

UNEQUAL DIVISION OF MATRIMONIAL PROPERTY

IN THE COMMON LAW PROVINCES OF CANADA

INTRODUCTION

The decade of the 1970's saw the enactment of a veritable rash of statutes in the common law provinces adopting new regimes relating to matrimonial property. By a variety of means the old common law rules relating to separation of property were removed, and replaced with a more modern recognition of the contributions of each of the married persons to the marriage. These rules were to replace the rather unreliable tests for the imposition of a resulting or even a constructive trust, which had reached their head in the Supreme Court of Canada decision in Rathwell v. Rathwell.*

The resulting legislation in the common law provinces represents a fairly broad spectrum in terms of the possible approaches. Some provinces have established an almost totally discretionary system where the Court is directed by a presumption of equal sharing, which may be set aside on the basis of a stipulated list of factors. In other cases, the presumption can only be set aside by satisfaction of a statutory test such as the imposition of an inequity by equal sharing, or where equal sharing would unduly impoverish one party.

Further, the range of assets to which the presumption is applicable also varies, some provinces applying the presumption to all assets, while other provinces apply the presumption only to those assets defined as family assets. Non-family assets are subject to distribution only if certain

*[1978] 2 SCR 436.

other statutory tests can be met.

The difficulty in approaching a subject like the basis for unequal division of matrimonial property lies in the variety of rules by which this may come about. However, it is clear that whatever system is adopted, all contain some possibility of the Court displacing the presumption of equal sharing and substituting another proportion.

My task, then, was to indicate to you those circumstances in which unequal sharing has been ordered and to attempt to isolate the factors which might justify such a division.

In order to do so, and in order to accommodate the different systems which are presented by the different types of provincial legislation, I took as a given the possibility of ordering an unequal division, although the methods by which such unequal division may come about are set out in Appendix I.

In Appendix I, the table divides the assets into Family and Non-family (with a further sub-division into business assets) since in some provinces different tests are required for different classes of assets. In Alberta, for example, no such distinction is drawn, so the same factors are referred to in each heading even though the presumption of equal sharing is slightly differently worded for different classes of property. (I do admit to some curiosity as to whether such distinction occurs in practice.)

Appendix II represents a compendium of all the factors used in the various provincial acts. The total is 33, no one province uses all 33, Saskatchewan being the highest with 17.

Others, such as Manitoba, in the case of commercial assets, has a single open-ended factor, whereas British Columbia is limited strictly to the four enumerated factors.

Secondly, in order to find a representative sample of decisions in which these factors should have come to light, I conducted a computer search of all family law cases in which some aspect of property had been considered and reported in either national or provincial reporter series, since 1980. This resulted in a computer print-out of approximately 672 decisions.

The actual search keyed on the words "division, distribution" and "unequal, inequitable, unfair, unjust, disproportionate" and "matrimonial, marital" and "property, assets" (or truncations thereof).

The reporter series searched were Dominion Report Services, Dominion Law Reports, Western Weekly Reports, National Reporter Services, All Canada Weekly Summaries, Western Legal Digest and the Supreme Court Reports.

On a research basis, the log-on time totalled 4.31 hours over three days. Seventy-eight different data base sign-ons were logged producing 85 searches. The result was a minimum of 258 pages, compiled by province and data base.

I did not perform a search by name of adjudicator, so all decisions, with the exception of Court of Appeal, are perused without reference to the person or character of the judge. Further, the print-out gave the name of the case and citation, and did not identify the actual trial judge.

The next stage was to review all of these decisions to determine whether or not an unequal division had been ordered and, if so, to try to isolate the factors involved.

The final stage was to review all of the decisions in which an unequal division had been ordered and attempt to categorize the circumstances which formed the basis of the decision. I attempted to do this without particular reference to the factors of the Alberta Statute, with which I am most familiar, although I obviously admit to some possibility of bias towards those factors.

The object of the exercise was to attempt to identify a profile or profiles of those cases in which unequal sharing would be justified. Failing such a profile, perhaps it would be possible to identify influential factors which tended to crop up most often. In other words, what common themes ran through the cases, and were these themes common to a number of provinces, notwithstanding the differences in legislation?

There were clearly some overall general impressions. For example, the reported cases suggest that Manitoba would be the most difficult province in which to justify an unequal division, and Saskatchewan the simplest; that is, if one were to judge by frequency of occurrence alone. However, when one looks at the different definitions of matrimonial property and the ability of the Saskatchewan court to exclude certain assets from division then it is not surprising that unequal division occurs much more frequently in that province. Nova Scotia and

Newfoundland seem diametrically opposed on the relevance of the conduct of the parties to a dispute. Furthermore, there is a remarkable divergence in the definition of matrimonial assets. One might contrast the definition found in Nova Scotia which purports to include property owned before the marriage with the Ontario definition which is limited, in the absence of the applicant satisfying a user test, to family assets only.

The result, is a preliminary, rather general study, the results of which might determine whether a much more detailed statistical study might take place. It is scientific only to a certain degree, and many of the conclusions and hypotheses are deliberately posed for discussion purposes.

The balance of the paper is divided into two parts. Part one describes the categories into which the various decisions were placed. Each heading contains a sample of the decisions from each jurisdiction which were placed in it. This is done so that each conferee may be aware of the types of cases from each province which have been placed in that category. There are a number of reasons for this selective sample. In some cases it was difficult not to place the decision in more than one category. For example, pre-owned assets and duration of marriage were often mentioned together. Other cases are almost identical, for example: "husband-owned farmland prior to marriage, co-habitation lasted only five years, and wife made little or no contribution to operations" became a rather frequent combination of factors.

Each heading is followed by a list of cases which is in turn followed by a brief comment on the factor, its relevance and possible difficulties or variations which may result from its use.

FACTORS IDENTIFIED THROUGHOUT THE CASES

The following is a list of categories which were discovered or coined to describe the different sets of circumstances which were identified in the perusal of the cases. They are not in any pre-determined order except that dictated by the order in which the cases appeared in the print-out.

Professional Qualifications - Non-divisible Assets

These cases highlight an obvious difficulty where assets are not capable of being transferred from one party to another. The first obvious example of this arose in cases in which one party had worked and supported the marriage and family while the other party obtained a job or educational qualifications. As a result one of the parties has a greater earning capacity than the other. Some provinces specifically mention this as a factor. Theoretically it might be possible to value the increased earning capacity by actuarial statistics and to include such a value in an inventory of matrimonial property. I am not aware of any case in which that has been done. Instead, courts have normally preferred to order an unequal division of the remaining assets in favour of the spouse having the lower

earning capacity. The typical example is the New Brunswick decision of Trifts v. Trifts (1984) 54 N.B.R. (2d) (147), where the existence of the husband's medical practice resulted in an unequal division in favour of the wife of the remaining family assets. A similar decision was reached in B.C. in a case of Jach v. Jach (1980) 113 D.L.R. (3d) (267) (B.C.S.C.).

However, where there are insufficient other assets to create an equitable result, it may be necessary to mortgage the increased earning capacity in some manner. The most popular method has been to require a balancing payment, perhaps by way of a lump sum maintenance under the Divorce Act. Thus, the qualified doctor, lawyer or architect, as the cases seem to represent, might be required to pay a lump sum annually out of his practice for a certain number of years.

Theoretically, the same approach would apply to any asset which was of restricted alienation, and one might question whether or not the shares in a private corporation subject to a shareholder's agreement or a buy-out provision should be treated in the same way.

Professional Qualifications
- Non-divisible Assets

- A.1 Wells v. Wells and Cormack, 36 R.F.L. (2d) 121 (Ont. H.C.J. 1983) Husband allowed to attend medical school until qualified as M.D.
- A.4 Bregman v. Bregman, (Ont. H.C.J. 1978) Husband qualified as architect while wife worked and put him through university.
- A.7 Schorr v. Schorr et al., (1983) 33 R.F.L. (2d) 34 (Ont.) Husband qualified as lawyer -- all his assets were held in a management company.
- C.26 Haines v. Haines, 23 A.C.W.S. (2d) 34 (Ont. 1983) Wife gave up nursing career and kept home -- unequal division awarded.
- Q.77 Graystone v. Graystone, 9 A.C.W.S. (2d) 389 (B.C.S.C.) Wife put husband through university
- S.47 Von Hessert v. Von Hessert, (1982) 27 R.F.L. (2d) 197 (Sask. Q.B.) Husband became geologist, wife still completing university -- possession of matrimonial home given to wife and assets frozen.

Assumption of Expenses

Most of these cases deal with situations where one party has almost solely assumed the expenses of running the household or of maintaining the family home. As a result it is more easy to identify the contribution of one party and that party may well be rewarded. Two other factors do come into play, however. The first is where the assumption of the expenses took place after separation, for example, maintaining the equity in the matrimonial home after the parties separated. It is not clear in those circumstances whether it is the extraordinary assumption of expenses that is important, or the obvious separation of the party's contribution to the marriage. The other aspect which is hinted at is where one party could have contributed more but for some reason did not do so. This is borne out in the Manitoba cases where equal division was awarded where it is stated that equal division is not predicated upon equal contribution, provided that each party contributes to the best of his or her ability.

Assumption of Expenses

- A.17 Kastrau v. Kastrau,
(1978) 7 R.F.L. (2d) 318
(U.F.C. 1978) Wife paid for all home care expenses.
- I.2 Barry v. Barry, (1981) 35
Nfld. & P.E.I.R. 91
(Dist. Ct.) Husband's obligation to support children, he had made all mortgage payments during the separation.
- L.7 Davidson v. Davidson, (36
R.F.L. (2d) 428
(N.B.Q.B.) Plaintiff paid for and improved matrimonial home and looked after the child.
- N.51 Wiebe v. Wiebe, (1983) 33
R.F.L. (2d) 62 (B.C.S.C.) Husband maintained and improved farm after separation and was given major share.
- S.2 Beaudry v. Beaudry,
(1982) 17 Sask. R. 400
(Sask. C.A.) Wife built up equity in home after separation, husband built up business assets -- each kept their own assets.

Conduct

One might have expected that the framers of legislation dealing with matrimonial property might have attempted to remove question of marital conduct from consideration. Perhaps this might have been the final step in the process which seems to have been occurring since the turn of the century. At that time, the reprehensible party, represented perhaps best of all by the adulterous spouse, was incapable of seeking the remedy of divorce against the other spouse on the basis of adultery. At a later date, such a person might have been capable of acquiring the remedy of divorce but not the ancillary remedy of maintenance. At an even later date, best represented by the English decision in Wachtel and Wachtel,* this principle was restricted even further by requiring that the conduct which would deprive an individual of the rights to maintenance had to be "gross and weighty misconduct", a test similar to the grave and weighty requirement which had been applied to conduct alleged to constitute cruelty for some time.

Far from removing the question of conduct altogether, many of the statutes build it in as an integral part of the consideration to be given by the Court. Thus, the statute might require the assessment of contributions to the quality of married life, both economic and moral.

The spectrum seems to vary from the requirement of some

*[1973] 1 All E.R. 829 (C.A.).

provinces that conduct, if it is to be argued in a matrimonial property action, must somehow be related to the pool of assets which are in question. Thus, the evidence here would be restricted to conduct amounting to dissipation of assets or fraudulent conveyances. Another possible aspect is the effect of conduct which prevents the other party from building up any assets or making any major contribution to the pool of assets. The opposite end of the spectrum is represented by a situation where abhorrent or undesirable conduct is taken into account as a negative factor against the party responsible.

This is a very small number of cases. As can be seen from the table of factors in Appendix II, most provinces do not list conduct or misconduct as a factor and the courts have consistently examined conduct from the point of view of whether or not it was a contribution or detraction from the pool of matrimonial assets.

Conduct

- A.26 Rasmussen v. Rassmussen and Harrington, (Ont. H.C.J. 1983) Husband abandoned farm, left wife with uneconomic farm and debts.
- A.32 Couzens v. Couzens, (Ont. C.A. 1981) Husband failed to make full disclosure of assets.
- A.48 Palumbo v. Palumbo, (1982) 30 R.F.L. (2d) 273 (Ont. H.C.J.) Short term marriage of two years, husband appropriated wife's money without her consent.
- A.49 Ricciuto v. Ricciuto, (Ont. S.C. 1981) Failure to provide support or satisfy terms of separation agreement.
- A.62 Gilbert v. Gilbert, (1979) 10 R.F.L. (2d) 385 (Ont. Co. Ct. 1979) Wife abandoning husband and children.
- C.91 Duckworth v. Duckworth, 13 A.C.W..S. (2d) 153 (Ont. Ct. Ct. 1982) Husband squandered family assets, leaving the wife to pay mortgage and taxes.
- F.24 Brown v. Brown, (59 N.S.R. (2d) 369 (N.S. C.A. 1983) Twenty-seven year marriage, wife's conduct led to break up and she received less than an equal division.
- G.8 Briggs v. Briggs, 64 N.S.R. (2d) 40; 13 A.P.R. 40 (N.S. S.C. 1984) Husband left wife after eighteen years, a serious erosion of his responsibilities -- unequal share awarded.
- H.6 Brown v. Brown, 20 A.C..W.S. (2d) 385 (N.S. C.A. 1983) Nova Scotia Court of Appeal said that conduct was clearly relevant.
- L.12 Jones v. Jones, (1981) 34 N.B.R. (2d) 492 (N.B. Q.B. 1981) Husband's drinking problem caused financial problems and he paid the penalty for it.
- L.13 LeBlanc v. LeBlanc, (54 N.B.R. (2d) 388 (N.B. Q.B. 1984) Drinking, non-contributing husband cut off from material assets.

Conduct

- N.5 McCuaig v. McCuaig, (34 R.F.L. (2d) 453 B.C. S.C. 1983) Wife left after ten years, made no further contribution -- lesser share awarded.
- N.23 Guinn v. Guinn (1981) 29 B.C.L.R. 277 B.C. S.C. Husband's conduct deceitful and reprehensible, but not used under Section 51 of the B.C. Act.
- N.40 Carlin v. Carlin (1979) 10 R.F.L. (2d) 176 (B.C. S.C.) Alcoholic husband made no contribution to home, wife worked hard at extra jobs -- husband was given a \$100.00 share.
- R.21 Lucas v. Lucas, (1982) 26 R.F.L. (2d) 233 (Alta. Q.B.) Short marriage, wife brought in and used her assets. Husband's conduct broke up marriage -- wife given share of increase in value of husband's pre-owned assets.
- S.20 Chernipeski v Chernipeski 36 R.F.L. (2d) 201 (Sask. Q.B. 1983) Husband dissipating assets in defiance of Court Order. Home vested in wife as a result.
- S.35 Wilson v. Wilson, (1980) 19 R.F.L. (2d) 321 (Sask. Q.B.) Husband squandering assets and incurring debts -- wife given all of equity in home.
- S.51 Simpson v. Simpson, (1981) 13 Sask. R. 323 (Sask. Dist. Ct.) Husband dissipated assets and built up debts -- unequal division in favour of wife.
- T.9 Pratt v. Pratt, 34 Sask. R. 308 (Q.B. 1984) Alcoholic husband squandered and pledge assets -- all remaining assets given to the wife.

Pre-owned Assets

This has been one of the more problematic areas. The question of assets brought into the marriage might be dealt with either by the awarding of an exemption for the pre-owned assets or by excluding such assets from the definition of matrimonial property altogether. Where the definition is such that pre-owned assets are brought into the pool then it is not unreasonable to expect that an unequal division will be made in favour of the prior possessor, especially in the case of short marriages. However, in the Saskatchewan case of Farr, the Supreme Court of Canada has unanimously stated that there is a limit to the effect to be given to pre-owned assets. It should be noted that the capital base theory which was used as a spring board to increase the interest of the possessor of assets was struck down quite clearly in that particular case.

The question surely is whether or not such assets have been made available to the marriage; or whether they have been used to benefit the marriage. One might further ask whether direct or indirect contribution has been made to the improvement or existence of the assets. However, the cases consistently support the view that the non-owning spouse will not necessarily be entitled to a windfall based on the wealth of the other spouses at the time of marriage.

Pre-owned Assets

- C.107 Myles v. Myles, 7
A.C.W.S. (2d) 90 (Ont.
H.C. 1981) Husband owned home before
marriage.
- F.27 Fraser v. Fraser Estate,
(1981) 50 N.S.R. (2d) 55
(N.S. S.C.) Husband owned home but wife
made substantial contribution
therefore equal division.
- J.6 Churchill v. Churchill,
(1981), 32 Nfld. &
P.E.I.R. 225 (Nfld. D.C.) Husband owned home for 31
years. Three year marriage
and one-fifth share awarded to
wife.
- L.6 Hayes v. Hayes, 50
N.B.R. (2d) 245 (N.B.
Q.B. 1983) Marital asset but owned by
husband prior to marriage and
used only occasionally by
family.
- L.9 Olmstead v. Olmstead,
(1981) 25 R.F.L. (2d) 74
(N.B. Q.B.) Pre-owned land regularly used
by the family excluded from
pool of assets (so were some
bonds of the wife).
- N.24 Forster v. Forster et al,
(1981) 31 B.C.L.R. 105 Husband owned matrimonial home
and made all payments. The
parties were virtually
separate as to property and
the wife got only a small
share.
- N.57 McCallum v. McCallum,
(1982) 28 R.F.L. (2d) 201
(B.C. S.C.) Eight month marriage, husband
previously owned home, no con-
tribution by wife -- larger
share to husband.
- N.66 Hunt v. Hunt (1981) 27
B.C.L.R. 134 (S.C.) Husband owned prior to
marriage but wife improved --
given less than half of value.
- N.82 Gazdeczka v. Gazdeczka,
(1981) 28 B.C.L..R. 69
(S.C.) Husband owned prior to
marriage, short marriage and
wife dependent -- small
interest only.
- Q.35 McIntosh v. McIntosh, 15
A.C.W.S. (2d) 144 (B.C.
C.A.) Husband acquired assets prior
to marriage during cohabita-
tion.

Pre-owned Assets

- Q.52 Bonke v. Bonke, 27
A.C.W.S. (2d) 367 (B.C.
S.C. 1984) Husband's home from first
marriage used by parties.
- R.7 Dwelle v. Dwelle (Alta.
C.A. 1982) Husband had large farming
operation, wife was paid
wages, even the proceeds of
sale of farm were not
necessarily distributed
evenly.
- R.14 Augart v. Augart, (1979)
12 R.F.L. (2d) 327
(Alta. Q.B.) Husband owned property, the
increase in value was split
80-20 in favour of the
husband.
- S.6 Martin v. Martin, 27
Sask. R. 259 (Q.B. 1983) Husband's pre-owned assets
were split 70-30 in his
favour.
- S.15 Werner v. Werner (1980) 1
Sask. R. 327 (Sask. Q.B.) Husband's pre-owned assets
formed capital base -- unequal
division ordered.
- S.24 Farr v. Farr, (1983) 21
Sask. R. 320 (C.A.);
[1984] S.C.C.D. 1643-01. Thirty year marriage, on
appeal the husband's pre-owned
assets were said to form a
capital base -- the theory was
used to weight in favour of
the husband. (Reversed by
S.C.C.)
- S.52 Bateman v. Bateman,
(1981) 22 R.F.L. (2d) 384
(Sask. Q.B.) Husband's pre-owned assets
were divided unequally to him
but the home was divided
equally.
- S.53 Johnson v. Johnson,
(1981) 22 R.F.L. (2d) 262
(Sask. Q.B.) Twelve year marriage.
Husband's pre-owned assets
were divided unequally to him
but the home was divided
equally.
- S.55 Nistor v. Nistor, (1981)
8 Sask. Q.B. Three year marriage.
Husband's pre-owned assets
were divided unequally to him
but the home was divided
equally.

Pre-Owned Assets

- S.65 Evenson v. Evenson,
(1980) 4 Sask. R. 47
(Q.B.) Husband's assets form capital
base in parent's health as
well. The wife got all of the
matrimonial home.
- S.73 Wolff v. Wolff, (1982) 27
R.F.L. (2d) 324 (Sask.
Q.B.) Five year marriage. Husband's
pre-owned assets were divided
unequally to him but the home
was divided equally.
- S.80 Sheridan v. Sheridan,
(1981) 3 W.W.R. 664
(Sask. Q.B.) Husband owned home prior to
second marriage which lasted
only three years -- home given
solely to husband.
- T.1 Seaberly v. Seaberly, (37
Sask. R. 219) (C.A. 1985) No division of inheritance
acquired before marriage.

Mortgage Payments

I had not expected this to be much of a factor. I had thought that it would represent the situation which many provinces have been trying to avoid namely the question of who bought what; but it appears that this might represent a comfort zone in the sense that the exact contributions can be identified. It is suggested that this will continue, for some time, to be an important factor in the preservation and maintenance of property, perhaps more than it ought.

Mortgage Payments

- A.72 Wiebe v. Wiebe (1980) 16
R.F.L. (2d) 286 (Ont.
Co. Ct.) Husband's mortgage payments a
factor in unequal division.
- N.7 Beck v. Beck, (1982) 28
R.F.L. (2d) 190 (B.C
S.C.) Wife living in house, husband
making mortgage payments --
house to be sold and the
proceeds to be split 40
percent to husband and 60
percent to wife.
- N.19 Joecks v. Joecks, (1982)
30 R.F.L. (2d) 269 (B.C.
S.C.) Wife made all mortgage
payments during three year
separation and did
renovations. Wife became
independent and only ten
percent share given to
husband.
- N.85 Middleton v. Middleton,
(1980) 15 R.F.L. (20) 174
(B.C. S.C.) Wife made lion's share of
mortgage payments, husband
compensated for his by small
share.
- Q.22 Strain v. Strain, 26
A.C.W.S. (2d) 242 (B.C.
S.C. 1984) Wife made most of payments on
house.
- Q.61 Butler v. Butler, 21
A.C.W.S. (2d) 409 (B.C.
S.C. 1983) Wife paid mortgage, taxes and
repairs after separation --
entitled to two-thirds of the
equity.
- Q.71 Barker v. Barker, 15
A.C..W.S. (2d) 232 (1982) Wife responsible for acquisi-
tion, preservation and main-
tenance of home.
- R.3 Goetjen v. Goetjen,
(1981) 23 R.F.L. (2d) 57
(B.C. Q.B.) Husband remained in home and
made all payments -- 55-45
split in favour of husband.

Length of Marriage

Clearly the length of the marriage reflects the time within which parties may be presumed to have contributed to the marital assets. The longer the period of marriage the stronger the presumption and the more likely that assets will have been brought into the regime. However, given the number of cases in which a short marriage was cited as a reason for unequal division, one might wonder whether or not there is a qualifying point which must be reached before the presumption of equal sharing really takes effect. Must the marriage last long enough for the party to be said to have earned her contribution; or, is the use of the length of the marriage merely a reflection of the court's view that the net of matrimonial assets has been cast too broadly, and a short marriage should not result in a windfall to one of the spouses. Perhaps it might be argued that the parties arranged their affairs contemplating a longer marriage and since their expectations have been defeated the division of property should reflect that. It appears clear, though, that in marriages up to five years it is quite likely that there will be an unequal distribution either in favour of the prior possessor of assets or in favour of the wage earner.

Length of Marriage

- A.56 Woodbyrne v. Woodbyrne, (1980) 16 R.F.L. (2d) 180 (Ont. H.C.J.) Short-term marriage -- house paid for by husband.
- A.65 Hartling v. Hartling and Leenders (Ont. H.C.J. 1979) Two year marriage, assets already owned by husband.
- C.19 Biggar and Biggar, 11 A.C.W.S. (2d) 91 (N.B. Q.B. 1981) Pre-owned home, marriage of short duration.
- C.24 Reeve and Barisheff, 25 A.C.W.S. (2d) 385 (Ont. H.C. 1984) Short marriage, husband's funds used for home.
- C.104 Hunt v. Hunt 7 A.C.W.S. (2d) 323 (B.C. S.C. 1981) Three year marriage, unequal division of pre-owned assets.
- F.2 Bedgood v. Bedgood, (1982) 26 R.F.L. (2d) 256 (N.S. S.C.) Thirty-six year marriage. Wife's loss of opportunity to share especially pension plan rewarded by unequal division.
- F.16 McLeod v. McLeod, (1983) 54 N.S.R. (2d) 338 (S.C.) One year marriage, husband left and gave no support, home of parents conveyed in joint tenancy -- ordered reconveyed to wife alone.
- F.19 Levy v. Levy Estate, (1981) 50 N.S.R. (2d) 15 (S.C.) Short marriage, all assets pre-owned by husband -- estate gave support to wife and that was enough.
- L.2 MacAllister v. MacAllister, 54 N.B.R. (2d) 211 (C.A.) Second marriage for both parties, short term -- unequal division of husband's pre-owned home.
- N.6 Carruthers v. Carruthers, 35 R.F.L. (2d) 248 (B.C. S.C. 1983) Thirteen year marriage, but cohabitated for only 5 1/2 years of that time.
- N.8 McIntosh v. McIntosh, (B.C. C.A. 1982) Short marriage but five year cohabitation prior, contributions during that time considered.

Length of Marriage

- N.9 Chau v. Tsang, (1982) 27 R..F.L. (2d) 187 (B.C. C.A.) Ten month marriage, no contribution by wife to assets -- therefore unequal share awarded.
- N.22 Beynon v. Beynon, (1982) 135 D.L.R. (3d) 116 (B.C. C.A.) Fifteen month marriage, pre-owned assets by husband, no contribution by wife.
- N.35 Dresen v. Dresen, (1979) 13 R.F.L. (2d) 97 (B.C. S.C.) Length not a factor in B.C. but check the contributions of each party.
- Q.5 Nicolette v. Nicolette, 29 A.C.W.S. (2d) 443 (B.C. S.C. 1984) Short marriage and pre-owned assets.
- Q.53 Gautier v. Gautier, 27 A.C.W.S. (2d) 315 (B.C. S.C. 1984) Sixteen month marriage, husband had made greater contribution.
- Q.79 Hunt v. Hunt, 7 A.C.W.S. (2d) 323 (B.C. S.C. 1981) Pre-owned home, wife contributed to improvement, short three year marriage but complicated formula to reflect this.
- R.16 Ahlgrim v. Ahlgrim, 45 A.R.9 (Alta. Q.B. 1983) Seven year marriage including some separation -- husband given lion's share of farm and machinery.
- S.5 Van Meter Estate v. Van Meter, 25 Sask. R. 109 (Sask. Q.B. 1983) Short marriage, death of wife and no contribution by her.
- S.10 Robinson v. Robinson, (Sask. Q.B. 1982) Seven month marriage, no contribution by wife, assets pre-owned by husband.
- S.30 Schwark v. Schwark, (1981) 12 Sask. R. 298 (Q.B.) Two year marriage, husband's pre-owned home, wife little contribution and given only one-third share of home.
- S.31 Brahmbhatt v. Brahmbhatt, (1981) 11 Sask. R. 398 (Q.B.) Six months cohabitation, half of home and 15 percent of balance to wife.

Length of Marriage

- S.46 St. Jacques v. St. Jacques, (1982) 29 R.F.L. (2d) 195 (Sask. Q.B.) Two year marriage, husband's pre-owned assets.
- S.87 Salter v. Salter, (1982) 32 R.F.L. (2d) 445 (Sask. Q.B.) Wife's inheritance put in joint names, short marriage -- husband given only 20 percent of increase in value.

Needs of Children

In all of the following cases, it was the husband's share which was reduced or which was placed in trust for the children. In two of the cases it might be argued that this is attributable to the husband's misconduct or the likelihood of his squandering the assets and the assets not being available for support of the children. One wonders, however, whether the question of support payments should be used as a factor in the distribution of marital property between the spouses, unless this is taken into account in the relative earning capacity of the parties.

Needs of Children

- A.5 C. v. C., (1979) 11
R.F.L. (2d) 356 (Ont.
Co.Ct.) Property placed in trust for
children, husband given no
share.
- A.49 Ricciuto v. Ricciuto,
(Ont. S.C. 1981) Husband's share placed in
trust for children (see this
case under Conduct).
- C.96 LeBlanc v. LeBlanc, 9
A.C.W.S. (2d) 516 (N.S.
C.A. 1981) Parent's needs reflected in
unequal division.
- S.7 Bernat v. Bernat, 26
Sask. R. 276 (1983) Wife would have sole care and
responsibility for children,
wife given home, rest divided
roughly equally (note incest
by husband).
- S.8 M.E.B. v. L.E.A.B.,
(1983) 35 R.F.L. (2d) 97
(Sask. Q.B.) Wife had sole care of home and
children and was given the
home.

Outside Assistance

In all of the following cases, the existence of outside assistance to one party by way of gift or inheritance was considered as possibly justifying an unequal division. The question is: Is the assistance or benefit given to the marriage or to one of the parties in the marriage, or should it be retained by that party alone? It seems clear that the presumption of equal sharing applies to assets which the parties have acquired and built up as a result of their joint efforts but does not apply so strongly where those assets are a result of assistance from outside parties. Presumably, this must be based on the fact that there is no contribution by one of the parties therefore no right to share. But then one might ask whether the party who is "well connected" has made any contribution either. Once again, it is clear that assets received from third parties will either be excluded by definition or partially by discretion.

Outside Assistance

- A.2 Wilbur v. Wilbur, (Ont. C.A. 1983) Gift from parents.
- A.3 Nielsen v. Nielsen, (1982) 30 R.F.L. (2d) 401 (Ont. Q.B.) Assets received by inheritance.
- A.39 Prytula v. Prytula and Schlomiuk, (Ont. H.C.J. 1980) Gift to husband by in-laws.
- C.18 Lorette v. Lorette, 15 A.C.W.S. (2d) 84 (N.B. Q.B. 1982) Second marriage, assets owned by husband and by efforts of first wife -- unequal division in respect of second wife.
- C.45 Douglas v. Douglas, 28 A.C.W.S. (2d) 128 (B.C. S.C. 1984) Assets purchased with proceeds of husband's accident settlement.
- C.63 Connor v. Connor, 14 A.C..W.S. (2d) 361 (Ont. C.A. 1982) Chattels purchased with proceeds of Fatal Accidents Claim from first husband's death.
- C.84 Carson v. Carson, 26 A.C...W.S. (2d) 116 (B.C. S.C. 1984) Wife's inheritance used to boost matrimonial estate.
- C.86 Coons v. Coons et al, 20 A.C.W.S. (2d) 401 (Ont. H.C. 1982) Loan from wife's mother to improve property to be repaid from proceeds -- reflected in unequal division.
- E.1 Gillis v. Gillis, (1980) 14 R.F.L. (2d) 147 (P.E.I. S.C.) Gift from mother and help from friends not made in circumstances that it could be implied to be to the husband alone, therefore no unequal sharing.
- I.3 Wade v. Wade, 36 R.F.L. (2d) 165 (Nfld. C.A. 1983) Husband inherited family home and made improvements -- wife entitled to a less than equal share.
- Q.6 Legebokoff v. Legebokoff, 22 A.C.W.S. (2d) 443 (B.C. C.A. 1983) Assets given to wife by father and wife built them up.

Outside Assistance

- Q.20 Duncan v. Duncan, 27 A.C.W.S. (2d) 471 (B.C. C.A. 1984) Short marriage and assets purchased from inheritance by husband.
- Q.56 Carson v. Carson, 26 A.C.W.S. (2d) 116 (B.C. S.C. 1984) Wife brought in inheritance which formed basis for growth of matrimonial estate.
- R.10 Millhaem v. Millhaem, (1981) 16 Alta. L.R. (2d) 355 (Alta. Q.B.) Husband's father assisted, husband's contribution substantially greater than wife's.
- R.11 Baker v. Baker, (1981) 32 A.R. 42 (Alta. Q.B.) Lands inherited and then mortgaged. Not a disposition but unequal share justified.
- R.12 Mazurenko v. Mazurenko, (1981) 30 A.R. 34 (Alta. C.A.) Husband's parents gave land used in marriage -- increase in value divided equally.
- S.9 Pepper v. Pepper, (1982) 18 Sask. R. 144 (Sask. Q.B.) Husband acquired business from father but build up over years and used for family -- equal distribution.
- S.27 Libke v. Libke, (1981) 15 Sask. R. 298 (Sask. U.F.C.) Wife driven out of home, father purchased house for wife -- husband not entitled to share.
- S.49 Schaufert v. Schaufert, (1981) 14 Sask. R. 310 (Q.B.) Husband acquired farm lands by gift -- wife's share reduced to 25 percent. This also considered the possibility of capital gains tax and the ability to maintain the farm as a viable entity.
- S.83 Wornath v. Wornath, (1980) 3 Sask. R. 266 (Sask. Q.B.) Pre-owned assets inheritance and third parties help, wife had no assets at all.

Individual Needs

The following cases seem to go right across the board and it is hard to define any common denominator among them. In some cases, the individual needs were catered to, while in others no special account was taken. It seems that in the cases where unequal division was ordered the party with special needs either suffered because of the misconduct of the other party or is capable of rehabilitating himself or herself and is therefore more likely to get special treatment.

Individual Needs

- A.16 Duncan v. Duncan, (1979) 26 O.R. (2d) 681 (Ont. Fam.Ct.)
Wife disabled and unable to work.
- A.47 Payne v. Payne, (1982) 31 R.F.L. (2d) 211 (Ont. U.F.C.)
Husband borrowing for own needs -- unequal division ordered.
- C.109 Kostuik and Kostuik, 6 A.C.W.S. (2d) 165 (Ont. D..C. 1980)
Wife's poor health and poor employment prospects.
- C.110 Irvine v. Irvine, 5 A.C.W.S. (2d) 230 (Ont. S.C. 1980)
Mentally incompetent wife, hospitalization for about one year -- not grounds for unequal division.
- G.3 MacGregor v. MacGregor, (65 N.S.R. (2d) 1113) (S.C. 1984)
Wife's poor skills and job prospects alone did not warrant unequal division in her favour.
- L.8 MacLeod v. MacLeod, (1982) 38 N.B.R. (2d) 63 (N.B.Q.)
Most of marital debts incurred to pursue husband's interests -- unequal division.
- M.9 Cormier v. Cormier, 17 (b) A.C.W.S. (2d) 344 (N.B. Q.B. 1982)
Husband having children living in house on land given to him, wife living with parents - lion's share given to husband.
- N.16 Peacock v. Peacock, (1983) 35 R.F.L. (2d) 218 (B.C. S.C.)
Wife depressed and unable to work, husband had substantial assets -- slightly greater share for wife.
- N.54 Krug v. Krug, (1982) 30 R.F.L. (2d) 176 (B.C. S.C. 1982)
Wife with little skills, husband paid nothing for home after separation, husband had substantial income -- home given solely to wife.
- Q.3 Peters v. Peters, 10 A.C.W.S. (2d) 428 (B.C. S.C. 1981)
Wife self supporting, paraplegic husband.

Individual Needs

- Q.7 Fong v. Fong, (20
A.C.W.S. (2d) 443 (B.C.
C.A. 1983) How do you compare the needs
of a dead spouse versus an
independently wealthy spouse.
- Q.60 Connolly v. Connolly, 22
A.C..W.S. (2d) 311 (B.C.
C.A. 1983) Wife had custody of children,
medical problems and was tak-
ing training courses.
- S.18 Morrison v. Morrison, 29
Sask. R. 102 (Q.B. 1983) Wife paid expenses, now had a
child going to university,
husband an alcoholic and
unemployable -- home given to
wife.
- S.25 McInnes v. McInnes,
(1982) 19 Sask. R. 171
(Q.B.) Wife had multiple sclerosis,
was hospitalized and all
expenses borne by social
services -- home given to
husband.
- S.76 Langford v. Langford,
(1981) 23 R.F.L. (2d) 423
(Sask. Q.B.) Husband left with co-respond-
ent, wife had no skills and
three children -- exclusive
possession and the lump sum
ordered in wife's favour.

Agreement Between the Parties

The spouses are free to choose their own division of labour and consequent division of the spoils. Provided that such an agreement is not entered into by duress or essential error then a court will enforce it, but woe betide the spouse who defaults on such an agreement. Normally an unequal division will reflect the fact that an agreement has not been carried through.

Agreement Between the Parties

- | | |
|--|--|
| A.13 <u>Burton v. Burton</u> , (Ont. C.A. 1981) | Second marriage, an agreement to keep property separate. |
| A.45 <u>Sudnicka v. Studnicka</u> , 36 R.F.L. (2d) 299 (Ont. Co. Ct. 1983) | Informal agreement accepted by the Court -- unequal division awarded. |
| A.52 <u>Kozel v. Kozel</u> , (1980) 21 R.F.L. (2d) 65 (Ont. U.F.C.) | Financing agreement not carried through -- unequal division to reflect that. |
| A.54 <u>Cushman v. Cushman</u> , (1979) 10 R.F.L. (2d) 305 (Ont. H.C.J.) | Husband transferring joint interest to wife as a show of good faith due to his bad conduct -- court enforced the agreement. |
| L.11 <u>Cochrane v. Cochrane</u> , (1981) 35 N.B.R. (2d) 477 (Q.B.) | Note left by wife on leaving not in accordance with the Act. |
| R.23 <u>Quinn v. Quinn</u> , (1981) 22 R.F.L. (2d) 304 (Alta. Q.B.) | Husband and wife agreeing to bear certain expenses such as downpayment, mortgage and household. Husband's default on the agreement and wife given greater share of the home. |
| S.32 <u>Guran v. Guran</u> , (1981) 10 Sask. R. 420 (Sask. Q.B.) | Husband repudiated separation agreement, not allowed to rely on it. Lengthy separation meant equal sharing inequitable. |

Non-Family Assets

If non-family assets are not available for distribution, it would be folly to ignore their effect. However, the question is just how substantial does the disparity have to be for an unequal division of family assets to be ordered. Clearly, assets which are outside the scope of the Act or outside the jurisdiction should properly be taken into account in determining whether an unequal division of the available assets should be made.

Non-Family Assets

- F.3 Archibald v. Archibald, (1981) 48 N.S.R. (2d) 361 (S.C.) Husband's extensive non-family assets justified unequal division.
- L.16 Fraser v. Fraser, (1982) 30 R.F.L. (2d) 382 (N.B. Q.B.) Equal division would have been 31,000 to 266,000 in favour of husband. Husband's non-marital assets considered.
- L.20 Kelsey v. Kelsey, (1982) 43 N.B.R. (2d) 90 (Q.B.) Fishing boat used only occasionally by wife for recreation not a family asset.
- N.1 Lind v. Lind, 1981) 26 B.C.L.R. 329 (S.C.) Fishing boat maintained for eight years after separation by husband -- only 25 percent share given to wife.
- S.21 Haughn v. Haughn, (1983) 25 Sask. R. 33 (C.A.) Wife's assets outside Saskatchewan substantial. Militated against equal distribution of Saskatchewan assets.

Contribution to Non-Family Assets

It would appear that non-family assets are not available for distribution unless it can be shown that there was a substantial contribution by both parties to the build up of these assets. Even where there has been a direct or indirect contribution, the share given to such party is likely to be less than equal. The philosophy appears to be that marriage alone does not justify a share in the assets built up by the personal business acumen of one of the spouses. But how substantial does the contribution have to be. Must the spouse do more than the average farm wife or supplement family needs in order to allow one party to pursue business interests.

Contribution to
Non-Family Assets

- A.42 Weir v. Weir, (1978) 6 R.F.L. (2d) 189 (Ont. H.C.J.) Sole possession of matrimonial home in lieu of other non-family assets.
- B.5 Young and Young, 32 O.R. (2d) 19 (Ont. C. A. (1981)) Equal contribution to management of apartment building which was a non-family asset.
- F.12 Hatfield v. Hatfield, 39 R.F.L. (2d) 331 (N.S. C.A. 1984) Husband's indebtedness at marriage cleared by wife and business built up.
- L.17 Williams v. Williams, (1982) 27 R.F.L. (2d) 444 (N.B.Q.B.) Wife's contribution to farm and carpentry business -- the family assets were not sufficient.
- N.2 Margolese v. Margolese, [1980] 2 W.W.R. 773 (B.C. S.C.) Wife's work in business in all capacities led to equal sharing of all assets.
- N.13 Vance v. Vance, [1981] 6 W.W.R. 431 (B.C. S.C.) Wife assumed home duties and actually encouraged business -- equal share awarded.
- N.31 Jackh v. Jackh, [1981] 1 W.W.R. 481 (B.C. S.C.) Husband's medical practice a family asset -- wife given a reasonable share. She had contributed but the share should not unduly burden the husband.
- N.39 Robertshaw v. Robertshaw, (B.C. S.C. 1979) Husband's medical practice was a family asset but wife given the lesser share.
- N.43 Treacher v. Treacher, (B.C. S.C. 1979) The wife had helped with the business not to a large extent over a long period of time -- given a comparatively small share.
- R.1 Stewart v. Stewart, (1982) 37 A.R. 57 (Alta. C.A.) Husband responsible for 50 percent increase in the business' net worth after separation.

Contribution to
Non-Family Assets

- R.8 Gabriel v. Gabriel,
(1982) 30 R.F.L. (2d) 150
(Alta. Q.B.)
Wife's minimal contribution to business justified a 75/25 split in favour of the husband.
- S.50 Glushyk v. Glushyk,
(1981) 12 Sask. R. 406
(Q.B.)
Long separation, no contribution by the applicant, assets other than the home divided unequally.
- U.7 Thibedeau v. Thibedeau,
(1982) 16 Man. R. (2d)
104 (Q.B.)
Husband's business activity and the wife's home care offset. Not clearly inequitable according to the Manitoba Act.
- U.11 Marks v. Marks, (1982) 17
Man. R. (2d) 209 (Q.B.)
An eight year marriage, wife did only housework -- family assets divided equally, non-family 75/25 to husband.

Domestic Duties

In all of the following cases where there was an unequal division in favour of the party assuming the domestic duties, it is clear that the party had gone beyond the call of duty. It seems that the cases reflect almost sole responsibility of one party for running of the household and meeting its expenses and that "sacrifice" was rewarded by a more unequal division.

Domestic Duties

- A.22 Haines v. Haines, 36 R.F.L. (2d) 252 (Ont. H.C.J. 1983) Wife quit work on marriage to manage household.
- A.42 Weir v. Weir, (1978) 6 R.F.L. (2d) 189 (Ont. H.C.J.) Wife having responsibility for household and not allowed to work. Viewed as greater contribution to non-family assets.
- F.21 Preston v. Preston, (1981) 45 N.S.R. (2d) 496 (S.C.) Wife solely responsible for home, no help from drinking husband and she built up assets.
- L.3 Fraser v. Fraser, (1983) 47 N.B.R. (2d) 364 (C.A.) Wife assumed all child and household responsibility therefore unequal division of marital assets in her favour.
- N.15 Butler v. Butler, 36 R.F.L. (2d) 84 (B.C. S.C. 1983) Wife steadily employed and met all household expenses -- unequal division in her favour.
- Q.40 Desbiens v. Desbiens, 10 A.C.W.S. (2d) 37 (B.C. S.C. 1981) Wife gave up career to have children and look after their special needs.
- Q.66 McCuaig v. McCuaig, 20 A.C.W.S. (2d) 20 (B.C. S.C. 1983) Husband having children and all household expenses since separation.

Extra Effort

As in the sacrificial assumption of domestic duties it appears that significant extra effort may well be rewarded. In all the following cases the responsibilities of work and household expenses fall almost exclusively on one party who met that burden by significant extra effort. There appears to be no evidence of an agreed upon division of labour by the parties and these cases were viewed by the courts as being departures from the norm.

Extra Effort

- I.5 Fahey v. Fahey, (1980) 40
Nfld. & P.E.I.R. 287
(U.F.C.)
Wife worked and had two part
time jobs, husband unemployed,
home on crown land -- 80
percent awarded to wife.
- M.23 McClure v. McClure,
(1983) 42 N.B.R. (2d)
397; 110 A.P.R. 397
(Q.B.)
Wife worked after separation
and covered all household
expenses -- 65/35 split in her
favour.
- S.11 Slonski v. Slonski,
(1981) 15 Sask. R. 186
(Q.B.)
Wife raised family and looked
after sick husband, managed a
business and was entitled to a
greater share.
- S.43 Braithwaite v.
Braithwaite, 35 R.F.L.
(2d) 376 (Sask. Q.B.
1983)
Wife's diligence allowed her
to preserve assets -- all
assets awarded to wife.

Second Time Around

- M.5 MacAllister v.
MacAllister, 54 N.B.R.
(2d) - 54 R.N.-B. and 140
A.P.R. 211 (N.B. C.A.
1984)
Second marriage -- assets
divided after first marriage
not brought into pool.

COMMENTS AND OBSERVATIONS

It is a clear that the onus of proof is on the party attempting to obtain an unequal division and that that party should show some compelling reasons to depart from the presumption of equal sharing. It also appears that the onus is greater where the parties have entered into some kind of agreement or some such agreement as reflected by joint tenancy.

If, however, that onus of proof is not sufficiently high or the presumption of equal sharing is not sufficiently strong then the prospect of exercise of discretion can only encourage a great deal of litigation. At that point, one must question whether or not increased litigation is beneficial when in the vast majority of cases there is not a great pool of assets. The parties are in fact using the existing pool of assets to finance the litigation and that seems counter productive. If the cases of unequal sharing are reviewed it would be seen that most often the asset which is divided unequally is a matrimonial home and it could be argued that the basis for that unequal sharing is an attempt to keep as large a part of the family together as possible in one place and not really a question of individual contributions to the acquisition of or maintenance of the home at all.

After several years of operations of the Acts, it is still difficult to discern any significant meaning from the term direct or indirect contributions. For instance, some cases have keyed on the actual contribution made by a spouse to the

business, such as working in a business, or investment, while others have keyed on the assumption of duties by one spouse which allowed the other to pursue business interests without restriction. In the latter, it is submitted, that the important factor is not the contribution by way of non-interference but the fact that the parties viewed the business activities as an integral part of their marriage relationship and division of labour. So it could be argued that it is rather false to categorize, as an indirect contribution to the business, activities which are essentially removed from the business.

This raises the question of whether or not an asset should be viewed as being brought into the pool of family assets. This question may arise by reference to categories of property or by the imposition of a user test by certain statutes. In those cases there is still considerable question as to whether ordinary use is demanded or whether occasional use for family purposes would be sufficient. Perhaps this is related to a further question of whether or not the Court can look to non-marital assets to decide whether the equal distribution of family assets is fair. In other words, it would appear that in appropriate cases one party may be denied a share in the marital assets if he or she is sufficiently well endowed with other assets. The question is: What are the appropriate cases?

There will be continuing debate over the question of the relevance to be attached to the conduct of the parties. Clearly conduct will be considered where it is intentional, and

has a deleterious effect on family property. This will especially be so if property is put at risk by the unilateral action of one party. However it is also clear that the conduct which affects the quality of family life will have an indirect effect on property. The fear must be that the court could be drawn into a review of the marital history in order to assess the effects of such conduct.

Most statutes prescribe as a factor to be considered the length of marriage. Some go further and are more specific by specifying the time of cohabitation and differentiating that from property acquired after separation. The authorities leave the lingering question of whether length of marriage is important because a party must earn his or her share in the matrimonial property. Thus, where property is widely defined, length of marriage and cohabitation may be used as a controlling factor on what otherwise might be viewed as a windfall profit.

It is also clear that we have not forgotten the trust rules and there is still some comfort in talking about factors such as contribution to purchase price, to expenses of maintenance or by way of an agreed upon division of labour.

The use of family assets to support business activities is also a problematic area. Securities placed against family assets, or spousal guarantees may well be required by lending institutions and it may be difficult to unravel these arrangements in the event of marriage breakdown. Most statutes give the Court the power to deal with such securities although at

the present time there seems to be some reluctance to use this power too widely.

Earning capacity seems to be a rather significant factor. Perhaps it is because it is used to achieve the kind of purpose which is set out in the British Columbia statute namely, taking steps to allow one party to achieve financial independence. The greater earning capacity of one party may be traded off against the provision of assets to the other provided that that party is willing to use the assets in order to achieve independence and is not likely to squander them. This problem also arises where the pool of assets is dominated by one asset such as the family farm or business. The courts are clearly torn between applying the presumption of equal sharing and forcing the asset to be sold or maintaining the asset as a viable unit and mortgaging its future earnings to compensate the other party. In many cases this situation has been alleviated by a finding which states that one party has made a lesser contribution to that asset and therefore is not entitled to an equal share and that the lesser can be met by way of a mortgage on the future activities and earnings of the business. In those cases an unequal division in fact assists in maintaining the viability of that asset, as well, perhaps, of avoiding any tax consequences of a disposition.

It is suggested that the division into family and non-family assets is intended to reflect the contributions of the parties. There is a presumed contribution to family assets

whereas there must be a demonstrated contribution to non-family assets. One might question, even after a short number of years of operation of the Acts, whether that division really does represent the contributions of the parties.

The capital base theory was clearly rejected by the Supreme Court of Canada in Farr and Farr. However, it appears, that there was some considerable sympathy for a party making that argument. Perhaps the theory might have been carried a little too far and might be espoused by a consideration of other factors. There is clearly a financial momentum created by pre-owned assets and also some reluctance to see the determination of that momentum immediately upon marriage. Perhaps the only room for the capital base theory is by way of a negative finding that states that one party has not contributed significantly to the pool of assets. And one wonders if such findings might take the place of the capital base arguments.

These comments have concentrated almost entirely on the question of unequal division. It would be unfortunate if the comments were not put properly in the context of the large number of cases in which the parties voluntarily accepted equal sharing and enter into Minutes of Settlement or agreements which more or less work that out. It is not my suggestion that unequal division is the norm.

APPENDIX I

	Assump- tion of Equal Sharing: Section Number	DEFINITION OF FAMILY OR MATRIMONIAL ASSETS		FAMILY ASSETS: ... are shared equally, unless:	NON-FAMILY ASSETS	BUSINESS
		"Use" test?	OTHER			
ALTA			NO: Matrimonial property is s.7(1) all property owned by either, or both, spouses. A list of exemptions follows. Market value at time of marriage of prior owned property is specifically exempted.	Pursuant to s.7, and in view of the factors in s.8, it would be UNJUST AND INEQUITABLE	Pursuant to s.7(3) ... court shall distribute justly and equitably.	All property is dis- tributed under s.7, subject to the exemp- tions and equitable considerations found therein.
BC	43(2)	YES: s.45 (1)		Pursuant to s.51 s.51 factors ... UNFAIR	Pursuant to s.51 ... UNFAIR	s.46(1) - If a spouse has made ... "direct or indirect contribu- tions" ... then business assets are included in the family assets, and can be divided unequally if it would be unfair not to.
MAN	12	YES: s.1(d)		Pursuant to s.13(1) ... any extraordinary cir- cumstances ... GROSSLY UNFAIR or UNCONSCIONABLE	Pursuant to s.13(2) ... anything relevant and s.13(2) factors ... CLEARLY INEQUITABLE	s.1(b), 1(d) - Assets are either "family" or "commercial" assets. Commercial assets include non-family and business assets, and are dealt with under s.13(2). There is no "direct or indirect contribution" clause.

APPENDIX I
Page 2

Assump- tion of Equal Sharing: Section Number	DEFINITION OF FAMILY OR MATRIMONIAL ASSETS		FAMILY ASSETS: ... are shared equally, unless:	NON-FAMILY ASSETS	BUSINESS
	"Use" test?	OTHER			
NB 3(1)	YES: s.1		Pursuant to s.7 ... s.7 factors... INEQUITABLE	Pursuant to s.8 ... s.7 factors ... INEQUITABLE	s.8 - Assets are either matrimonial or they are non-matrimonial. Business assets may be classified as non- matrimonial and divid- ed unequally if it would be inequitable not to. "Direct or indirect contribution" is a s.8 factor to be considered. Prior owned property can also be exempt s.6(a).
NFLD 19(1)	NO: "Matrimonial Assets" = s.16 ... all real and personal property acquired by either or both spouses during the marriage, with the exception of: (list of exemptions). "Business assets" are specifically excluded.		Pursuant to s.20 ... s.20 factors ... GROSSLY UNJUST or UNCONSCIONABLE	Pursuant to s.20 ... s.20 factors ... GROSSLY UNJUST or UNCONSCIONABLE	s.27 - "Direct or indirect contribution" test applies to business assets.

Assump- tion of Equal Sharing: Section Number	DEFINITION OF FAMILY OR MATRIMONIAL ASSETS		FAMILY ASSETS: ... are shared equally, unless:	NON-FAMILY ASSETS	BUSINESS
	"Use" test?	OTHER			
NS 12	NO: "Matrimonial assets" = s.4(1) ... the matri- monial home or homes all other real and personal property acquired by either or both spouses before or during their marriage with the except- ion of [list all except- ions]. specifically excluded are business assets.	Pursuant to s.13 ... s.13 factors ... UNFAIR or UNCONSCIONABLE	Pursuant to s.13 ... s.13 factors ... INEQUITABLE	s.18 - "Direct or indirect control" test applies to business assets.	
ONT 4(1)	YES: 3(b)	Pursuant to s.4(4)4(4) factors ... INEQUITABLE	Pursuant to s.4(6) ... s.4(4) factors ... INEQUITABLE	Assets are either family or non-family assets, ie. there is no separate "business assets" classification. Non-family assets can be split unequally if it would be inequitable (s.4(6)) or (and this would seem to be specifically aimed at business assets) by s.8 "direct or indirect contribution" test.	

Assump- tion of Equal Sharing: Section Number	DEFINITION OF FAMILY OR MATRIMONIAL ASSETS		FAMILY ASSETS: ... are shared equally, unless:	NON-FAMILY ASSETS	BUSINESS
	"Use" test?	OTHER			
PEI 5(1)	YES: 4(a)		Pursuant to s.5(5) ... s.5(5) factors ... INEQUITABLE	Pursuant to s.5(5) ... s.5(5) factors ... INEQUITABLE	Assets are either family or non-family assets, ie. there is no separate "business assets" classification. Non-family assets can be split unequally if it would be inequitable (s.5(6)) or (and this would seem to be specifically aimed at business assets) by s.9(1) "direct or indirect contribution" test.
SASK 21(1)					Saskatchewan is somewhat unique. All property, including business assets, is presumed to be marital property s.2(h). S.23(3) then provides, subject to the "fair and equitable" considerations of s.23(4), a number of exemptions. Marital property is then divided equally, unless it would be unfair and inequitable to do so, pursuant to s.21(2) and in view of s.23(4) in view of s.21(2) factors, and the additional factors found in s.23(5). The bottom line is that all property can be divided unequally, if it would be unfair and inequitable not to. S.23(5)(c) would appear to be directed at business property, and contains the "direct or indirect contribution" test.

ALTA	BC	MAN	NB	NFLD	NS	ONT	PEI	SASK
s.8	s.51	s.13 (2)	s.7	s.20	s.13	s.4 (4)	s.5 (5)	s.21 (2)

10. The contribution made directly or indirectly by one spouse to the career or career potential of the other.
11. The nature of the assets.
12. The date when the property was acquired.
13. Whether the value of the assets substantially appreciated during the marriage.
14. The value of the matrimonial property situated outside of the province.
15. The extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the marriage.
16. Any debts or liabilities of a spouse, including debts paid during the course of the marriage.
17. The needs of each spouse to become or remain economically self sufficient.
18. The income, earning capacity, property and other financial resources that each of the spouses has or is likely to have in the foreseeable future.
19. The fact that a spouse has dissipated matrimonial property. (ie. unreasonable impoverishment)

*	*	*	*	*	g	*		* f
---	---	---	---	---	---	---	--	-----

		g						
f	c		d	k	e	d	d	d
					j			
								p

d		h						g
---	--	---	--	--	--	--	--	---

d		b		b	b			o
---	--	---	--	---	---	--	--	---

	e		b					
--	---	--	---	--	--	--	--	--

			a					
--	--	--	---	--	--	--	--	--

l		a		i	a			k
---	--	---	--	---	---	--	--	---

* See footnotes.

ALTA	BC	MAN	NB	NFLD	NS	ONT	PEI	SASK
s.8	s.51	s.13 (2)	s.7	s.20	s.13	s.4 (4)	s.5 (5)	s.21 (2)

20. The fact that a spouse has made a substantial gift of property to a third party, or has transferred property to a third party other than a BFP for value.

21. The conduct of a spouse cannot be regarded unless it amounts to dissipation.

22. The maintenance payments payable for the support of a child.

23. The needs of a child who has not attained the age of majority.

24. Interests of third parties in the matrimonial property.

25. The proceeds of an insurance policy, or an award for damages.

26. The value to either spouse of any pension or other benefit which, by reason of termination of the marriage relationship, that party will lose the chance of acquiring.

27. The standard of living enjoyed by the spouses before the breakdown of the marriage.

28. A tax liability that may be incurred by a spouse as a result of the transfer or sale of matrimonial property or other order of a court.

29. The age of each party.

h								h
---	--	--	--	--	--	--	--	---

*	* SS (3)	*	*	* s21		*		*
---	-------------	---	---	-------	--	---	--	---

								m
					h			

								n
					k			

				h	l			
--	--	--	--	---	---	--	--	--

				c				
--	--	--	--	---	--	--	--	--

k					m			j
---	--	--	--	--	---	--	--	---

				d				
--	--	--	--	---	--	--	--	--

* See footnotes.

ALTA	BC	MAN	NB	NFLD	NS	ONT	PEI	SASK
s.8	s.51	s.13 (2)	s.7	s.20	s.13	s.4 (4)	s.5 (5)	s.21 (2)

30. Any physical or mental disability of either of the spouses.

31. Any benefit received or receivable by the surviving spouse as a result of the death of the other spouse.

32. The effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset.

33. Any other relevant fact or circumstance.

				f				
								1
			*		f	*		
m	*	*SS f (2)	*	*		*	f	*
	f		f			f	f	q

* Applies for division of non-family assets only.

* See footnotes.

Unless otherwise noted, the factors listed in the chart apply to the unequal division of matrimonial and non-matrimonial property.

*BC - These factors apply to the division of family assets, but in view of the statutory construction of s.51, there may be no requirement for the Court to consider these factors when dividing non-family assets.

*MAN - These factors only apply to the division of commercial assets. For a division of matrimonial assets, the Court can view any "... extraordinary financial or other circumstances that it deems relevant".

*NB has rather unique provisions. The charted factors are to be considered if making an unequal division of marital property generally. But, if the property is marital property that was acquired:

(a) before the spouses were married;

or

(b) by one spouse as a gift from the other spouse or as a gift, bequest or devise from some other person, then the Court is to look at any relevant factor;

and specifically:

(c) the contributions of the spouses to the asset;

(d) the length of the cohabitation period

(e) any agreement or understanding between the spouses.

If dividing non-family assets, the Court is directed to view all of the s.7 charted factors, plus:

(a) the unreasonable impoverishment of the property;

(b) the effect of the assumption by one spouse of any of the responsibilities of child care, household management, etc., on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not marital property.

*ONT - These factors apply to the division of marital and non-marital property. In addition, if dividing non-marital property the Court is to consider:
the effect of the assumption by one spouse of any of the responsibilities of child care, household management, etc., on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not family property.

*SASK - These factors apply to the division of family and non-family assets. In addition, if dividing non-family assets, the Court is to consider:
(a) contributions of any kind by the spouses to their relationship, children or property prior to their marriage;
(b) a contribution, whether financial or in any other form, made by a spouse directly or indirectly to the acquisition, disposition, preservation, maintenance, improvement, operation, management or use of property... ;
(c) the amount of other property available for distribution; and
(d) any other fact or circumstance.