CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE
INSTITUT CANADIEN D'ADMINISTRATION DE LA JUSTICE

Second Judicial Conference on Family Law

August, 1985

VALUATION: METHODS, PROOF, TIMING AND DETERMINATION

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INTRODUCTION

> "Child care, household management and financial provision are joint responsabilities of spouses and are recognized to be of equal importance in assessing the contributions of the respective spouses to the acquisition, management, maintenance, operation or improvement of marital property; and subject to the equitable considerations recognized elsewhere in this Act the contribution of each spouse to the fulfillment of these responsabilities entitles each spouse to an equal share of the marital property and imposes on each spouse, in relation to the other, the burden of an equal share of the marital debts."

This wording of section 2 of the Marital Property Act of New Brunswick[1] summarizes the philosophy which underlies similar legislation across Canada. Given that the "entitlement" of a spouse, regardless of the role played during the marriage, is to an equal share of the marital property and, where equity warrants, an unequal share thereof or a share of non-marital property, the valuation of such property becomes the hard-core practical question in the whole spectrum of issues involved in the liquidation and winding-up of a marriage. It is through this process, which leads to the actual apportionment of their respective shares, that the parties see, in dollars and cents, the true economic meaning of their separation.

Most of the Canadian legislation dealing with marital property provides that contribution of a non-owning spouse is a factor to be taken into account in deciding whether such property is to be divided equally or whether that

spouse can share in non-marital property. As a result, the Courts are faced not only with valuation of assets per se, but in many instances, with the valuation of contributions. However, since contribution is a factor which is so intimately linked to the particular fact situation of each case, it is hard to extrapolate from the decisions any significant guidelines for the valuation of any particular kind of contribution. Thus, this exposé will solely address the question of valuation of assets and will be reviewing factors such as the proper date of valuation, the methods of valuation, the proof and determination of value as they relate to the different categories of assets susceptible of being acquired or used during a marriage. However, before dealing with each of these individual components, it is necessary to identify that which will be or can be the subject of valuation; thus, the need for a definition of terms.

1. DEFINITIONS

In the process of trying to determine the value of the share to which a spouse is entitled, it is essential to determine whether the thing or things which are the subject of a claim are capable of being valued, hence shared. In the

words of Clayton J. Shults, "...before entitlement to a share in a family asset or compensation for a proportionate interest in that asset can be determined, we must first determine whether an asset or a property even exists".[2]

Most provincial legislations contain a definition of property which is said to include both real and personal property or any interest therein. In the absence of such a definition, the term "assets" is defined and said to include both real and personal property. These definitions, in fact, are all encompassing in that they allow the Court to deal with anything that falls within the categories of personal or real property. But, there lies the "hic" in applications for division of marital property: the items to which an interest is claimed must fall within those classifications otherwise there is no sharing possible.

It has been suggested that in order to qualify as an asset potentially eligible for division, an item must meet these four tests:

(a) it must already exist and be capable of contributing to the future enjoyment of its owner, and that contribution must be measurable in monetary terms;

(b) the transferor must be able to transfer the asset to someone else who can assume the benefit of ownership of the item, and it is essential that the transferee receive some monetary benefit. The item cannot be valueless in the hands of the transferee;

(c) the transferee must be able, that is physically willing and legally able, to receive the property;

(d) the benefits of ownership must be capable of being enjoyed by a living transferor.[3]

By way of an example, a dental practice passes all four tests whereas the practice of an anaesthetist passes only the first three tests but may fail the fourth since it is impossible for an anaesthetist to transfer his practice to another as this is a discipline which requires hospital privileges. The case of Barley v. Barley[4] is a case on point, and so are Trift v. Trift[5] where the obtention of a medical degree was considered to be incapable of division and Girik v. Girik[6] which held that a medical degree is not tangible property capable of valuation.

2. TIMING

A survey of provincial legislations reveals that all but a few Acts are silent as to the proper time or choice of date to be used for purposes of valuating marital assets.[7]

In those jurisdictions where such statutory provisions are absent, the tendency of the Courts has been to value the spouses assets as of the date of trial. This appears to be the general rule especially insofar as family assets or marital property are concerned. This judge-made

rule has been applied by the Ontario Court of Appeal in Young v. Young[8] and in Defreitas v. Defreitas[9] and followed in many cases such as Pike v. Pike[10], Grine v. Grine[11] and Ling v. Ling[12]. The New Brunswick Court of Appeal followed the same course in Fraser v. Fraser[13] and Newfoundland with Ridler v. Ridler[14] wherein the Unified Family Court Judge stated, in addition, that the proper date should be the date of sale, when sale is ordered. The same principle has been applied by the Alberta Court of Appeal in Mazurenko v. Mazurenko[15] which was followed in Goetgen v. Goetgen[16] as well as in McArthur v. McArthur[17] and also by the Nova Scotia Court of Appeal in Mason v. Mason[18].

A corrolary to this general rule is that adjustments can then be made for improvements made after separation or for any increment, during that period, in the value of the asset which are the result of the efforts of only one of the spouses.

Cases indicate that, in general, the increase in market value of an asset not solely due to ordinary economic factors such as inflation but due to improvements or contributions of one of the spouses, will be credited to that spouse and the division will be made on the basis of the value of the asset at the time of trial. This view was expressed in Fraser v. Fraser (supra) and the principle also followed in cases such as: Ling, Defreitas, and Mazurenko (supra) as well as in Hopwood v. Hopwood[19] and in Wibe v. Wibe[20].

However, this general principle that valuationshould be made as of the date of trial is not an absolute rule. Even in those provinces where legislative provisions exist on the matter, the cases reveal that those have been the subject of some form of judicial engineering. In essence, regardless of the existence or the absence of provisions as to the date of valuation, the timing of the valuation has been used by the Courts has a tool to judicially apportion spousal shares in a way that would prevent inequitable divisions. This judge-made rule is best expressed by Stratton J.A. of the New Brunswick Court of Appeal in the Fraser case (supra, at pages 378-379) as follows:

> "It is, of course, necessary in each case to determine when to value and how to measure the spouses' interest in marital and non-marital property. In the usual or normal case, the marital property will be valued as of the date of trial and divided equally. In other cases, where an equal division of the marital property would be inequitable, it may be necessary to make an unequal division of the marital property or to divide the non-marital property, or both, having regard to the considerations set out in ss. 7 and 8 of the Act. In such cases, the value of the property, both marital and non-marital, may have increased or decreased due to one spouse alone and it will be necessary either to alter the valuation date or to adjust the division. Over all, I think it should be kept in mind that the spouses ought to receive shares commensurate with the proportion of his or her contribution of child care, household management and financial provision to the acquisition of the property as of the valuation date."

This view had also been adopted, among others, by the British Columbia Rutherford v. Rutherford.[21] and in Martelli v. Martelli[22].

Questions such as the length of the marriage, the length of the separation, the delay in bringing the application have been taken into account by the Courts in determining the applicable date of valuation. For instance, in Murray v. Murray[23], the parties had separated in 1975 after 7 years of marriage. The Court used the date of separation as the proper date of valuation because it felt that it would be unfair to effect an equal division taking into account the length of the marriage, the length of the separation, the economic independance of the parties and the wife's plan to remarry. This case followed the reasoning in Dresden v. Dresden[24]. In Groeneweg v. Groeneweg[25], the valuation was accepted as of the date of separation because the Judge was satisfied that there had been no economic co-operation since that date and that no pre-separation activities substantially affected the value subsequent to separation. Also pertinentis Christensen v. Christensen[26] where the interest of the wife was valued at the date the wife commenced living with another man because of the delay in proceeding by the wife.

Yet another factor which has been taken into account by the courts in choosing a proper valuation date is

the nature of the assets, especially where depreciable or consumable family asssets are involved. Boydell v. Boydell[27] indicates that where the asset is a depleting one, it may be that the Court may try to preserve the value as of the date of separation subject to the equities of the situation. Moricv. Moric[28] indicates that the depreciable or consumable family assets are to be valued as of the date of separation and not as of the date of trial. In Price v. Price[29] is also interesting on that point. In that instance, the learned trial judge fixed the value of the household articles (car, beds etc.) as of the time of their sale since no evidence as to their value has been presented to the Court and because he found that the Applicant had granted to the Respondent a licence to use those goods until division and that consequently both parties should share in their depreciation from the time of separation to the time of sale.

Bank accounts and pensions are items which deserve special consideration. In the case of the first, it is submitted that the rule applicable to other property with respect to post-separation contributions or increments is equally applicable to this item and that any decrease in capital must be accounted for and credited proportionally to the other spouse.

Pensions have been valued as of different times, depending mainly on the nature of the pension. Since the subject of pensions would by itself require all of the time allotted for considering the topic of valuation. This item of property is considered more fully under the heading "methods" which follows.

3. METHODS

In those instances where Provincial Acts refer to the method to be used by the Court in valuing assets, "market value" or "fair market value" are the precribed methods. In the absence of such legislative provisions, the method used is also market value with its variables such as current fair market value and fair market value. Those have been recognized by the Courts, at least in so far as real property is concerned, and value at cost or bulk value have been rejected.

According to Silverstein v. Silverstein[30], the value to be assigned to any particular asset is the "current fair market value". In Ling (supra) which followed Defrietas (supra), the Ontario Court of Appeal held that the wife's share in a jointly held farm was to be calculated on the basis of the market value of the farm, whereas in Boothe v.Boothe[31],

the Court used the "fair market value" for assigning value to shares.

The case of Vance v. Vance[32] establishes that among all the different manners of valuing assets, the fair market value concept is the most generally accepted of all valuation terms for the most purposes. In Canada, England and the United States, fair market value is the basis for taxing capital gains, determining inheritances and resolving shareholders' disputes. This case quotes with approval Lavene v. Lavene[33], an American case, which stands for the proposition that fair market value is the appropriate basis for value determination in matters of matrimonial property division. This latter case also sets out in extensive details the essential elements that should characterize a carefully prepared fair market value determination for a business[34].

At this point, the question arises as to whether there is a real difference between these different attributes of market value. The decision of the Court in Untermyer Estate v. Attorney General of British Columbia[35] indicates that the difference between mere "market value" and "fair market value" is one of degree. In the words of Mignault J.: "It may, perhaps, be open to question whether the expression 'fair' adds anything to the words 'market value' except that the market price must have some consistency and not be the

effect of transient boom or a sudden panic on the market". Looked at it from this angle, it is submitted that Courts have a duty to look beyond the mathematical findings of the appraiser concerning the value of a given assets in order to ensure a fair compensation for the non-possessing spouse.

The following statement found in Kerber v. Kerber[36] also helps to shed some light on those concepts and also on the view that the value as determined by experts cannot and should not be taken by the Court at face value.

> "The appraisal (sic) appraises the fair market value of the farmlands and acreage. In the appraisal "market value" is defined as follows:
>
> '1. As defined by the Appraisal Institute of Canada, is the highest price estimated in terms of money which a property will bring if exposed for sale in an open market, allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted, and for which it is capable of being used.
> 2. Frequently, it is referred to as the price at which a willing seller would sell, and a willing buyer would buy, neither being under abnormal pressure.
> 3. It is the price expectable if a reasonable time is allowed to find a purchaser, and both seller and prospective buyer are fully informed.'
>
> This definition assumes a reeasonable time to sell with neither the seller nor the buyer under abnormal pressure. The witness for the appraisal company agreed that at present there is a slow market for farmland and the land might have to be on the market for some time. He estimated it might take six to nine months to sell the land. He stated that if his company were evaluating land for forced sale purposes, such as a foreclosure, then:
> (a) If the terms required cash within 30 days, a 15 per cent reduction from the appraised value for these lands would be reasonable; or
> (b) If the forced sale permitted time to pay, a 10 per cent reduction from the appraised value would be reasonable."

As for the "current fair market value", it does not appear to have been defined as such but it may be said to be the fair market value as of a certain date, such as, the date of trial. Most of the time, in matrimonial cases there is no transaction taking place, what is in fact considered is a notional property value.

However, the market value, be it current fair market value or merely fair market value, is not, in some instances, the most appropriate method of valuation in light of the nature of the asset to be valued. This is particularly so where business assets, goodwill, household effects, pensions, professional practices, works of art, and the like are involved.

This is well illustrated by ta case dealing with Manitoba legislation which at its inception only provided for valuation based on fair market value. In Isbeter v. Isbeter[37], it became obvious that this provision of the legislation was too restrictive for the Court of Appeal. In that case, the Court refused to include a pension plan in an accounting under the Act because it was impossible to determine the fair market value for such an asset. The Act was subsequently amended by the addition of subsection 14(3) which allows an asset which is not by its nature a marketable asset to be valued by whatever means is appropriate for that

asset. This provision is of course useful not just with respect to pensions but also in relation to any assets where fair market value is not appropriate as a method of valuation.

The following cases illustrate well the inadequacy of the market value method in some of the above noted example and the need to resort to sometimes "improvised" methods of valuation. Vance v. Vance (supra) is an example of the difficulties which are encountered in the valuation of business assets. In that case, which dealt with the valuation of the shares of a closely held corporation, both asset value and potential income value were taken into account in valuing the husband's company. In Silverstein (supra), the Court was faced with two "market values", one established by a real estate agent and the other, $90,000.00 higher, established by an appraiser. Again in Boothe v. Boothe (supra), the Court was faced with similar problems in so far as they related to the valuation of shares.

In Langford v. Langford[38], the Court, in light of the great discrepancies in the valuation of the household goods, decided (given those discrepancies in the valuation of thethose goods and the inequity of allowing the husband to receive realizable assets while settling the wife with household goods required for the care of the children) that the wife was to be granted exclusive possession of the household goods during possession of the home.

In the case Jackh v. Jackh[39], the Judge found that where the assets is a professional practice and the valuation primarily based on the future earnings of the professional spouse, judicial re-apportionment should be considered according to section 51 of the British Columbia Act.

In Lockyer v. Lockyer[40], Goodrich, J. of the Newfoundland Trial Division addressed the difficulties of valuing assets consisting of chattels personal in the following words:

> "With respect to the other items, the Plaintiff, for the most part, has given the new catalogue value for the items while the Defendant has given his own idea of the value based on such experience as he has in that connection. The valuation of asset is always a difficult matter. I do not believe that used household appliances and furniture could be expected to realize more that 40% of the new value. In certain circumstances, I have formed my own finding by taking the Defendant's value or 30% of the Plaintiff's valuation whichever is the greater. There is really no satisfactory way to value such assets and without the evidence of an auctioneer who has some experience in the field, one must arrive at the figures rather arbitrarily".

In Criton v. Criton[41], the Court refused to include value for goodwill in the husband's dental practice, on the basis that it is unlikely that professional people can pass to another the goodwill developped with patients or clients because these patronize a professional person because they have confidence in his skill or judgment and upon his

departure, his goodwill leave with him. The learned judge's conclusion was that the fair market value of a professional practice is limited to the value of its assets other than goodwill.

The case of Hutchinson v. Hutchinson[42] raised yetanother interesting point in relation to the valuation of goodwill. By the terms of the dealership agreement, neither the husband nor his estate had any right to dispose of the business in an open market. The franchise owner retained the exclusive rights under all the circumstances to purchase or direct the sale of the business and the valuation in such case was based on inventory and fixed assets but not on allowance for goodwill. On the basis of this valuation, the husband's interest in the company at the date of valuation was in a deficit position. Even if the business could not be valued under Section 14(2) of the Marital Property Act (that is on the basis of fair market value), the Court ruled that it could be valued under subsection 14(3) and held that despite the fact that the business had a value to the husband in its income producing capability and potential. However, in that case, the Court was unable on the evidence before it to justify any appropriate means to value the business.

The Manitoba case of Buytendorp v. Buytendorp dealt with the value to be placed on art works done by the

husband. The Court therein rejected the wife's claim that the worth of the works was equal to the total of the sale pricesasked by him and agreed with the husband that unless a painting is sold, it's only value is the total value of the canvas, paint and frame. One is thus lead to conclude that the business of artists and craftsman is limited to the value of their stock in trade and equipment.

Pensions are yet another category of assets which do not lend themselves to standard valuation methods. The problem with pensions is twofold. The first component is to determine the value of the asset and the second is to select the most appropriate method to provide for the sharing thereof. In some instances, they do not pass the four prong test mentioned before and thus are incapable of being shared.

Registered Savings Retirement Plans are undoubtedly the easiest to deal with, since they can simply be the subject of a roll-over for the benefit of the non-owning spouse without attracting any income tax liability for the transferror. Such a scheme is provided for under the Income Tax Act.

The most often-used method of valuing the non-owning spouse's interest in a pension is that prescribed in Pryschlak v. Pryschlak[43]. The formula which was followed by the British Columbia Court of Appeal in Rutherford (supra) translates as follows:

$\frac{1}{2}$ X $\frac{\text{the number of years contributed up to separation}}{\text{the total number of years contributed to age 65}}$
X the actual pension payable.

The owner of the pension then holds the benefits in trust for the non-owning spouse. Coupled with that is the right for the non-owner spouse to receive compensation if the employee hold up the pension by refusing to retire.

Variations of the Rutherford formula can be found in McAllister v. McAllister[44]. The Court having imposed a trust on the Plaintiff-wife's entitlement to her husband's pension, which was both unmatured and non-payable at trial, ruled that the quantum of the pension assets which the Plaintiff was entitled to when the trust became payable was to be calculated as follows:

$\frac{1}{2}$ X $\frac{\text{years of payment into pension at trial}}{\text{years of pension employment at retirement}}$

In Manister v. Mollberg[45], yet a slightly different method of calculation was used:

Monthly pension payment x $\frac{\text{number of years of marriage}}{\text{number of years of pension contribution}}$

These words of Walker, J. of the Saskatchewan Queen's Bench, in Tataryn v. Tataryn[46] summarize well the various approaches which are opened for valuation of pensions:

> "What is one-half the pension? One-half the capitalized value actuarily calculated? One-half the contributor's contribution plus interest? One-half the monthly payment when the pension

> matures? Something else? It may, in proper circumstances, be any of these. But basically, it is simply one-half the pension valued as at the date of application".

On appeal, the Court of Appeal of Saskatchewan took the position that the value of a pension entitlement in the first years of contribution is likely to be reflected in the acumulated contributions less deductions to take into account tax liabilities, and as the date of retirement and of maturity of the pension draws near, the capitalized value is a more appropriate basis for valuation.

As can be seen, there is not one single method that can be said to be appropriate in all the circumstances; Fisher v. Fisher; Fisher v. Fisher[47] provides an excellent review and analysis of the difficulties which are inherent in the valuation of pensions and the impossibility of fixing or adopting a single method of valuation.

4. PROOF

In many of the provinces, the parties to the procedures are required to file with the Court a statement which contains a sworn inventory of all their property together with the value of that property to the best of the deponent's "knowledge, information and belief". This, one might say, is the first step in establishing the proof of

value of the property. On the one hand, it puts the other party on notice as to the value that the Applicant ascribes to the property and, secondly, if both the Applicant and the Respondent agree on values, it does away with the no need to adduce further evidence.

The particulars to be contained in such statements, subject to specific provincial requirements, have been defined in Fahey v. Fahey[48] as follows:

> "....property, real and personal, owned by a spouse at the date on which a spouse applies to have matrimonial assets divided pursuant to s.19(1) showing the date of acquisition of the property, its location, its current market value, outstanding mortgages or liens (showing date, names of parties, amount of debt, interest rate, monthly repayment instalment, terms, etc.), identification, particulars of property, clogs on title (if any), names and addresses of others with an interest therein and type thereof and all known information and particulars which might affect rights, ownership, value, title, etc., of either party. Such statement should require little amplification or explanation at trial."

Considering that the litigants in family disputes have seldom great wealth, the advice given to the profession on the conduct of these proceedings in Ryan v. Ryan[49] is particularly relevant and can serve as a guideline:

> "Because of the expense, spouses and their counsel should attempt to agree on what property falls within the definition of matrimonial asset and agree on valuation of property, particularly matrimonial home and its furnishings. A great deal of time and, as a consequence, a great deal of the litigant's money can be wasted in obtaining appraisal in the matrimonial home whereas the value likely be agreed upon and secondly, there is the time and money wasted haggling over whether a 13 year old refrigerator or whatever is worth $50.00 or $500.00."

However, where no such agreement is arrived at, it is submitted that the rule established by our New Brunswick Family Court Judges is equally applicable throughout the country: experts must be called to assist the Court in arriving at a final determination of the parties' respective entitlements, except in those cases where the parties or lay witnesses have a personal knowledge of the value of an asset such as bank accounts, insurance policies, etc.

Dyke v. Dyke[50] and Ferguson v. Ferguson[51] are cases on point. In the latter, for instance, MacDonald, J. noted that with respect to household items, "except in exceptional circumstances, the Court should not become involved in valuation of the hundred items within a household and the correct proceedure is for the parties to either agree on a valuation or for each to submit an appraisal of the goods".

As a general rule, he who alledges, must prove. The person claiming to be entitled to an interest in any given asset must therefore prove its value in order to allow the court to effect the apportionment, if applicable. For example, in a comment concerning the decision in McCreadie v. McCreadie[52], Professor McLeod summarizes the general procedure that should be followed where the applicant claims an entitlement to his husband's medical practice. "The onus should be on the wife to establish the value of the assets.

The husband can be made to file statements, appraisals can be undertaken and acountant's statement obtained. If the husband fails to co-operate, an adverse inference can be drawn."

In Stewart v. Stewart[53], the Court determined that where the husband sought relief pursuant to Section 51 of the British Columbia Act the onus was on him to prove the value of the property brought into the marriage. Similarly in Hutchinson v. Hutchinson (supra) the wife was denied a share in the value of the business because the Court was unable to find any appropriate means to value the business on the evidence adduced and it held that the wife had not satisfied the onus upon her to establish the value of the business.

Failure to adduce proper evidence to establish the value of the assets can adversely affect the share allotted to one's client. The consequences of such failure are well illustrated by many reported cases. For instance, in Chisholm v. Chisholm[54], the Court, having recognized the principle that improvements made since the separation should be allowed to the extent that they were related to the increase in the value of the property, concluded, in the absence of evidence as to the increase in value, that the increase was equivalent to one-half of the expenditures and awarded one-half of that amount. This matter was also addressed, in no uncertain terms, by Deniseth J. in Hall v. Hall, Cantin and Allain, Hall v. Hall and Robinson:[55]

> "Any party who does not supply all the requested information does so at his peril.... The decision is based on the evidence available with all reasonable inferences that can be made."

Further, the Courts of Appeal have made it clear that the trial courts should not attempt to reach a conclusion as to quantum without resort to objective criteria. In Capozzi v. Capozzi[56], where the Trial Judge proceeded to an apportionment without knowing the value of the assets, the British Columbia Court of Appeal stated that without purporting to require a Trial Judge in every case to have evidence before him on the valuation of assets with which he is called upon to deal, the Trial Judge could not under the particular circumstances of that case, purport to apportion the assets without knowning their value. Similarly in Underhill v. Underhill[57] which was considered in Capozzi, the same Court, without ruling that one is forbidden to do so altogether, determined that it was not desirable for a trial judge to apportion family assets without first obtaining a valuation. The Court also said that, likewise, if other property was to be dealt with by the Trial Judge in considering the application of Section 51, it would be generally unwise to attempt to do so without knowing the value of such property.

The appeal in Stewart (supra) was also successful because the Trial Judge valued a boat at $180,000.00 when there was no evidence to support such valuation. In O'Connell v. O'Connell[58], again a decision of the British Columbia Court of Appeal, the Court found that too much weight had been attached by the Trial Judge to counsel's statement of value and that sufficient weight was not given to the requirements necessary to find the true value of the property and the case was remitted to the Trial Judge to receive evidence with respect to valuation. In LeBouthillier v. LeBouthillier[59], the New Brunswick Court of Appeal having ruled that the Trial Judge erred in valuing the marital home at $50,000.00 when the only evidence, the municipal assessment, was that it was worth $16,200.00, found that although it was sometimes questionable as to whether such assessment was in line with reality, it was nevertheless prima facie proof of the value of the property and that in the absence of other evidence, the Trial Judge should, in that case, have adopted it.

From a purely procedural standpoint, it is submitted that the rules applicable in other civil cases with respect to the adducing of expert evidence must be followed in matrimonial property cases. Even though, in New Brunswick, for instance, the courts appear to have shown more flexibility with respect to the delay for giving notice of

intention to call expert witnesses, it is submitted that counsel on the opposite side is entitled to whatever notice is prescribed by the Rules of Court. If it is true that in family matters, "trial by ambush belongs in the past and has no place in the present"[60] and, similarily, it is equally true that, at least in New Brunswick, the resort to "surprise witnesses" is also gone since the advent of new Rules of Procedure.[61]

When the Court is faced with conflicting expert evidence as to the value of property, the question as to what evidence will be accepted becomes, just as in other cases, a matter of credibility. Some cases suggest that, in any event,the Court must choose between the evidence which, according to the Trial Judge, best reflects the value of the property and the Court cannot, for instance, average values. However, a review of the reported cases indicate that this rule is not followed universally and that in many instances the Court will resort to its inherent discretionnary powers in arriving at what it considers to be the fairess result for all concerned. This matter will be fully discussed under the heading "determination" which follows.

5. DETERMINATION

Under the heading "Methods", the concept of valuation has been looked at as the process of ascertaining the worth of assets or property. In this context, the term determination will be used to describe the decision-making process involving the application by the Court of the selected method of valuation of property to the facts and circumstances of the particular case before it requires the spouse holding the greater share of property, in terms of value, either to transfer property or to make a compensatory payment with respect thereto to the other spouse. In fact, we are dealing here with the judicial engineering or moulding to which the Court appears to resort to in ascribing a value to particular assets or items of property.

The case law establishes that in determining the respective entitlements of the parties, the Court will not look at the property at its face value alone, regardless of what method was used to determine that value. In addition to considering the experts' or other witnesses' opinions as to value, several factors which do not affect the value of an asset per se, will be considered in arriving at the determination of what may be termed "value for purposes of division". This is probably due to the realization that

valuation is not an exact science and also because the Court feels duty bound to arrive at an apportionment which is not only mathematically sound but equitable and in accordance with the philosophy of matrimonial property legislation. These factors may include the conditions under which the sale is held, the cost of disposition or of maintaining the asset, depreciation, appreciation, contribution, and tax consequences.

The comments of the appraiser in Kerber v. Kerber (supra) are most relevant when considering the effect of a forced sale on the market value of a property. The value of the farm land was discounted by 10% to take into account the nature of the disposition under the Act and the cost of disposition.

The cost of maintaining the assets by contributions such as payment of the mortgage, insurance, taxe payments was credited to the paying party in cases such as Smith v. Davies[62]. However, in Peacock v. Peacock[63], it was ruled that a third mortgage on the marital home should not be taken into account in arriving at the equity involved in the marital home since the Court had concluded that it was placed on the property to faciliate the husband's business dealings in non-business assets. And, in Maruda v. Maruda[64], a mortgage placed on the property in violation of a restraining order was not considered in valuing that property.

With respect to the taking into account of the value of the improvements made after the date of separation, it is interesting to note the principle expressed in Brock v. Brendon[65], that it should not be entirely opened to the party who retains possession (of the matrimonial home) after separation to spend whatever he or she wants towards improvements and be able to charge that amount to the other party without limit. Accordingly, in that case, the Court limited the reimbursement for improvements. This decision is in accordance which Chilsolm v. Chilsolm (supra) which stands for the principle that improvements made since the separation of the parties should only be allowed to the extent that it provoked an increase in value of the property. (See also Defreitas v. Defreitas (supra).)

The cost involved in selling an asset is also a factor to be reckoned with by the Court in determining the value of an asset. There is some authority for deducting from the value of assets not only an amount for potential tax liability but also an amount for legal and real estate commissions and expenses which would be incurred if the assets were sold. However, it is submitted that the better view is that expenses should not be deducted unless they are actually incurred because the asset is sold. Otherwise, cost might be deducted which may never be incurred.

Yet another factor which is taken into consideration is the additional contribution made by a spouse towards an asset which forms part of the marital property through usage, etc, where such asset was, for instance, acquired before marriage, and the increase in value of such property. This problem was addressed by the Supreme Court of Canada in Farr v. Farr[66]. In that case, the husband was relying on the "capital base theory" which theory, as applied in earlier cases, stood for the proposition that a spouse could receive more than an equal share of the property where that spouse brought assets into the marriage if these assets form the capital base from which the parties were able to accumulate other assets. However, the Supreme Court rejected that theory and ruled that it is not possible to exempt more than the fair market value of such asset at the time of marriage and that the capital based theory is wholly incompatible with the statutory presumption of equal distribution subject to assets being exempted. The presumption of joint contribution to the accumulation of matrimonial assets entitling each spouse to an equal distribution of assets is extended to the growth of the value of the assets after the marriage and such growth is presumed to result from the joint effort of the spouses and to be equally divisible. The "capital based theory" was also

discussed, among others, in Bergeron v. Bergeron[67] and in Seaberly v. Seaberly[68], insofar as gifts are concerned.

On the other hand, the appreciation in value of assets after separation which has already been dealt with under the heading "timing" is one of the other factors which the Courts take into account in arriving at the final determination of the value of an asset.

The Courts are also generally of the view that tax consequences are to be considered in arriving at the determination of the value of an asset. In some provinces, the appropriate legislation imposes that duty on the Court. But even in the absence of such legislative provisions, the Courts have nevertheless taken that factor into consideration. Although this subject will be more extensively addressed in a few minutes, it is nevertheless appropriate to mention it, at least briefly, in this context.

In many instances, it may be that a mathematical 50-50 division of the family assets may not be fair unless the tax consequences are taken into account. However, the comments of O'Sullivan, J.A. of the Manitoba Court of Appeal in orbiter in George v. George[69] are very relevant:

> "...Even though there is authority in Manitoba in treating the value of an asset under the Marital Property Act as its value taking into account tax liabilities, there is no authority I am aware of for presuming the extent of those tax liabilities wholly in favour of an owner of an asset. Certainly, in determining market

> value, it is difficult in principle to see when a tax liability should be taken into account at all, save possibly as a justification for anunequal division. After all, an asset does not sell for any more or less due to absence or otherwise of tax liability. What does a buyer care is the willing seller has to include some amount of his income due to recapture of capital cost allowance for capital gains?"

While it may be true that tax liability does not affect market value, it can certainly affect the value of an asset to the owner. The intention of matrimonial property legislation is to divide equally the accumulated wealth of the parties. The non-owning spouse should not be put in a better position than the owning spouse. However, such effect is sometimes difficult to determine when it is impossible to know the amount to be taken into consideration without knowing when and how the asset will be sold. This was recognized by Morris, J. in Nykafolk v. Daviduik[70] and the learned trial judge solved the problem by fixing an arbitrary sum to be deducted from the sum payable to the wife during an accounting under the Act. He stated:

> "In fixing the amount of $5,000.00, I have kept in mind not only the factors to which I have referred by also the likelihood that the husband's tax liability will not arise for some time and that the future value of the dollar would probably be less than the present value. I recognize that the result is arbitrary but I have concluded that this is the most practical way that I can attempt to insure equality between the parties so far as the sharing of the marital assets is concerned."

But before it can arrive at the net value of a property, taking into account the above-noted factors, the Court is in fact first of all faced with the problem of ascribing a "gross" value to the asset under consideration. This means being faced very often with conflicting expert or other evidence or, in some cases, being faced with flagarently unjust results for one of the parties.

The difficulties which the Courts face in reaching what is the value of an asset are well illustrated by some of the following cases. In Silverstein v. Silverstein (supra), the Learned Judge commented as follows:

> "I am more inclined to accept the opinion of the experience of a real estate broker who does business in the area than the opinion of the appraiser based upon interesting but hypothetical calculation."

There are different schools of thought with respect to the treatment to be given by the Court to the value ascribed to assets by experts. The prevailing view of the Court of Appeal of Ontario appears to be that averaging values is not a proper way of establishing market value, i.e. taking the average of two appraisals submitted at trial and the purchase price of the property. (See Ling v. Ling).The Newfoundland Court of Appeal followed the same approach in Duff v. Duff[71]. The manner of dealing with contracdictory expert evdence was said to be as follows:

"...The trial judge erred in averaging the value given by the two appraisors. As stated in Atlantic and North West Railway v. Judah, 'such a practice would relieve the courts from the exercise of their judicial functions, to adopt those of an accountant, and would, in most cases, lead to unjust and absurd results'.

Contradictory evidence of value must be carefully weighed by the trial judge and, if he is unable to arrive at a fair and reasonable valuation based on all the evidence adduced so as to order one spouse to pay to the other an amount to provide for a division of the property, his only recourse is to order the property to be sold and the net proceeds divided between the parties.

It is all the more important for the trial judge to arrive at a proper assessment of the value of the matrimonial home, if possible, when, as here, one of the parties wishes to retain the home. In such circumstances that party should have an opportunity of paying the other one-half of the assessed market value rather than be dispossessed.

It must not be forgotten...that the final verdict is the responsibility of the trial judge and, where there is a marked difference of opinion among experts, regard must be had to the relative skill or experience of the witnesses on either side, and to the strength of the reasons which were advanced by the witnesses in support of their respective opinions. A mere expression of opinion without supporting reasons, whatever the experience and expertise of the witness expressing that opinion, can be of little assistance to the court."

The Courts have on occasion averaged opposing figures; but the more complicated the assets, the more likely the Court is to choose the figures put forward by the expert witnesses of one side or the other.

On the other hand, the view expressed in Vance v. Vance (supra), seems to have gained wide acceptance by our Courts. This view is best summarized as follows by the Court:

> "Mr. M... has argued that I must prefer either by Mr. Reed or Mr. Schultz's valuations and as a Trial Judge, I cannot embark upon my own method of valuation. While I accept that a Trial Judge must have close regard to the expert evidence put before him, I do not think that I am absolutely bound to chose one or the other. Findings of facts including those bases upon expert evidence, are the prorogative of the finder of facts."

Whatever the method used in ascribing a value to matrimonial assets, it must be borne in mind that valuation is not an exact science and that the equity and fairness of each case rest not with the appraiser but with the Court, which is duty bound by the philosophy which underlies matrimonal property legislation to recognize, in addition to the other factors mentioned above, the inherent pitfalls of valuations and apportion shares in the most equitable manner possible. In that sense, an equal share is sometimes not necessarily 50% of the value of an item as determined by the expert valuator at a given time. The need for a careful dosage of judicial discretion and appraisal expertise is best illustrated by the following passage which, it is submitted, is equally applicable to the valuation of any assets:

> "... a valuator may shade his perspective of a business in accordance with the objectives of the valuation. Indeed, there is probably no one hypothetical valuation of any business that will

> satisfy all those interested in the result. The only time a one-figure valuation is unassailable is in circumstances of an arm's length, open market completed transaction, where both buyer and seller have exchanged values, each with a sense of equitable treatment".[72]

CONCLUSION

In summary, the proper date for valuing property in marital property litigation is the date of trial subject however to specific legislative requirements or equitable considerations that may dictate resorting to another date; fair market value is the most common valuation method used except in those cases where the nature of the asset does not lend itself to that method and the final determination of the value of any asset is a responsability which lies with the Court. However, as a preriquisite, assets which the Court is called upon to divide must be capable of being shared and the Court must be provided with sufficient evidence in order to make a determination.

The enactment of matrimonial property legislation marked the beginning of a new era of economical equality and justice for marital partners. The process of dividing assets upon the dissolution of this partnership symbolizes the concrete application of these principles. In that sense, justice must not only be done but it must also appear to be done; shares must not only be equal but they must appear to be equal. The final award is the yardstick by which parties to the litigation measure that justice.

TABLE OF AUTHORITIES

1. Marital Property Act, S.N.B. 1980, c.M-1.1.

2. Shultz, Clayton G., Valuing the Matrimonial Estate, paper presented to 36th Tax Conference of the Canadian Tax Foundation, November 26-28, 1984.

3. Id at page 3.

4. Barley v. Barley (1985), 43 R.F.L. (2d) 100.

5. Trift v. Trift (1984), 54 N.B.R. (2d) 147.

6. Girik v. Girik (1983), 37 R.F.L. (2d) 385.

7. In Manitoba, the effective date for valuation, in the absence of agreement between the parties, is determined by statute to be the date of cessation of cohabitation or where the spouses continue to cohabit, the date of application to the Court. In Saskatchewan, the Court is authorized to determine the value of matrimonial property either at the time of the application or at the time of the adjudication. In B.C., the Court of Appeal has ruled in Williams v. Williams, (1982), 26 R.F.L. (2d), that the absence of a separation agreement did not require that the date for valuation of assets necessarily be the date of the Decree Nisi. There could be one date for the triggering event under section 43 and another date for valuation of assets. In some provinces, there are legislative provisions dealing with the proper date for valuing assets which are limited to specific items such as those acquired before marriage or by gift and which have become family assets by usage.

8. Young v. Young (1981), 21 R.F.L. (2d) 388.

9. Defreitas v. Defreitas, (1979), 10 R.F.L. (2d) 238.

10. Pike v. Pike (1984), 38 R.F.L. (2d) 71.

11. Grine v. Grine (1980), 16 R.F.L. (2d) 365.

12. Ling v. Ling (1981), 17 R.F.L. (2d) 52.

13. Fraser v. Fraser (1983), 47 N.B.R. (2d) 364.

14. Ridler v. Ridler (1985), 51 Nfld & P.E.I. R. 19.

15. Mazurenko v. Mazurenko (1981), 15 Alta. L. R. (2d) 257 (C.A.).

16. Goetgen v. Goetgen (1981), 23 R.F.L. (2d) 57.

17. McArthur v. McArthur (1980), 15 R.F.L. (2d) 293.

18. Mason v. Mason (1981), 23 R.FL.L. (2d) 68.

19. Hopwood v. Hopwood (1984), 37 R.F.L. (2d) 81.

20. Wibe v. Wibe (1982), 33 R.F.L. (2d) 62.

21. Rutherford v. Rutherford (1981), 127 D.L.R. (3d) 658.

22. Martelli v. Martelli (1982), 26 R.F.L. (2d) 1.

23. Murray v. Murray (1979), 11 B.C.L.R. 338.

24. Dresden v. Dresden (1979), 13 R.F.L. (2d) 97.

25. Groeneweg v. Groeneweg (1981), 22 R.F.L. (2d) 22.

26. Christensen v. Christensen (1981), 19 R.F.L. (2d) 240.

27. Boydell v. Boydell (1978), 2 R.F.L. (2d) 239.

28. Moric v. Moric, (1983), 34 R.F.L. (2d) 323.

29. Price v. Price (1984), 37 R.F.L. (2d) 40.

30. Silverstein v. Silverstein (1978), 1 R.F.L. (2d) 239.

31. Boothe v. Boothe (1981), 2 F.L.R.R. 81.

32. Vance v. Vance 23 R.F.L. (2d) 397.

33. Lavene v. Lavene (1978), 392 A (2d) 621.

34. These factors are reproduced from Valuing the Matrimonial Estate supra note 2.

35. Untermyer Estate v. Attorney General of British Columbia, [1929] S.C.R. 85.

36. Kerber v. Kerber; Kerber v. Kerber (1983), 35 R.F.L. (2d) 184.

37. Isbeter v. Isbeter (1981), Man.R.(2d) 353.

38. Langford v. Langford (1981), 23 R.F.L. (2d) 425.

39. Jackh v. Jackh (1980), 22 R.F.L. (2d) 215.

40. Lockyer v. Lockyer (1982), 27 R.F.L. (2d) 277.

41. Criton v. Criton (1983), 34 R.F.L. (2d) 215.

42. Hutchinson v. Hutchinson (1982), 20 Man.R. (2d) 1.

43. Pryschlak v. Pryschlak (1980), 11 F.L.D. 344 (B.C.S.C.).

44. McAllister v. McAllister (1983), 23 Alta L.R. 141.

45. Manister v. Mollberg (1982), 24 Alta L.R. (2d) 83.

46. Tataryn v. Tataryn (1982), 27 R.F.L. (2d) 283 at 287; varied on Appeal, (1984), 6 D.L.R. (4th) 77.

47. Fisher v. Fisher; Fisher v. Fischer (1983), 31 R.F.L. (2d) 71.

48. Fahey v. Fahey (1980), 40 Nfld & PEI R. 287 at 290-291.

49. Ryan v. Ryan (1980), 43 N.S.R. (2d) 423.

50. Dyke v. Dyke (1982), 31 R.F.L. (2d) 22.

51. Ferguson v. Ferguson (1980), 16 R.F.L. (2d) 207.

52. McLeod James G., Comment on McCreadie (1982) 29 R.F.L. (2d) 189.

53. Stewart v. Stewart (1984), 40 R.F.L. (2d) 396.

54. Chisholm v. Chisholm (1977), 4 R.F.L. (2d) 242.

55. Hall v. Hall, Cantin and Allain, Hall v. Hall and Robinson (1981), 20 R.F.L. (2d) 12, at 19.

56. Capozzi v. Capozzi (1984), 39 R.F.L. (2d) 349.

57. Underhill v. Underhill (1983), 34 R.F.L. (2d) 419.

58. O'Connell v. O'Connell (1981), 23 R.F.L. (2d) 123.

59. LeBouthillier v. LeBouthillier (1982), 39 N.B.R. (2d) 242.

60. Connolly v. Connolly (1981), 33 N.B.R. (2d) 128.

61. Rules of Court of New Brunswick, Regulation 82-73 under the Judicature Act and the Summary Conviction Act.

62. Smith v. Davies (1978), 6 R.F.L. (2d) 218.

63. Peacock v. Peacock (1983), 35 R.F.L. (2d) 218.

64. Maruda v. Maruda (1985), 43 R.F.L. (2d) 26.

65. Brock v. Brendon (1979), 1 F.L.R.A.C. 190.

66. Farr v. Farr 52 N.R. 326.

67. Bergeron v. Bergeron (1984), 40 R.1F.L. (2d) 269.

68. Seaberley v. Seaberly, (1985), 43 R.F.L. (2d) 1.

69. George v. George (1983), W.W.R. 606 at 616.

70. Nykafolk v. Daviduik (1982), 20 Man.R. (2d) 16 at 18-19.

71. Duff v. Duff Nlfd. U.F.C. 1980 No. F/80/543, November 5th, 1981.

72. McQuillan P., Doherty P. and Donald G., Valuation of Businesses, C.C.H. Canadian Limited, 2nd edition 1979.