55] Of these, the most important is probably s.25(1)(f), "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family". .

The court is also mandated by s.25

> to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down... .

The early cases moved hesitantly in implementing the reforms,[56] but in 1973 the Court of Appeal established clear working principles. In *Wachtel* v. *Wachtel*[57] Lord Denning observed that the Act was

---

[50] *Matrimonal Property Act*, New Zealand Statutes, 1963, No.72.

[51] Saskatchewan Commission, *Third Working Paper, supra*, f.n.2, 5. The Saskatchewan legislature has now responded with an amendment to the *Married Women's Property Act*, R.S.S. 1965, c.340, which confers a discretion on the court to alter existing property rights; see S.S. 1974-75, c.29.

[52] Alberta Institute, *Working Paper, supra*, f.n.2, 40-47.

[53] Ontario Commission, *Report on Family Law, supra*, f.n.2, 52.

[54] *Supra*, f.n.49.

[55] They are found in s.25(1) as follows:
(a) income and financial resources of each party;
(b) financial needs and responsibilities of each party;
(c) the family's standard of living;
(d) age of each party and duration of marriage;
(e) any physical or mental disability;
(f) contributions to the welfare of the family;
(g) value to either party of any benefit that will be lost by dissolution of marriage.

[56] Cretney, *Financial Provision after Wachtel* v. *Wachtel* (1973) 36 M.L.R. 653.

[57] [1973] 1 All E.R. 829.

"a reforming statute designed to ... accord to the courts the widest possible powers in readjusting the financial position of the parties".[58] He noted that the above mentioned section 25(1)(f) was the legislature's answer to the justifiable complaint that one spouse, usually the wife, received no share in the other's property even though the wife's performance of domestic chores released the husband for gainful employment.[59]

In calculating the wife's share, Lord Denning said that the courts should work from a starting point of an allocation to her of one third of the family's combined assets.[60] This division is based on the traditional practice of the divorce courts,[61] and while it creates less than a full egalitarian solution, it was supported on the basis that most wives want a share of capital assets as well as future maintenance.[62] It would therefore not be fair to impose a continuing support obligation on the husband in addition to depriving him of half his capital.[63] Nevertheless it must be emphasized that the one third division is not a rule; it is simply a starting point, for "the essence of the legislation is to secure flexibility to meet the justice of particular cases, and not rigidity".[64]

Although the Act requires the court to have regard to the conduct of the spouses,[65] this does not mean that a judge should hold a "post-mortem" to see who killed the marriage.[66] This provision, which applies equally to husband and wife, means that a spouse will only be disentitled to an award through conduct that is "both obvious

---

[58] *Ibid.*, 836.

[59] *Ibid.*, 838. The case was decided under the *Matrimonial Proceedings and Property Act, 1970, supra,* f.n.49, and his Lordship was referring to s.5(1)(f) of that Act which was the predecessor of s.25(1)(f) of the *Matrimonial Causes Act, 1973, supra,* f.n.49.

[60] *Supra,* f.n.57, 842.

[61] But see *Kershaw* v. *Kershaw* [1964] 3 All E.R. 635, 637 *per* Sir Jocelyn Simon P.

[62] *Wachtel* v. *Wachtel, supra,* f.n.57, 840. However Lord Denning also observed that:

> "If we were only concerned with the capital assets of the family, and particularly with the matrimonial home, it would be tempting to divide them half and half .... That would be fair enough if the wife afterwards went her own way, making no further demands on the husband. It would be simply a division of the assets of the partnership. That may come in the future." (839-840).

[63] *Ibid.*

[64] *Ibid.*, 839.

[65] *Matrimonial Causes Act, 1973, supra,* f.n.49, s.25(1).

[66] *Wachtel* v. *Wachtel, supra,* f.n.57, 835.

and gross".[67] That phrase was subsequently explained by Bagnall J. in *Harnett* v. *Harnett* [68] as follows:

> The party concerned must be plainly seen to have wilfully persisted in conduct ... calculated to destroy the marriage in circumstances in which the other party is substantially blameless. I think that there will be very few cases in which these conditions will be satisfied.[69]

In a second important Court of Appeal decision, *Trippas* v. *Trippas*,[70] the wife was not seeking a transfer of property but requested a lump sum settlement under the predecessor of section 23 of the *Matrimonial Causes Act, 1973*. This provision is subject to the discretionary factors contained in section 25.[70a] The husband and wife, who were married in 1941, split up in 1968, each going off to live with a new partner. The husband was co-owner of a family business which he had inherited from his father, and in 1969 the business was sold, the husband receiving £80,000 in cash and £95,000 in shares. The sale had been under discussion before the family's separation and the husband had promised that on its completion he would "settle a lump sum on each of us and have my freedom".[71] In fact he gave £5,000 to their two sons but nothing was paid to the wife.

Under section 25(1)(g) of the *Matrimonial Causes Act, 1973* the court is required to take account of:

> the value to either of the parties ... of any benefit (for example, a pension) which, by reason of the dissolution... of the marriage, that party will lose the chance of acquiring.

Furthermore, under section 25(1), as noted above, the court must try to place the parties in the financial position they would have occupied if the marriage had not broken down. In applying these provisions the Court of Appeal awarded Mrs Trippas £10,000 on the basis that if the marriage had continued she had a good chance of obtaining a capital payment from the sale of the business.[72] In that respect her adultery was irrelevant and in any event it was not "obvious and gross".

One commentator has summed up the result by saying:

> In effect, therefore, the Act establishes a presumption that a wife has some interest (albeit in property lawyers' language a mere *spes*) in her

---

[67] *Ibid.*
[68] [1973] 2 All E.R. 593.
[69] *Ibid.*, 601.
[70] [1973] 2 All E.R. 1 (C.A.).
[70a] *Supra*, f.n.55.
[71] *Supra*, f.n.70, 4.
[72] *Ibid.*, 5 and 8.

> husband's capital assets, future earnings and pension provision, even during the currency of the marriage.[73]

However, by contrast with *Wachtel* where the wife received approximately a one third share of the matrimonial home, Mrs Trippas was granted roughly 6% of her husband's business capital. Thus the quantum of the wife's potential property interest seems to be determined by "concentrating the assessment on 'family assets', rather than the husband's investment capital".[74]

A further point regarding the *Matrimonial Causes Act, 1973* should be made. In both *Wachtel* and *Trippas* the predecessor of this Act was applied to persons married many years before the legislation came into effect. The Act therefore introduced rules which retrospectively ameliorate the injustices wrought by the law of separation of property in existing marriages without unfairness to the spouses.

The "family assets" doctrine was legislatively enshrined[75] in New Zealand in 1963 by section 5(2) of the *Matrimonial Property Act*,[76] which granted the court a discretion to sell or divide the spouses' property or to transfer one spouse's property into their common ownership. Under section 5(1), jurisdiction arises in any question between husband and wife as to title, possession or disposition of property and thus, unlike its English counterpart, the power is not confined to proceedings for divorce, nullity or separation. However, the factors to be taken into account in the exercise of the court's power are not as fully detailed as in the English Act. Under section 6(1), when the dispute relates to the matrimonial home, the court "shall . . . have regard to the respective contributions of the husband and wife to the property in dispute"[77] and in other cases it "may" do so. This appears to create an unjustifiable distinction between the law governing the matrimonial home and other property.[78] A 1968 amendment to the Act provided that wrongful conduct of a spouse is not to be taken into account where it is not related to the acquisition of the disputed property,[79] but the courts still seem to be favourably inclined towards an "innocent" spouse.[80]

---

[73] *Cretney, supra,* f.n.56, 654. As Bagnall J. put it in *Harnett* v. *Harnett, supra,* f.n.68, 601, "[s]he must be treated as potentially entitled to benefit at some time from her husband's capital assets".

[74] Cretney, *ibid.*, 655.

[75] *E.* v. *E.* [1971] N.Z.L.R. 859, 872.

[76] *Supra,* f.n.50.

[77] The contributions may be "in the form of money payments, services, prudent management, or otherwise howsoever"; s.6(1).

[78] *E.g., E.* v. *E., supra,* f.n.75.

[79] *Matrimonial Property Amendment Act,* New Zealand Statutes, 1968, No.61, s.7.

[80] *E.g., E.* v. *E., supra,* f.n.75.

The only Canadian jurisdictions to have enacted a form of discretionary legislation are British Columbia, the Northwest Territories and, more recently, Saskatchewan.[80a] In British Columbia, section 8(1) of the *Family Relations Act*, 1972[81] provides:

> Where the court makes an order for dissolution of marriage ... and it appears that a spouse is entitled to any property, it may... make any order that, in its opinion, should be made to provide for the application of all or part of the property, including settled property, for the benefit of either or both spouses ... .[82]

No guidelines for the exercise of the discretion are contained in the Act. On the other hand, in the Northwest Territories, the court is expressly required to take account of "the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family...".[82a]

Under the *Divorce Act*, the court may order the husband or wife to pay a lump sum to the other spouse for maintenance,

> ... if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them... .[83]

While this provision does not authorize the transfer of property belonging to the spouses, it gives the court a substantial discretion to use the lump sum payment effectively to enlarge one spouse's interest in the other's property.[83a] After all, payment of a capital sum is usually as good as transfer of property *in specie* and it is submitted that more use should be made of this provision. However, unlike the English *Matrimonial Causes Act, 1973*, this power to award a lump sum payment has not been seen by the courts as a primary form of order [84] and there is nothing which requires the court to have

---

[80a] See S.S. 1974-1975, c.29. The legislation differs from England's *Matrimonial Causes Act, 1973, supra*, f.n.49, in that it does not contain guidelines for the court's exercise of its discretion.

[81] *Supra*, f.n.28.

[82] In *Stevenson* v. *Stevenson* (1974) 44 D.L.R. (3d) 762 it was argued that this provision did not alter the substantive law of separation of property but the court held that:

> "... s.8 confers upon the court a ... discretion to make an order that allocates property held in the name of either or both spouses between them... in a just and equitable way according to all the circumstances. Section 8 thereby altered the rigours of the common law ...". (764-765).

[82a] *Matrimonial Property Ordinance*, N.W.T. 1974, 3rd Sess., c.3, s.28(4).

[83] R.S.C. 1970, c.D-8, s.11(1).

[83a] *E.g., Fiedler* v. *Fiedler, supra*, f.n.1. The Appellate Division subsequently ruled that the case should be referred back to the trial judge for reconsideration but it did not say that the award of a lump sum was improper; *ibid.*

[84] MacDougall, "Alimony and Maintenance" in Mendes da Costa (ed.), *Studies in Canadian Family Law* (1972), vol.1, 282, 321-323.

regard to the spouse's contribution to the family welfare. It must be emphasized that any enactment creating a discretion to alter existing property rights may be *ultra vires* the Parliament of Canada.[85] Accordingly, even if the transfer of property were to be made possible in relation to divorce, the power probably would have to be contained in provincial legislation.

As the Alberta Commission observed, the advantage of a discretionary division of property is that "it enables the court to look at the merits of the particular case".[86] This form of legislation is based on

> ... the *contribution* theory for the division of family property rather than the *status* theory: the wife is regarded as earning a share in family assets by her contribution to the family welfare... rather than by the mere fact of marriage.[87]

This flexibility compares favourably with a "rigid universal rule [that] treats the deserving and undeserving in the same way...".[88] It should be noted that if the husband requests a share in his wife's assets he must also demonstrate the requisite contribution.[89] Moreover, while moral conduct may disentitle a spouse in exceptional circumstances,[90] that provision contributes to the aim of flexibility. Unlike the present law, it operates equally against both spouses.

However the discretionary legislation has one major shortcoming.[91] There is no presumption that either spouse will get a defined share of property accumulated during the marriage even if he or she makes a full contribution. The leading cases in the English con-

---

[85] *Cf. Zacks* v. *Zacks* [1973] S.C.R. 891 which held that the authority to award maintenance under the *Divorce Act, supra,* f.n.27, s.11, is ancillary to jurisdiction in divorce and therefore within the legislative competence of the Parliament of Canada, *British North America Act, 1867,* 30-31 Vict., c.3, s.91(26) (U.K.). It is questionable whether an authorization to divide the property of the spouses would be regarded as necessarily ancillary to divorce.

[86] Alberta Institute, *Working Paper, supra,* f.n.2, 45.

[87] Cretney, *supra,* f.n.56, 655.

[88] Alberta Institute, *Working Paper, supra,* f.n.2, 45.

[89] Sections 24 and 25 of the *Matrimonial Causes Act, 1973, supra,* f.n.49, apply equally to both spouses.

[90] *Supra,* f.n.69.

[91] The Alberta Institute concluded that

> "[t]he disadvantages are that the vesting of a discretion in the court invites ligitation with the expense, and sometimes bitterness, that go with it; and that different judges may exercise their discretion in markedly different ways. Another point is that the wife does not have from the beginning an assurance as to the precise extent of her interest .... Moreover, it may invite each party to keep a record of contributions and disagreements ...".

text illustrate that where a wife looks after the home and family, she has potential interests of one third of the household assets plus maintenance and a smaller percentage of investment capital, at least where the latter is a large amount.[92] In sum therefore, marriage only potentially affects property, and while the wife's domestic chores may create what is almost a partnership in the "family assets", there is far less than a full partnership in other property. The "usual division of labour"[92a] in the family therefore continues to enure to the husband's advantage.

2. *Deferred Sharing of Property*

By contrast with the reform of the matrimonial property system through the creation of a judicial discretion, the adoption of a matrimonial regime, as proposed by the Ontario Commission, fundamentally alters existing norms since it causes marriage to have a direct effect on the spouses' property rights. The proposed regime would apply to all marriages after the date of the appropriate legislation, but the spouses would be able to avoid it if they elected to have their property rights governed by the law of separation of property or the special provisions of a marriage contract.[93] The Alberta Institute and the Saskatchewan Commission have considered the Ontario scheme, with Alberta reaching no final conclusions on its advisability,[94] and Saskatchewan recommending its adoption in addition to the discretionary power of division of property.[95]

---

[92] *Wachtel* v. *Wachtel, supra,* f.n.57; *Trippas* v. *Trippas, supra,* f.n.70.

[92a] *Supra,* f.n.21.

[93] Ontario Commission, *Report on Family Law, supra,* f.n.2, 125. The Ontario Commission recommends that spouses who wish to elect out of the regime should be able to choose one of the following:

a) separation of property;
b) subject to the Commission's recommendations regarding choice of law, the property regime of the habitual residence of the husband or wife at time of marriage;
c) special contract covering particular terms or property relations; *ibid.*

Persons who did not wish to be subject to the statutory regime would be required to make a statutory declaration and register it with the Registrar General of Ontario; *ibid.,* 126. Spouses would also be able to change their property relations after marriage but any change from the statutory regime to that of separation of property would require a court application; *ibid.,* 127.

[94] Alberta Institute, *Working Paper, supra,* f.n.2, 68.

[95] Saskatchewan Commission, *Third Working Paper, supra,* f.n.2, 5. It also recommended that the principle of co-ownership of the matrimonial home be adopted; *ibid.*

The matrimonial property regime proposed by the Ontario Commission reflects its view that marriage is an economic partnership.[96] The regime, which is similar to Quebec's partnership of acquests,[97] draws on the best features of the laws governing separation and community of property,[98] while avoiding the inherent pitfalls of both systems.[99] As already noted, separation of property has the advantage of allowing separate administration and ownership of property during marriage but it causes inequities by continuing the separation upon dissolution of the union. Community of property, on the other hand, "ensure[s] substantial equality between the spouses in relation to property, regardless of the division of labour between them".[100] This enables an equitable partition of property to be made on termination of the marriage, but the community regime has certain detracting features which occur while the marriage is in force. The principal difficulties are firstly, that community of property requires common ownership of property by both spouses throughout the marriage, with a consequent problem as to which spouse should administer the common fund of property. Secondly, the creation of the common fund and its separation from other property belonging to the spouses causes difficulties with respect to allocation of property for payment of debts.[101]

The system of deferred sharing of property conveniently combines separate ownership and administration during the marriage as in separation of property, with an approximately equal division upon termination as in community.[102] Moreover, the most critical periods in the spouses' property relations occur at the breakdown of marriage or death of one partner and the system of deferred sharing has the advantage of becoming operative on those very contingencies.[103]

Under the Ontario Commission's proposed regime, each spouse's share in the net gains realized by the family during marriage would be achieved through a money payment called "the equalizing claim" which is a personal claim in debt and not a right against specific

---

[96] Ontario Commission, *Report on Family Law, supra,* f.n.2, 49.

[97] *Supra,* f.n.4.

[98] Community of property regimes are found in some states of the U.S.A., *e.g.,* Arizona, California. It is available in Quebec as one of the alternative regimes to partnership of acquests; see art.1268 C.C.

[99] Ontario Commission, *Report on Family Law, supra,* f.n.2, 52.

[100] *Ibid.,* 50.

[101] *Ibid.*

[102] *Ibid.,* 55. See also, the Commission's reference to the Scandinavian regimes on which the system of deferred sharing is based; *ibid.,* 51.

[103] *Ibid.,* 55.

assets.[104] Its calculation involves the following steps:[105] Firstly, each spouse's total assets are separately valued and all existing liabilities are deducted. This figure represents the net estate of each spouse. Secondly, their residuary estates are established by deducting from each net estate the net value of property owned at the date of marriage[106] and the net value of property acquired during the marriage gratuitously from a third party.[107] Thirdly, the residuary estates of husband and wife are added together to show "the total financial product of the marriage",[107a] of which each partner is entitled to a half share. Thus the final step is to divide the total financial product in half and subtract therefrom the amount of the smaller residuary estate. The balance is "the equalizing claim" and is payable from the spouse with the larger residuary estate to the other spouse. The spouses would be required to produce an inventory disclosing all relevant property values.[108]

The system is best understood by looking at an example: At the date of marriage Mr X had assets totalling $7,000 and debts of $2,000. Mrs X had $1,000 worth of assets and no debts. Upon dissolution of their marriage Mr X had $40,000 in assets and $10,000 in debts while Mrs X's assets amounted to $12,000 with $3,000 in debts. During the marriage Mr X received a legacy of $6,000 from his uncle and Mrs X was given $5,000 by her father.

Mr X's net estate is $30,000, that is, total assets of $40,000 minus $10,000 debts. Mrs X's net estate is $9,000, that is, total assets of $12,000 minus $3,000 debts.

Mr X's residuary estate is $19,000 made up of the net estate of $30,000 minus $11,000 representing the net value of his ante-nuptial property ($5,000) and the legacy received during marriage ($6,000). Mrs X's residuary estate is $3,000 made up of the net estate of $9,000 minus $6,000 representing the net value of her ante-nuptial property ($1,000) and the gift received during marriage ($5,000).

The total financial product is $22,000, calculated by adding together the two residuary estates of $19,000 and $3,000; each spouse is entitled to an equal half-share, that is, $11,000. Mrs X has a residuary estate of only $3,000 which, being the smaller of the two, is

---

[104] *Ibid.*

[105] *Ibid.*, 57.

[106] The deductible value of ante-nuptial property could not be less than the spouse's net worth at the time of marriage; *ibid.*, 73.

[107] The value would be calculated as at the date of receipt; *ibid.*, 57.

[107a] *Ibid.*

[108] *Ibid.*, 78.

then deducted from $11,000 to give her an equalizing claim of $8,000 against Mr X's estate.

It should be noted that the equalizing claim is potentially a means for sharing both gains and debts.[109] However the Ontario Commission recommended against sharing some kinds of debts and losses. In this regard the most controversial provision may be the recommendation that while increases in the value of deductible property during marriage (such as ante-nuptial assets) are included in the spouses' estates,[110] capital losses on such property are not allowable deductions.[111]

In order to facilitate the calculation of the equalizing claims and to put the onus of establishing an allowable deduction on the spouse who asserts it, the Commission recommends a presumption that all of the spouses' assets are shareable unless the contrary is shown.[112]

The equalizing claim is payable on termination of the matrimonial property regime. This occurs on the death of one spouse or upon court application in proceedings for divorce or nullity[112a] and in other special circumstances.[113] The claim is a debt which the court

---

[109] *Ibid.*, 66.

[110] *Ibid.*, 56, 75.

[111] *Ibid.*, 75-76. There are two other instances where debts would not be shared: Firstly, where at the time of marriage a spouse's debts exceeded assets, the net worth would be taken as zero (at 74). Similarly, where at the time of dissolution of the marriage, a spouse's total debts exceed assets resulting in a negative residuary estate, the debts are deductible only to the extent that they reduce the residuary estate to zero (at 67), except where they were assumed for support of the spouses or their children (at 68).

[112] *Ibid.*, 71.

[112a] *Ibid.*, 55-56. It should, however, be realized that a decree of nullity, unlike a divorce, means that the marriage had no legal effect. It would follow therefore that the matrimonial property regime was not validly created but, while it is not explicitly stated by the Commission, presumably it intended that the regime would be deemed to exist until the date of a nullity decree, where at least one spouse contracted the marriage in good faith. This view has been proposed in Quebec; see C.C.R.O., *Report on the Family, supra,* f.n.28, 127-128.

[113] The other circumstances are as follows:

a) on a joint application by the spouses to wind up the regime;
b) on an application by one spouse to wind up the regime where the parties have been "separated and living apart" for at least a year, and where, in the court's opinion, "normal cohabitation" has ceased.
c) on an application by one spouse to wind up the regime where that spouse's interest in the shareable assets is jeopardized.
d) on an application by one spouse to wind up the regime on the ground that the other spouse has sold or granted security over the matrimonial home without the authorization contemplated by the Commission; *ibid.*, 56.

may make payable by instalments over a term not exceeding ten years, subject to the provision of adequate security for the creditor-spouse.[114] It should be emphasized that the creditor-spouse's claims rank behind all legitimate third-party creditors of the debtor-spouse.[115]

The Commission devoted a full chapter of its report to a consideration of special problems which would be created by the adoption of the regime.[116] One important area is the control of tranfers of property designed to prevent a spouse from depleting his or her estate so as to reduce the amount of shareable assets;[117] the spouse could do this by "excessive gifts"[118] to third parties. The Commission therefore recommends that where a spouse makes excessive gifts, the other partner may apply for termination of the regime and the court may include the value of the donated property in the net estate of the donor.[119] However the Commission recommends against a power to set aside completed gifts.[120]

Another special problem involves rules applicable to the termination of a regime by the death of a spouse. In this situation, the Commission recommends that the equalizing claim should be based on the net estate of each spouse instead of the residuary estate[121] and should not be payable by a surviving spouse to the deceased's estate.[122]

---

[114] *Ibid.*, 79. The Commission noted that "the immediate payment of a claim could cause hardship"; *ibid.*

[115] *Ibid.*, 80.

[116] *Ibid.*, ch.8. The problems are damages for personal injuries, controls or transfer of property, termination of the regime on the death of a spouse, variation of the results of the equalizing claim, insurance programs and pension schemes.

[117] *Ibid.*, 86.

[118] The term "excessive gifts" is defined as

a) with the exception of usual and customary gifts (*e.g.*, birthday or holiday gifts) a transfer for no consideration, whether the transfer is absolute or in trust;

b) a transfer for a consideration which the court finds to be clearly inadequate, whether the transfer is absolute or in trust; *ibid.*

[119] *Ibid.*, 87.

[120] *Ibid.*

[121] *Ibid.*, 88-89. Marriages terminated by death of a spouse are likely to have had considerable duration. The Commission's recommendation therefore avoids the difficulty of identifying and valuing ante-nuptial property (at 88).

[122] *Ibid.*, 89. The amount of the claim would usually be returned to the survivor by the deceased's will and the survivor would often need all available assets for maintenance of children; *ibid.*

As mentioned above, the Ontario Commission's recommended regime of deferred sharing of property is similar to Quebec's partnership of acquests. That regime applies to all marriages in Quebec where the spouses have not made other arrangements by way of marriage contract.[123] In Quebec, the division of property into shareable and non-shareable assets is achieved by classification of property into acquests and private property.[124] The acquests fall into the partnership between the spouses and are shareable, while the private property is non-shareable. Acquests include the proceeds of each spouse's work during marriage, the incomes received throughout the marriage from all the spouse's property[125] and all property not declared to be private.[126] Since the private property of each spouse is that which was owned at the date of marriage as well as property acquired during marriage by way of succession or gift,[127] it can be seen that the acquests correspond to the residuary estates in the Ontario Report. The mass of acquests (or total financial product of the marriage in the Ontario scheme) is divided in half between the spouses upon termination of the regime.[128] The presumption of shareability of assets which was recommended by the Ontario Commission seems to have been drawn from an article in the Quebec Civil Code which provides that all property is deemed to be acquests unless there is proof to the contrary.[129]

In accordance with the basic principle that the spouses are separate as to property during marriage, each "has the administration, enjoyment and free disposal of all his private property and acquests".[130] However, the Civil Code goes further than the Ontario Commission's recommendations against excessive gifts and requires the consent of the non-titled spouse to all gifts other than "modest sums".[131]

The partnership of acquests is dissolved by death, divorce or judicial separation or upon modification of the regime.[132] Both the

---

123 Art.1260 C.C. The parties may choose either community of property, known as community of moveables and acquests, art.1268 C.C., or separation of property, art.1436 C.C.

124 Art.1266c C.C.

125 Including income from private property.

126 Art.1266d C.C.

127 Art.1266e C.C.

128 Art.1267c C.C.

129 Art.1266m C.C.

130 Art.1266o C.C.

131 *Ibid.*

132 Art.1266r C.C. Modification of the regime during marriage is permitted by art.1265 C.C.

Civil Code and the Ontario Commission's recommendations provide for judicial control of modification of the regime during marriage, and require that notice of any changes in the regime be registered in order to protect the spouses' creditors.[133] The provision in the Civil Code that the division of the acquests cannot prejudice the spouses' prior creditors[134] seems to correspond to the Ontario Commission's recommendation that the equalizing claim rank behind the debtor-spouse's creditors.

The crucial distinction between the deferred sharing regime proposed by the Ontario Commission and the discretionary powers approach of the English *Matrimonial Causes Act, 1973* is that the Ontario regime creates guaranteed property rights while the English legislation requires spouses to apply for an exercise of the court's discretion. Moreover, the quantum of the guaranteed rights would be fixed by law whereas in England the extent of the spouses' potential rights is determined on a case by case basis. Both approaches elevate the wife from her present status of dependency, but only the regime of deferred sharing would give her an indefeasible equal partnership in assets acquired during marriage.

However the Ontario Commission's proposed regime is open to two principal criticisms. Firstly, the mere status of marriage gives each spouse an equal share in the family property without reference to their contributions to the marriage. Yet in some cases their contributions may be grossly unequal and the reform would sometimes operate to the detriment of married women. For example, should an incorrigibly lazy husband who did not support his family and merely "hung up his hat in the hall",[135] have an automatic right to one half of his wife's hard earned property?

The Commission recognized that fixed property rights may not be in accord with "the infinite variety of human circumstances that will be revealed in individual cases",[136] and it therefore considered the possibility of permitting a variation of the result of the equalizing claim.[137] It recommended that:

> [W]here ... the unmodified application of rules ... would lead to grossly inequitable results, the court, having regard to the circumstances of the case but without regard to matrimonial fault, should be able to make

---

133 Art.1266 C.C.; Ontario Commission, *Report on Family Law, supra,* f.n.2, 127-128.

134 Art.1267d C.C.

135 *Gollins* v. *Gollins* [1964] A.C. 644, 657.

136 Ontario Commission, *Report on Family Law, supra,* f.n.2, 90.

137 *Ibid.*

> an order varying the results of the equalizing claim... as may appear just and proper.[138]

Since the power of variation would not be "a disciplinary or punitive measure with respect to the fulfilling of matrimonial obligations",[139] the incorrigibly lazy husband hypothesized above would get his half share, illustrating that "fixed property rights would... cause dissension and injustice".[140] That could be prevented by a more extensive power of variation than recommended by the Ontario Commission. It is therefore submitted that the court should have the power to vary the result of the equalizing claim where a spouse has failed to contribute to the general welfare of the family. This could be achieved either by specific provision for variation of the equalizing claim or by the enactment of legislation creating discretionary powers to vary property rights,[141] in addition to the matrimonial regime.

The second criticism of the proposed regime stems from the Ontario Commission's recommendation that spouses should be able to elect to have their property rights governed by separation of property or by the terms of a marriage contract. A recent study in Quebec, where a similar right of election exists, showed that from July 1, 1970, when the regime of partnership of acquests was established, to December 31 1973, the spouses chose separation of property in 53.3% of all marriages.[142] 39.6% of the marriages occurring during the period were celebrated without a marriage contract and accordingly fell into the statutory regime of partnership of acquests.[143] Another 6.6% elected partnership of acquests by notarial deed[144] so that a total of 46.2% of marriages were governed by the regime. The study concludes that [l]a société d'acquêts nous apparaît donc bien implantée au Québec",[145] but it must be conceded that a significant number of marriages are still subject to separation of property. Moreover, in the common law provinces, where there is no tradition of a matrimonial regime, it might be expected that the percentage of marriages in which the spouses elected separation would be higher.

---

138 *Ibid.*, 93.
139 *Ibid.*
140 Law Com. no.52, *supra*, f.n.18, 4.
141 *E.g.*, *The Matrimonial Causes Act, 1973, supra*, f.n.49, ss.24 and 25.
142 Rivet, *La popularité des différents régimes matrimoniaux depuis la réforme de 1970* (1974) 15 C.de D. 613, 628.
143 *Ibid.*
144 *Ibid.*
145 *Ibid.*, 636.

It is therefore clear that even if the Ontario Commission's proposed regime were adopted in the common law provinces, separation of property would continue to play an important part in matrimonial property law. But unless the rigidity of the traditional rules of separation of property were ameliorated, injustices of the type seen in *Murdoch* [146] could still be perpetrated where the spouses were separate as to property.[147] It must be noted that the matrimonial home would not be subject to separation of property since the Ontario Commission has recommended that the principle of co-ownership should apply to it.[148] However, this proposal merely engrafts an exception onto the rules of separation with respect to one species of property, but many families do not own a matrimonial home. Thus the Ontario Commission's Report offers only a partial solution to property disputes between spouses who elect the system of separation of property.

The loophole could be blocked by removing the right to opt out of the proposed regime but such a draconian measure would hardly be acceptable. It is therefore submitted that the right to opt out of the regime should carry the corollary that the courts have power to prevent injustices with respect to property rights in marriages governed by separation of property. The unavoidable conclusion seems to be that those marriages would have to be subject to a judicial discretion to override the rules of separation and create or vary property rights. This result would be achieved by the Saskatchewan Commission's recommendation that both the matrimonial regime and the system of discretionary powers be adopted.[149] The

---

[146] *Supra*, f.n.1.

[147] A parallel problem exists in Quebec for those marriages which are subject to the regime of separation of property. The standard form of marriage contract by which the spouses elect separation contains provisions for the husband to promise certain gifts of property to the wife as consideration for her renunciation of the statutory regime. Under art.208 C.C. the wife may demand execution of the gifts on dissolution of the marriage, but the court has a discretion to declare them forfeited if she has been guilty of misconduct. Moreover, in some marriages the regime of separation of property is elected without any provision for gifts. See generally, Brierley, "Husband and Wife in the Law of Quebec: A 1970 Conspectus" in Mendes de Costa (ed.) *Studies in Canadian Family Law* (1972), vol.2, 795, 843-844. The Civil Code Revision Office has recently recommended an amendment to the terms of art.208 C.C.; see C.C.R.O., *Report on the Family, supra,* f.n.28, 279-280.

[148] Ontario Commission, *Report on Family Law, supra,* f.n.2, ch.12.

[149] Saskatchewan Commission, *Third Working Paper, supra,* f.n.2, 5. The Commission recommends that the spouses should have the right to agree that the courts be precluded from exercising the judicial discretion (at 12). In

legislative structure would then resemble the present British position with the matrimonial regime superimposed upon it. However, it should be noted that in view of the "potential scope... [for] equitable sharing"[150] illustrated by *Wachtel* and *Trippas*, the British Law Commission rejected the necessity of superimposing a deferred community regime upon the discretionary powers.[151]

The Alberta Institute made two other criticisms of the deferred sharing regime. Firstly it was said that the task of separating shareable from non-shareable property is complicated.[152] Special problems would be likely to arise with respect to the source of particular items. For example what was the true value of ante-nuptial assets and debts? Was an item acquired by way of gift? While the presumption of shareability would solve the legal question, it may exacerbate the tensions of dissolving a marriage. Secondly, it was said that the wife does not have a present right of ownership during the regime and is therefore still in a dependent economic position until the marriage is terminated.[153] However, the only way that both spouses could have present rights of co-ownership in all the family's assets during marriage would be under a regime of community of property with the inherent problems noted above.[153a] Furthermore, since property disputes usually arise only upon termination of the marriage, the deferred community regime seems at least to provide sufficient protection for the wife's property rights.

Finally, the details of the Ontario Commission's regime should be carefully considered. As suggested earlier, perhaps the most controversial element is the recommendation that capital gains on deductible property should be shareable while capital losses should not. It is submitted that neither losses nor gains can be attributed

---

order to ensure that the courts would be able to do justice in all marriages not subject to the statutory regime, this right of election would have to be disallowed. It does not exist in England.

[150] Law Com. no.52, *supra*, f.n.18, 18.

[151] The Commission said that "[i]t appears unnecessary at this stage to superimpose a community structure"; *ibid.* This suggests that it may reopen the issue if the *Matrimonial Causes Act, 1973, supra*, f.n.49, does not prove to be a completely effective vehicle for equitable division of family property.

[152] Alberta Institute, *Working Paper, supra*, f.n.2, 68; See also, Hahlo, *Deferred Community of Gains — A Note of Warning* (1974) 52 Can.Bar Rev. 482, 483. The author notes that "the whole system puts a premium on accurate book-keeping, a mercenary practice hardly to be encouraged as between spouses"; *ibid.*, 483.

[153] Alberta Institute, *Working Paper, supra*, f.n.2, 18.

[153a] See text at f.n.100.

to the fact of marriage and therefore whatever rule is adopted, it must treat losses and gains in the same way. The present recommendation would simply encourage a spouse with ante-nuptial property to opt for the system of separation.

3. *Co-ownership of the Matrimonial Home*

The legal position of the matrimonial home in family property relations is of special importance because it is the "shelter and focal point of the family"[154] and is often the spouses' only "substantial asset".[155] Thus one of the major complaints about the existing law has been the failure of the courts to achieve an equitable solution applicable to disputes over ownership of the home.[156] To meet this criticism, the Ontario and Saskatchewan Commissions both recommended the legislative adoption of the principle of co-ownership by the spouses of the matrimonial home.[157] The proposal is also discussed in the Alberta Institute's working paper,[158] and it is worth noting that the British Law Commission has recommended that the discretionary powers of the *Matrimonial Causes Act, 1973* be supplemented by provision for co-ownership of the matrimonial home.[159] More recently, the Civil Code Revision Office of Quebec has proposed protection of the matrimonial home through the medium of a declaration of residence which, when registered against the home, would prevent the owner from dealing with the property without the consent of his or her spouse.[159a]

---

[154] Ontario Commission, *Report on Family Law, supra,* f.n.2, 131.

[155] Law Com. no.52, *supra,* f.n.18, 4; see also, Ontario Commission, *ibid.*

[156] *E.g., Pettitt* v. *Pettitt, supra,* f.n.16; *Gissing* v. *Gissing, supra,* f.n.16. *Murdoch* v. *Murdoch, supra,* f.n.1, involved a dispute over a farm property of which part comprised a house that the family occupied as their matrimonial home.

[157] Saskatchewan Commission, *Third Working Paper, supra,* f.n.2, 5, 14; Ontario Commission, *Report on Family Law, supra,* f.n.2, 135. The Ontario Commission defined the matrimonial home as "the dwelling, and the area attached thereto, that is owned by either of the spouses, and occupied by them during marriage as their principal family residence"; *ibid.,* 132. The principle of co-ownership of the home would apply only to one dwelling house. If a spouse owned more than one house, co-ownership would attach only to "the principal family residence"; *ibid.,* 133.

[158] Alberta Institute, *Working Paper, supra,* f.n.2, 47-55.

[159] Law Com. no.52, *supra,* f.n.18, 7, 10.

[159a] C.C.R.O., *Report on the Family, supra,* f.n.28, 187-188. In certain cases the court has power to make a preferential attribution of the home to either spouse; *ibid.,* 199-200.

Under the Ontario Commission's detailed scheme of co-ownership, the spouses would have joint control over the home, as tenants in common, even if title were not taken in both names, because in every disposition of the home, the non-titled spouse would have to be a party to the transaction or sign a written form of consent to it.[160] The non-titled spouse could protect his or her half share in the home by registration of that interest, but even without registration, the right of co-ownership would prevail over claims of third parties who transacted solely with the spouse whose name appeared on the title.[161] The rights of parties holding security interests in the home at the date of proclamation of the new legislation would be preserved,[162] but subsequently, if a mortgage were obtained without the consent of the non-titled spouse, the mortgagee would not be able to realize the security with respect to that spouse's share in the home.[163] The spouses would be able to agree that the home should not be jointly owned but the Commission recommends that the courts have "broad powers . . . to set aside or vary such arrangements".[164] Both the Ontario and Saskatchewan Commissions recommend that the law should apply retroactively to homes owned prior to the date of the legislation.[165] The principle would also cover a home acquired before the marriage but brought into the union by one of the spouses.[166]

The principle of co-ownership would carry with it the right for each spouse to occupy the matrimonial home[167] but in the event of a dispute between the spouses, the existing law would entitle either co-tenant to apply for a partition of the property.[168] The Ontario Commission therefore recommends that the court have power to safeguard occupation rights of a spouse where necessary and that such rights should prevail over the provisions for partition.[169]

---

[160] Ontario Commission, *Report on Family Law, supra,* f.n.2, 137.

[161] *Ibid.,* 140. *Cf.* The Civil Code Revision Office's recommendation that third party rights be protected by a declaration of residence; C.C.R.O., *Report on the Family, supra,* f.n.28, 187-188, 193-197.

[162] Ontario Commission, *Report on Family Law, supra,* f.n.2, 139.

[163] *Ibid.,* 141.

[164] *Ibid.,* 136. See also, Saskatchewan Commission, *Third Working Paper, supra,* f.n.2, 14; Law Com. no.52, *supra,* f.n.18, 7.

[165] Ontario Commission, *Report on Family Law, supra,* f.n.2, 138; Saskatchewan Commission, *Third Working Paper, supra,* f.n.2, 5.

[166] Ontario Commission, *Report on Family Law, supra,* f.n.2, 135.

[167] *Ibid.,* 144.

[168] *E.g., The Partition Act,* R.S.O. 1970, c.338, s.2.

[169] Ontario Commission, *Report on Family Law, supra,* f.n.2, 144-145.

Co-ownership of the home should also entail the right to use household goods[170] such as furniture. In this regard the Ontario Commission, following the lead of the British Law Commission, recommended that property rights in the goods need not be altered.[171] Its proposals are confined to protecting use and enjoyment of the goods.[172]

The Ontario Commission recommended that the principle of co-ownership of the home be adopted independently of any decision with respect to its proposed deferred sharing regime.[173] However, unless co-ownership of the matrimonial home were supplemented by other legislation, there might still be instances of injustice because the rigid rules of separation of property would continue to apply to family assets other than the home. To prevent injustices, the principle of co-ownership of the home could be added either to the system of discretionary powers over matrimonial property or to the deferred sharing regime. If co-ownership of the home were combined with the judicial discretion over family property, as would be the result of the British Commission's proposal, each spouse would be entitled to an equal share of the home but the court could exercise its discretion to vary those rights upon dissolution of the marriage.[174] Thus, unless the legislation were to exempt the matrimonial home from the court's discretion over property rights, upon termination of the marriage the principle of co-ownership of the home would operate only as a *prima facie* presumption.

If co-ownership of the home were combined with the deferred sharing regime, there would be some overlap between the two provisions. The Ontario Commission recommended that upon termination of the regime, the value of the matrimonial home should be included in the calculation of the equalizing claim, by determining the net value of the home and adding half that amount to the net estate of each spouse.[175] Thus even without the principle of co-ownership of the home, the titled spouse would have to share the home

---

[170] The Commission recommended that household goods "should include furniture and effects used in or reasonably necessary to the running of the home .... Categories which ought ... to be excluded are purely personal items and goods used by a spouse for business purposes"; *ibid.*, 147.

[171] *Ibid.*, 146; Law Com. no.52, *supra*, f.n.18, 31.

[172] Ontario Commission, *Report on Family Law*, *supra*, f.n.2, 147. *Cf.* the proposals of the Civil Code Revision Office; C.C.R.O., *Report on the Family*, *supra*, f.n.28, 177-184.

[173] *Ontario Commission, ibid.*, 131.

[174] *Matrimonial Causes Act, 1973, supra*, f.n.49.

[175] Ontario Commission, *Report on Family Law*, *supra*, f.n.2, 143.

through the equalizing claim. The only additional advantage that could be achieved through the principle of co-ownership of the home would be where one spouse purchased the home before marriage. In that situation the home would not be shareable under the regime since it would be ante-nuptial property, but it would be shareable through the principle of co-ownership of the home. Of course, one instance in which co-ownership of the home *would* have the intended effect would be in those marriages where the spouses opted out of the regime in favour of separation of property.

It should be noted that the Saskatchewan Commission recommended that the principle of co-ownership of the home be supplemented by both discretionary powers over property and the deferred sharing regime.[176] This would result in a complex inter-relationship between the three sets of provisions upon which the Commission has not elaborated.

There are strong arguments in favour of the principle of co-ownership of the home. Often it is the family's main asset and there is already a well established practice of joint ownership.[177] Co-ownership of the home would apply during the marriage and would give "security of ownership"[178] to the non-titled spouse — usually the wife. This would be of particular importance to those wives whose only work is domestic duties. It would also eliminate the wastefulness and uncertainty of litigation.[179]

The principal argument against co-ownership of the home is that it assumes equal contribution by both spouses and creates fixed property rights solely by virtue of the status of marriage. This criticism has been noted with respect to the deferred sharing regime. However, if the co-ownership principle were combined with a judicial discretion over the spouses' property rights, the court would be able to readjust or abrogate co-ownership where necessary. If co-ownership of the home were exempted from the general discretion then a specific power to vary property rights in the home would be required.[180]

A second argument against co-ownership of the home is that where the spouses do not hold title jointly or in common, it would

---

[176] Saskatchewan Commission, *Third Working Paper, supra,* f.n.2, 5.

[177] Law Com. no.52, *supra,* f.n.18, 8; Ontario Commission, *Report on Family Law, supra,* f.n.2, 135.

[178] Law Com. no.52, *supra,* f.n.18, 9.

[179] *Ibid.,* 9-10.

[180] See Saskatchewan Commission, *Third Working Paper, supra,* f.n.2, 15.

complicate real estate transactions.[181] Purchasers and mortgagees would be put on enquiry as to the owner's marital status and as to whether the house constituted a matrimonial home.[182] The Alberta Institute's suggestion that the *Dower Act* could be used as a vehicle of co-ownership would not alleviate conveyancing difficulties.[183]

A third objection is that spouses would be required to share the home, but there would be no corresponding obligation regarding other assets.[184] Thus the spouse who obtained an interest in the home might own other assets of considerable value which would not have to be shared.[185] However, if the principle of co-ownership of the home were combined with discretionary powers over property rights, the courts could make the necessary adjustments.

Finally, as mentioned above, it must be stressed that the principle of co-ownership of the matrimonial home does not assist spouses who do not own a home.[186]

Relationship between the Proposed Reforms and the Law of Succession

The main criticism of the existing law of family property is that it discriminates against the wife during the lifetime of the spouses. But many marriages survive until the death of one partner and it is therefore important to consider the relationship between the proposed reforms and the law of succession. It has been recommended "that the surviving partner of a marriage should have a claim upon the family assets at least equivalent to that of a divorced spouse".[187]

1. *Judicial Discretion*

The first proposal for reform, as discussed earlier, is the judicial discretion to create or vary property rights between the spouses on

---

181 Jacobson, *Murdoch* v. *Murdoch: Just about what the Ordinary Rancher's Wife Does* (1974) 20 McGill L.J. 308, 322-323. But *cf.* the proposals of the Civil Code Revision Office, *supra*, f.n.28, 161.

182 The problem would be exacerbated where the vendor owned two homes because the purchaser may have to decide which one constituted the principal family residence.

183 *Meduk* v. *Soja* [1958] S.C.R. 167. But *cf. Freedman* v. *Mason* (1957) 9 D.L.R. (2d) 262 (Ont. C.A.), aff'd by [1958] S.C.R. 483.

184 Law Com. no.52, *supra*, f.n.18, 9.

185 *Ibid.*, 17.

186 A determined spouse might therefore avoid sharing the home by purchasing it through a corporation.

187 Law Com. no.52, *supra*, f.n.18, 13.

divorce, nullity of marriage or separation. If this were accepted, the surviving spouse would be treated less generously than the divorcee and others because there is no judicial discretion to alter property rights upon the death of a spouse.[188] Where the deceased leaves a will which partly or totally disinherits a dependent spouse, the latter is entitled to apply to the court for a change in the provisions of the will. Here the court's discretion is limited to making "an order charging the whole or any portion of the estate . . . with payment of an allowance sufficient to provide . . . maintenance".[189] As the British Law Commission noted "this is clearly narrower in concept than the provision of a fair share"[190] which is the aim of legislation creating discretionary powers to adjust property rights. Symmetry between the laws of succession and dissolution would therefore require an amendment to the *Dependants' Relief Act*[191] in which maintenance rights would be superceded by provision for a share of property.[191a]

It must also be noted that the *Dependants' Relief Act* discriminates against married women because "a wife who was living apart from her husband at the time of his death under circumstances that would disentitle her to alimony" is not entitled to an order.[192] But a husband is not similarly disentitled by such misconduct. It is imperative that this discrimination be removed and the Ontario Commission has so recommended.[193]

Where the deceased is intestate, the surviving spouse is entitled to a fixed share of the estate.[194] As noted earlier, the intestacy laws of the common law provinces provide quite fairly for the surviving

---

188 Alberta Institute, *Working Paper, supra,* f.n.2, 75.

189 *The Dependants' Relief Act, supra,* f.n.37, s.2(1).

190 Law Com. no.52, *supra,* f.n.18, 13. But the provision in *The Dependants' Relief Act, ibid.,* s.2(2) for payment of a lump sum and conveyance of certain property seems to allow for a concept of a fair share of capital for the survivor.

191 R.S.O. 1970, c.126.

191a This point does not seem to have been given sufficient attention in the reports. See Alberta Institute, *Working Paper, supra,* f.n.2, 75; Saskatchewan Commission, *Third Working Paper, supra,* f.n.2, 8. On the other hand, the British Law Commission has recently made extensive recommendations on this subject. See The Law Commission, *Second Report on Family Property: Family Provision on Death* (1974), no.61. The standard applicable to the surviving spouse would be a reasonable share of the estate similar to the case of termination of marriage, but other dependents would be entitled only to adequate maintenance (at 5-6).

192 *Supra,* f.n.191, s.9.

193 Ontario Commission, *Report on Family Law, supra,* f.n.2, 110.

194 *E.g., Devolution of Estates Act, supra,* f.n.35.

spouse [195] and thus even if a judicial discretion over *inter vivos* property rights were adopted, it might not be necessary to extend the discretion to cases of intestacy. However it has been held that a widow who, prior to her husband's death, lives apart from him in an adulterous relationship, loses most of her rights under the intestacy laws.[196] There is no parallel disentitlement against widowers and the discriminatory effect of the present law should be reversed by legislation.

2. *Deferred Sharing of Property*

It will be recalled that the deferred sharing of property would be effected by the termination of the matrimonial regime and that one of the terminating circumstances would be the death of a spouse. If the survivor were entitled to receive an equalizing claim it would be payable by the deceased's estate; however, no equalizing claim would be payable by the survivor *to* the estate. The equalizing claim would be based on the spouses' net estates in order to avoid the problem of identifying and deducting the value of ante-nuptial property. The effect of the regime on succession will now be considered.

Where the deceased spouse leaves a will, the amount of the equalizing claim, if any, payable to the survivor, would have to be deducted from the value of the property distributed by the will.[197] The widow would therefore be protected against testamentary disinheritance and would be entitled to a share of her husband's property upon his death at least equivalent to what she would receive on dissolution of marriage. Moreover, the wife would have guaranteed property rights, whereas under existing law a disinherited spouse must apply for maintenance, the amount of which depends on the discretion of the court. Nevertheless, the fact that existing law contains protection against disinheritance "probably has some influence on testators minded to be ungenerous to their dependants, and this may account for the fact that applications . . . are relatively few in number".[198] The burdensome calculation of the equalizing claim may therefore "not be worth the trouble that it imposes on the estate".[199]

---

[195] See text, *supra,* at f.ns.34 *et seq.*

[196] *MacWilliams* v. *MacWilliams, supra,* f.n.41.

[197] Ontario Commission, *Report on Family Law, supra,* f.n.2, 170.

[198] Law Com. no.52, *supra,* f.n.18, 13; see also, Alberta Institute, *Working Paper, supra,* f.n.2, 79.

[199] Alberta Institute, *Working Paper, supra,* f.n.2, 79.

Furthermore, since the deferred sharing regime was modelled on Quebec's partnership of acquests, it is necessary to compare the succession laws of Quebec with those of the common law provinces. In Quebec, there are no limits on freedom of testation either through provision for adequate alimentary maintenance or for a forced survivor's share (*légitime*).[200] Thus the case for a statutory regime of deferred sharing of property applicable on succession is far stronger in Quebec than it is in the common law provinces.

Where the deceased is intestate, the surviving spouse's rights under the Ontario Commission's proposed regime would comprise both the equalizing claim and the share prescribed by the intestacy laws in the balance of the estate.[201] This appears to be unnecessary duplication since the surviving spouse is already entitled in Ontario to a preferential share of the first $50,000 of the estate and a minimum of one third of the balance.[202] It is therefore submitted that Ontario's existing intestacy laws provide property rights which are at least equivalent to, and sometimes greater than, the rights that would be created by the deferred sharing regime. The calculation of the equalizing claim would thus be superfluous.

Comparison with Quebec's succession laws on an intestacy further weakens the case for the operation of the Ontario Commission's deferred sharing regime in this situation. In Quebec the surviving spouse has no fixed preferential entitlement and may be required to share part of the estate with the deceased's parents and collateral relatives up to nephews and nieces in the first degree.[203] Moreover, where there are children of the marriage or such relatives as previously mentioned, the widow is required to abandon her rights under the partnership of acquests in order to obtain her share of the intestate estate.[204] In this regard the Ontario Commission's proposal would be more favourable to the widow than the comparative provisions of the law of Quebec; but even without the regime the present intestacy laws already provide well for the widow who is treated more generously than her Civil Law sister.

3. *Co-ownership of the Matrimonial Home*

This principle would give equal shares in the home to husband and wife where only one spouse has the title. It would give the non-

---

200 Brierley, *supra*, f.n.147, 829.

201 Ontario Commission, *Report on Family Law, supra*, f.n.2, 170.

202 *The Devolution of Estates Amendment Act, supra*, f.n.34; *Devolution of Estates Act, supra*, f.n.35, s.31.

203 Art.624b C.C.

204 Art.624c C.C.

titled spouse vested property rights during the marriage as a tenant in common. Upon the death of one spouse, the other would not become sole owner by survivorship as that would only occur where the spouses hold title as joint tenants.[205] Thus the principle of co-ownership of the home would have the same result whether the marriage was terminated *inter vivos* or by death. In either case, the non-titled spouse would obtain at least a one half share in the home. However, if the principle of co-ownership of the home were combined either with the system of judicial discretion or the deferred sharing regime, there would be complex problems of interrelationship between the provisions which, as noted earlier, do not seem to have been fully resolved by the law reform commissions.

Conclusion

Each of the proposals for reform is open to some criticism but it is submitted that the most acceptable modality for an immediate and far-reaching reform of the system of family property in the common law provinces is the creation of a judicial discretion over property rights, as in England's *Matrimonial Causes Act, 1973.* It should be noted that this reform would build on the foundations of the existing common law and the significant social and judicial results of the English experience have been illustrated. While this type of legislation would not immediately make the wife a full economic partner with her husband it would be a large step in that direction. The reform has what seems to be the disadvantage of imposing on one spouse the onus of presenting an application for an exercise of the court's discretion but it is submitted that this is not a major criticism. Firstly, the determination of property rights would often be handled concurrently with the court proceedings that generally accompany a dissolution.[206] Secondly, separate applications could be decided in the judge's chambers with a minimum of time and expense. Thirdly, the English Court of Appeal has shown that clear working principles follow from the legislation so that precedents would be quickly established which would prevent substantial variations from case to case.

While the Ontario Commission's proposed deferred sharing regime would certainly make both spouses full economic partners in the marriage, adequate provision would still have to be made for those

---

[205] Megarry and Wade, *The Law of Real Property* 3d ed. (1966), 403.

[206] But note the constitutional problems if such jurisdiction were to be given to the divorce court, *supra,* f.n.85.

marriages in which the spouses elected to be governed by the system of separation of property. Moreover, one important reason for imposing deferred sharing of property as the statutory regime would be to protect the surviving spouse against disinheritance by will. In the common law provinces, unlike Quebec, the law already provides such protection and the argument in favour of a deferred sharing regime is therefore weakened.

The principle of co-ownership of the matrimonial home could easily supplement the discretionary powers legislation to ensure that the spouses would be *prima facie* equal partners in the matrimonial home. Such a reform would introduce into the common law provinces a tradition of community of property, at least in regard to one asset, which would facilitate the evolution of a deferred sharing regime if that step were eventually considered necessary.

Finally, it should be realized that if the discretionary power to alter property rights is adopted, some cases will be decided in connection with divorce proceedings [207] while others will be dealt with in a non-divorce setting.[208] Cooperative federalism will therefore be required in the drafting of legislation. Moreover, if some provinces choose other solutions in their legislation, grave conflict of laws problems will arise. Accordingly, it would seem that the ultimate resolution of the problem will require collaboration between all the provincial legislatures and the Parliament of Canada.

---

[207] The jurisdiction over divorce is federal; see s.91(26) of the *British North America Act, 1867, supra,* f.n.85.

[208] This jurisdiction would be provincial; see s.92(13) *British North America Act, 1867, ibid.*