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1. INTRODUCTION

Over one-third of all Canadian marriages will end in divorce or separation.[1] The problem of marital breakdown becomes more acute when it is realized that in some provinces the same matrimonial property regime operates on death as divorce thus strikingly reinforcing the view that the one thing that is certain in this world is death and taxes.[2] In the short space available to me I am only able to point out in sweeping brush strokes the matrimonial property regimes of the common law provinces. For those wishing more detail of the law of their own or sister Provinces there are the specialist looseleaf legal services on the Matrimonial Property Acts.[3] I should emphasize that only three provinces' laws are truly similar namely Ontario, P.E.I. and Yukon and one should be wary of transposing decisions from one province to another without having a clear grasp of the legislative schemes of the respective legislation. Moreover the matrimonial property laws have to be seen in the context of other legislation such as provincial maintenance legislation, the Federal Divorce Act and, perhaps most importantly, the Income Tax Act. The tax implications of marital breakdown can be profound and the use of tax experts in matrimonial property cases may be essential to prevent the sort of hardship that occurred in the case of Lawrence v. Lawrence.[4] In that case the husband was entitled, on transferring from one university to

another, to pension funds in the form of cash which he could not roll over into his new university's pension scheme. The Nova Scotia Court of Appeal treated these returned pension funds as cash available for distribution as a matrimonial asset. In addition because the wife was a warden of Halifax County, an elected position, and might lose her $24,000 p.a. job at the hands of the electorate, she was given the security of a lump sum maintenance award under the Divorce Act. In reality the husband could only meet the lump sum payment by collapsing the pension rather than by rolling his pension funds over into an R.R.S.P. At his marginal rate of tax half the returned pension fund payment would disappear in tax, a fact which the Court of Appeal missed despite having a statutory duty to consider the consequences of this order. The harshness of the order was compounded by the fact that lump sum maintenance payments are neither tax deductible nor variable. In due course the wife in Lawrence did lose her job - when she was appointed to a Provincial Board at double her original salary! Periodical payments which are both tax deductible and variable would have given a much more flexible remedy to the wife's needs for a "topping up allowance". An explanation to the Court of the tax consequences of its order would have been an enormous help to the Court and the husband.

2. THE GENERAL SCHEME

All of the provinces' legislation provides for division of defined categories of assets regardless of ownership in a way the legislature thinks appropriate. Usually an equal division is thought appropriate. Prior to the triggering breakdown event which authorizes a court order

for division, (commonly petitioning for divorce or nullity, or establishing separation with no reasonable prospect of reconciliation) each spouse is free to deal with his or her own property although special rules apply to the matrimonial home. The legislation of the common law provinces recognises separation of property during the "happy phase" of the marriage subject to the floating charge of community property which crystallises, with the possible exception of B.C., either on marital breakdown or the subsequent court order resulting from matrimonial property proceedings.[5] This analysis will perhaps appeal to commercial lawyers. Prior to this time, the non-owning spouse has no vested right to an equal division, though special rules apply to the matrimonial home. This has considerable importance to spouses changing their habitual residence from one common law province to another or from one common law Province to Quebec.[6] It is important to emphasize that the right to seek an equal division of the appropriate assets is a personal right attaching to the spouse not owning the appropriate share of assets, and not one in which third parties can seek to stand in that spouse's shoes. If a wife, with little or no assets in her name, incurs debts in her own name it is not possible for her creditors to force her to separate from her husband and then seek to divide the assets standing in her husband's name so that funds will thereby become available to her creditors.[7] Conversely if a spouse with a greater share of the appropriate assets in his or her name has debts or goes into bankruptcy before proceedings for a fair division have been instituted, the non-owing spouse's entitlement to the assets may be reduced to rights to share in a smaller pie.[8] The one exception to this is that special

protection is accorded to the matrimonial home which cannot be unilaterally disposed of or encumbered by one spouse without the permission of the other spouse or of the court.[9]

I now move on to raise some of the grosser differences[10] between the legal position in the various provinces. If there are a number of Nova Scotia cases included this is not for parochial reasons but because they have wider significance.

3. CONTRACTING OUT

(i) Common Law Provinces

If the spouses or cohabitees do not wish to subject themselves to the rigors of an inflexible matrimonial property regime they can contract out of it wholly or partially.[11] Provided that the economically weaker spouse will sign a contract, the private ordering result may be preferable to an imposed court order. Where there is an agreement it is imperative that the necessary formalities be observed including in some provinces both the need for a written instrument and witnesses. Moreover, in order that the instrument is not overturned by the court on the ground that the agreement was entered into because of undue influence, duress or was inequitable or unfair in the circumstances[12] it may be desirable to ensure that both spouses or cohabitees only sign such agreements after receiving independent legal advice. A specialist family lawyer may be able to advise on what terms and financial consequences a court may accept. The prime people who need to sign such agreements are business executives with substantial resources or those who are remarrying and who may have complex

responsibilities to children of former marriages, to ex and current spouses and possibly children of the new union. As will be seen from the latter sections these statements apply with even more force in those provinces in which a surviving spouse can bring proceedings under the Matrimonial Property Act against his or her deceased spouse's estate. It is not surprising that many of the first cases[13] on applications on death have been by surviving spouses in second marriages who have not been satisfied with the life interest left to them by their deceased spouse. The value of this in actuarial terms has been substantially less than the fair sharing provided for by the Matrimonial Property Act. Another feature of these same cases has been the fact that the remainderman and executor/trix has been the deceased's child by a prior marriage which heightens the potential conflict of interest. When the executor/trix tries to uphold the deceased's will they stand to benefit themselves.

(ii) Quebec & Civil Law Systems

The Quebec community of property regime continues to tax the understanding of common lawyers. The traditional approach was to regard the community of property rights as having vested under an implied term of the marriage contract and the parties were unable to rid themselves of the community of property laws by simply changing domicile or residence. The traditional rules are, however, subject to review in the light of recent caselaw developments in Ontario. Moreover there may be an argument that the implied contract theory is no longer accepted in Quebec[14] and that the current matrimonial regime in Quebec is not very different from the new common law statutory regimes.

In Sinnett v. Sinnett[15] parties married in Québec only to have their marriage break down in Ontario. They had expressly contracted out of the Quebec community regime and operated under separation of property. The question which then arose was whether the wife had any rights under Quebec law that would displace the statutory choice of law in s. 13 of the Ontario Family Law Reform Act--the law of Ontario, the last common habitual residence. Would it be possible for the husband to assert a claim for the division of assets under s. 4 of the Ontario Act in respect of assets standing in the wife's name? Scott Co. Ct. J. indicated that while the right to apply for a division of property under s. 4 of the Ontario Act might be excluded by a marriage contract, a contract such as the present one which merely purported to deal with ownership of assets would not have that effect. Section 4 permitted a court to deal with division and possession of property otherwise than in accordance with ownership and thus could still operate. According to this argument the contract merely placed the parties in the same position as spouses marrying in Ontario without a marriage contract who applied to the Ontario courts for a division of assets. In such a case the court would first need to find the value of family assets standing in the name of each spouse, but this would not preclude the court from redistributing assets so as to achieve the aim of the legislature in enacting s. 4. This overtechnical common law approach to the civil law, however, may do scant justice to the Quebec regime.

In Kerr v. Kerr[16] the parties entered into a marriage contract prior to their marriage in Quebec in 1964. Subsequently they moved to Ontario where they lived together and purchased a matrimonial home prior to their

separation in 1977. The narrow question was whether a marriage contract providing only that the parties adopted a regime of separation would defeat a claim brought by one spouse under s. 4 of the Ontario Act asking for a sale of the matrimonial home and division of assets. Although Walsh, J. held this to be a marriage contract he held that since the provisions of the contract only provided for ownership it did not cover either expressly or impliedly divisions of property which were independent of ownership. Some problems arose out of s. 13 of the Ontario Act which refers the choice of law to the law of the parties last common habitual residence. Since this was Ontario this superficially appears to bypass the Quebec agreement. However it is submitted that this was not intended to avoid vested rights or rights which the Ontario rules including its conflicts rules would recognize. It is perhaps easier, on the emotional level, to accept that vested rights apply in a case such as De Nichols v. Curlier[17] where the vested rights exceed those conferred by the present litigation than in a case where the wife appears to have bargained away valuable rights. Nevertheless the contractual separation of property might properly be regarded as a vested right. It is submitted s. 13 should not just be taken to apply to the internal law of the last common habitual residence and that what constitutes acceptable contracting out should not be decided by a parochial and narrow reference to the lex fori. A definite answer to the problem must await cases in which more expert evidence of Quebec law is given in evidence and possibly for a decision of the Supreme Court of Canada. There may be a real danger in according Quebec marriage contracts less favourable treatment than Ontario marriage contracts, or analyzing

Quebec contracts in common law terms. What sort of marriage contract one might reasonably ask could Quebec notaries have been expected to draft for a couple marrying in Quebec in 1964?

4. WHO CAN APPLY

Applicants must be within the statutory definition of spouse which includes voidable and some void marriages. Some care must be taken with common law spouses, since although some provinces include common spouses within the statutory definition of spouse for some purposes, e.g. maintenance, they exclude them for the purpose of property adjustment orders.[18] Thus for people who are not married to one another but who wish to solve their property problems the answer seems to be to invoke the provisions of a cohabitation contract in those provinces that recognize them[19] or to rely on the equitable remedies of the constructive trust or unjustified enrichment.[20]

The other question that arises is whether the legislation applies on death so that the matrimonial property regime to some extent replaces the usual provincial laws of succession. One theory is that a spouse who sticks by his or her partner until death should be no worse off than one who terminates the marriages by divorce during the lifetime of the spouses. A number of provinces apply the matrimonial property regime on death.[21] Other provinces allow the continuation of an action against the estate of a deceased spouse if it had already been commenced during the lifetime of the deceased spouse,[22] or if a matrimonial property order could have been commenced immediately before the death of the other spouse.[23] Sometimes a six month period of limitation is imposed.[24]

Even where the Act applies on death in some provinces such as New Brunswick it is made clear that, though an action can be brought against the estate of a deceased spouse as defendant under the Survival of Actions Act, the action does not survive for the benefit of the deceased spouse's estate qua plaintiff except for actions already instigated during the plaintiff's lifetime.[25] In Nova Scotia and Newfoundland the legislation is not clear and the question has had to be solved by the courts. In Newfoundland the result, perhaps surprising in view of its effect on the statutory joint tenancy of the matrimonial home, was to allow the action by the deceased spouse's estate.[26] In Nova Scotia it has recently been decided that such actions are not possible.[27]

Where an action is brought by a surviving spouse against the estate of a deceased spouse, the relationship between the Matrimonial Property Acts and existing succession laws is unclear. S. 12(4) of the Nova Scotia Act provides:

> Any right that the surviving spouse has to ownership or division of property under this Act is in addition to the rights that the surviving spouse has as a result of the death of the other spouse, whether these rights arise on intestacy or by will.[28]

Thus, if there are $250,000 of shareable assets under the Matrimonial Property Act and a wife has been left a half share in her husband's estate by will; can she claim $125,000 under the Act and then claim, in the absence of an election clause in the will, a second bite of the cherry worth $62,500 under the will? What is clear is that an older second wife who has merely been granted a life interest in her husband's estate (even with a power of encroachment on capital) with the remainder being given to

the children of the first marriage, who are also the executors of the estate is unlikely to be satisfied with this arrangement. She will want to sue for a fair division under the Matrimonial Property Act. Equally a wife who is a beneficiary under a spousal trust but where substantial assets are bequeathed elsewhere may not feel she has received a fair share of the assets under the Matrimonial Property Acts, even where she receives all the income from the trust property during her lifetime and is the only person able to encroach on the capital of the fund. If the Acts have such dramatic effect on a straightforward provision on a will, they may have catastrophic effects on more sophisticated estate plans such as estate freezes, transfers into corporate names, or buy sell agreements.

A further problem is whether actions under the Act can be brought after the decree absolute. In Alberta[29] actions have to be brought within two years of the decree nisi whilst in other provinces the period can be much shorter. In New Brunswick[30] a period of sixty days is specified, whilst in Nova Scotia it would appear that because of the statutory definition of spouse it is not possible to initiate proceedings under the Act after the divorce decree has been absolute.

5. THE MATRIMONIAL PROPERTY ACTS AND CONVEYANCING CONSEQUENCES

The historic protection for a non-owning spouse, usually a wife, in the matrimonial home was by means of dower in the East and Homestead legislation in the West. Homestead laws originated in the U.S.A. and according to Bowker[31] generally did these things:

(i) it protected the matrimonial home against execution creditors,

(ii) it required a wife's consent to any disposition or encumberance on the home and

(iii) it gave the wife and sometimes the children the right to remain in the home after the death of the husband or father.

In contrast the rights of a wife under common law dower[32] were more limited. The wife acquired a one third interest in her husband's land after he died. Her rights in the home only extended to a 40 day quarantine period after her husband's death.

Under both the dower and Homestead schemes a balancing act is required to establish an equalibrium between protecting wives whilst at the same time not disrupting the conveyancing system by placing too onerous demands on purchases on mortgagees of property. For example in British Columbia "homestead protection" requires the registration of the Homestead as such.[33] At the same time the financial limits on the exempted homestead property have largely been eroded by inflation.

This then provides the background to the recent changes in the Eastern Provinces Matrimonial Property Acts. Only in Newfoundland has a proprietary right in the matrimonial home been conferred on the non-owning spouse.[34]

In the Eastern Provinces the legislation confers on the non-owning spouse the same rights of possession in the matrimonial home as the owning spouse.[35] These rights of possession are coupled with restrictions on the ability of the owning spouse to dispose of or encumber the matrimonial home without the other spouse's permission or the consent of the court.[36] We shall return to these provisions in more detail later. However, certain things can be said about the non-owning spouse's possessory rights:

(i) They are dependent on the rights of the owning spouse. Thus if the owning spouse loses his rights, e.g., by creditors foreclosing on or selling the property, the non-owning spouse will be vulnerable.[37] What the position is in a Province like N.S. where death is a triggering event is an interesting academic point. Has the owning spouse any rights of possession after his death? If you can't take such a right with you can you confer it on your estate? I suspect part of the trouble lies in adopting the Ontario wording verbatim when death is not a triggering event in Nova Scotia.

(ii) The rights of occupation only arise on marriage. Thus if property is bought by a husband in his name on a mortgage prior to marriage, a wife cannot on marriage use her possessory rights so as to give herself priority over the existing mortgagees.[38]

(iii) The rights of the non-owning spouse may be overriden where the owning spouse gives a false affidavit to a purchaser or mortgage under s. 8(3). In Stoimenov[39] the trial judge held that the mortgagee took free of the wife's rights and was able to rely on the husband's false affidavit that he was unmarried because he had no actual notice to the contrary. It is worth emphasising that in some Provinces actual notice is not required, e.g., the Nova Scotia Act merely talks of notice. The decision has, however, recently been overturned on appeal.[40] Apparently the mortgagee, following its usual practice, had obtained a Toronto Credit Bureau check which showed a husband and wife living at the house, and the filing of a non-responsibility notice by Mr. Stoimenov in 1978. However, this information and the discrepancy between it and the husband's representing himself as being "single" on the mortgage application form was never passed

on to its solicitor. Moreover, the solicitor had done a title search in 1976 which showed that there was a transfer from the Stoimenovs as joint tenants to the husband alone. A search of the old abstract should have revealed the necessity for Mrs. Stoimenov to consent to the encumbrance. The effect of the decision on real estate practice is profound and requires mortgagees and others to take into account any information they may possess which conflicts with the affidavit's contents, and not merely to rely pro forma on the affidavit alone for their protection. Tarnopolsky, J.A. held that the words in s. 42(3) of the Ontario Act do not relate to whether the mortgagee had 'notice to the contrary that the propert was a matrimonial home'. Rather the words 'to the contrary' relate to any of the items relevant to s. 43(a) to (d).

The practical effect of the decision may be to force the computerisation of Law Offices and Trust Companies so that they can cross reference all information coming to them in a series of apparently unrelated transactions. Also unresolved is the question of client confidentiality, e.g., when a solicitor learns of the husband's marital status when acting for him in one transaction and then later acts for the mortgagee in another apparently non-contentious transaction and comes across an apparently inaccurate affidavit. Furthermore are all partners bound by information in each others possession? Whilst the full import of this decision is still to emerge, at least one step may need to be taken by the Bar. Solicitor's certifying title to purchasers or mortgagees may wish to exempt themselves from responsibility for information in the personal knowledge of their clients which has not been passed on to them.

As to what constitutes a disposition or encumbrance we now know that a lease by a wife without her husband's permission is a disposition liable to be set aside.[41] More importantly the attempt by a mother in Mills v. Andrews[42] to sever a joint tenancy into a tenancy in common so that she could leave something to her child by a previous marriage was held to infringe s. 8. The result is sad in that the mother was unable to leave anything to her son despite having contributed to the purchase of the home and its furnishings. Nor could her estate sue as plaintiff for an equal share of the matrimonial assets. Actions for equal division under s. 12(1)(d) seem to be restricted to actions by a living plaintiff against the deceased spouse's estate.[43] If the property had been in the husband's and wife's names as tenants in common it is uncertain whether the wife's leaving her share in the home to her some in her will might still not be a disposition within s. 8. That this is even arguable shows the problem of copying the Ontario legislation's wording in Nova Scotia whilst at the same time making death a triggering event.

Some concluding points are worth noting in connection with homes. Although s. 3(1) of the Nova Scotia Act appears to exclude leasehold property from the definition of matrimonial home, this needs qualification in the light of Beaman v. Beaman.[44] In that case Burchell J. held that the effect of a lease/purchase scheme operated by the Department of Housing was to create a property right taking the arrangement outside the range of ordinary leases. This holding that the lease/purchase home was a matrimonial asset was without prejudice to the contractual rights of the Department of Housing.

When drafting marriage or separation agreements between spouses relating to the home it may be important to make clear whether a spouse is merely putting legal title in the wife (e.g., putting it beyond the reach of his creditors)[45] or whether he is relinguishing his statutory matrimonial rights which are notwithstanding the ownership of the assets. Finally if a wife is taking a conveyance from her husband when she is currently a joint tenant with him but she wishes to retain the right to sue him on the deed (e.g., for a defect in title), it may be better for the wife not to join in the conveyance to herself under a warranty deed.[46]

6. OCCUPATION OF THE FAMILY HOME AND THE HUSBAND'S EQUITY IN IT

Prior to the Matrimonial Property Act, it was not uncommon for the husband to be deprived of all interest in the home by the device[47] of secured lump sum maintenance under the Divorce Act.[48] More recently the Courts have shown a willingness to give the wife the matrimonial home in such a way as not to totally deprive the husband of his equity.[49] The arithmetic in some of these cases shows that the generosity of the court's award is less apparent on close scrutiny. In MacGregor v. MacGregor[50] the husband was ordered to transfer his share in the matrimonial home to his wife (approximately $55,000) in return for his wife giving him a mortgage on it in the sum of $47,000. This mortgage was not to be redeemable until 1989 and to carry no interest. One might speculate that, assuming a 10% increase in property at compound rates, the wife's home in 1989 would be worth in excess of $175,000. If the purchase power of the dollar goes down by 5% (a modest rate of inflation judged by recent years) the husband's

purchasing power in 1989 would be about $35,000 in 1984 dollars. Still, something is better than nothing, though it must be admitted that the payment of interest on the mortgage by the wife to the husband would probably see half of the interest paid over as income tax by the husband. My impression is that the Nova Scotia courts are more inclined to leave the custodial parent in possession of the former matrimonial home that the Ontario Court. In Ontario more than the disruption inevitably consequent on breakdown of marrige has to be proved as a precondition to obtaining an order for exclusive occupation of the home rather than its immediate sale.[51] The presence of children tends to make matters different but even here delays in selling the matrimonial home may merely postpone it until the end of the school year[52] since urban children have to expect at least one change of home during their lifetime.[53] Where the provision of an alternate home for the children is difficult having regard to the parties financial circumstances this may tip the scales in favour of giving the custodial parent exclusive possession and postponing sale.[54]

7. MATRIMONIAL PROPERTY ACTS RELATIONSHIP TO OTHER CONCEPTS OR REMEDIES

One problem in all the provinces is the extent to which the statute overlaps with and displaces existing remedies like the constructive trust, a legal device arising independently of the spouses' intention to prevent a spouse who is the legal owner of property unjustly enriching himself at the expense of his partner's contribution of money or efforts. The continued operation of the constructive trust in the light of statutory provisions to a similar effect[55] was in some doubt after the Supreme Court of Canada

decision in Leatherdale v. Leatherdale[56] but at least where there is no overlap such claims can still be made.[57] Unfortunately the boundary line between the statutory constructive trust claims in business assets and claims to equal or unequal sharing of matrimonial or family assets is far from clear as the Supreme Court of Canada decision in Leatherdale and the earlier Ontario Court of Appeal decision in Colville-Reeves[58] shows. The problem becomes acute when third party claims against property are involved and it becomes necessary to determine at what time the interest arises under either the equitable constructive trust or its statutory equivalent. Traditional trust law would date the interest from the time of the contribution of the money or monies worth.[59] However, the case law seems to involve some confusion about whether the constructive trust is a propietary remedy or merely a remedial tool analogous to the personal remedy of unjust enrichment.[60] It is submitted the latter approach would be preferable but then one asks why use the language of constructive trust rather than unjust enrichment? It is significant that in none of the recent cases on constructive trusts were third party rights involved. If ever they are, judicial refinement of the language and effects of such remedial tools may be forthcoming.

8. INVOLVING A SPOUSE IN THE OTHER SPOUSE'S BUSINESS

Equity presumed that if one person transferred property into the name of another person without there being other evidence that a gift was intended, the donee held the legal title only and the donor held the equitable title under the doctrine of the resulting trust. However by way

of exception to the general rule a gift was inferred if the donor was a husband or father and the donee was a wife or child. (Gifts were not presumed from wives to husbands!) However this presumption of advancement has been repealed in most provinces[61] with the result that a husband may retain an interest in property in his wife's name. But this does not mean that giving a wife shares in her husband's business is necessarily desirable. Even putting qualification shares in the wife's name, a practice legally required in few provinces, may be risky. Putting shares in a wife's name (as it usually is) is best reserved for those cases where the non-owning spouse is actively contributing to the business. In such a case either an appropriately worded marriage contract or buy sell agreement should be signed at the time of making the allocation of shares.

The wife has no automatic right to share in her husband's business assets and by putting shares or other business assets in her name may limit the husband's rights to claim in these assets. It is true that in most provinces the old presumption of advancement or gift from husband to a wife has been replaced by the presumption of a resulting trust <u>but this does not mean that other evidence of an intention to make a gift may not be available</u>. Such evidence may exist in terms of statements made at the time of transfer or even an admission during the course of discovery prior to trial. It may be extremely difficult for a husband to rely on the doctrine of the resulting trust. In Miller v. Miller[62] a husband transferred property into his wife's name for purposes of tax planning but then sought to invoke the doctrine of the resulting trust under s. 11 of the Ontario Act. The Ontario Court of Appeal pointed out that the tax planning would

have been ineffective if the wife were a mere trustee or nominee and there was, therefore, evidence that a gift to the wife was intended. This reasoning was also followed by the Nova Scotia Court of Appeal in Mallia v. Mallia.[63] The husband's explanation for transferring property into his wife's name ("I wanted my wife to have full enjoyment of the lands as my wife ... I never thought in my wildest imagination that she was going to walk out of the door") was clearly inconsistent with his having retained an interest in the property in his wife's name.

It is true that in Moog v. Moog[64] Cromarty J. held that a husband, who had registered all the shares in one of his companies in the wife's name to provide the family with security if the husband's other ventures failed, had only given it to her as a trustee. Thus when the marriage broke down the husband was entitled to require reconveyance of the shares by the wife subject to $4,000,000 as compensation for the wife's contribution to the husband's $61,000,000 of non-family assets. However the question must be asked what would the husband's intention in relation to the "wife's company" have been if the marriage had not broken down but his other businesses had gone bankrupt? If his wife was bare trustee for him, his trustee in bankruptcy could have claimed the assets. Would that have accorded with the husband's intention? Can he say "I intend to transfer my shares to my wife outright if I go bankrupt but only as trustee if the marriage goes wrong?"

Even if the wife has no shares in her husband's business and takes no part in its operation it cannot be assumed a wife has no claim on the business. Often in order to raise capital a mortgage or collateral

security will have to be given. Does the fact of using a family asset as security for a husband's business give the wife a claim on the business? In Dziedic v. Dziedic[65] the Ontario High Court held that by permitting the residence to be mortgaged for business purposes, the wife contributed money or money's worth to the company and was thereby entitled to an interest in the company.

However where a wife contributes to a business by answering the phone, etc., at home, it cannot be assumed that the business has any value. In Arthur v. Arthur[66] stated that the fruits of the wife's labours did not result in the creation of a business sset of any value that could be measured. The wife, apparently, takes the risk in such circumstances. However, the husband may take the risk of tax deductions backfiring in his face. In Page v. Page[67] the wife drew a salary of $10,000-$15,000 p.a. She frequently went with her husband on business trips paid for by the company ostensibly to promote the company,s business. The company claimed this was a legitimate expense. Several of the trips were overseas. When the marriage broke down she claimed a share in the husband's business by virtue of her contribution to it or improvement of it. Note what Lerner, J. said:

> The husband is on the horns of a dilemma. Either the wife's contribution to the business warranted her beingpaid these sums, or these payments were a means of reducing the company's taxable income in order to put it in lower tax brackets by creating an expense which did not exist. It is axiomatic that, prima facie, legitimate motives are to be imputed and consequently, since there was no evidence adduced otherwise, the Court must assume that she earned her salary and had a share in developing this corporation.

When the case reached the Court of Appeal the decision was affirmed.[108]

In Best v. Best[68] the fact that a hobby farm in the husband's name had never made a profit was a factor, together with the farm's healthy environment for rearing a family, used to justify its classification as a matrimonial rather than a business asset. Although the point is not completely clear in the text of the judgment, one may surmise that the tax deductions claimed were the maximum that the law allowed and but for the tax deduction against farm income the expenses might not have been so attractive to the husband. It may well be that the mere fact of the legitimacy of a business expense for tax purposes does not follow over into matrimonial law for the purpose of establishing it is a business asset. Certainly in Best the tax authorities had treated the farm as a 'hobby farm' for the purpose of the Income Tax Act.

Since the recent repeal of s. 74(3) of the Income Tax Act, a common way of income splitting is to pay the non-owning spouse a salary for working in the owning spouse's business. This course too can be fraught with danger since the courts have treated a spouse employee more generously than other employees for the purpose of establishing an interest in her husband's business. This is true even where the spouse has been paid the union rate for the job.[69]

9. MATRIMONIAL OR SHAREABLE ASSETS**

The critical question is which assets are normally subject to equal division between the spouses. In some ways the broadest definition is that in Nova Scotia and Saskatchewan since virtually all property including

property owned prior to marriage is a matrimonial asset.[70] In Nova Scotia an exception is made if it comes within a narrow list of exclusions such as gifts, inheritances or business assets.[71] In Nova Scotia even matters coming within these categories can apparently get transformed into matrimonial assets by use for family purposes or apparently even the promise of use for family purposes.[72] Since pensions and R.R.S.P.'s have been held to be outside the definition of business assets, as has an apartment building currently let for profit but ultimately intended for use as a means of providing for retirement and thus analogized by the court to a pension, one might question what is left of business assets in Nova Scotia.[73] Equally the exclusion of monies paid under an insurance policy from the definition of matrimonial assets has been restricted to only apply to personal injury policies[74] but not usually to life insurance or annuity policies.[75] In Saskatchewan virtually everything is a family asset, to be presumptively equally shared unless this would be inequitable according to a list of 17 statutory criteria. The main exceptions are personal injury awards, and property acquired after a decree nisi of divorce. The fair market value at marriage of assets owned by a spouse at marriage and brought into it is, however, subtracted from the division without allowance for inflation, and this and the lack of an exception for property acquired after separation, was recently investigated by the Saskatchewan Law Reform Commission.[76] The increase in value of Saskatchewan farmland from $37 per acre in 1961 to $292 per acre in 1981 meant that in many cases of longer marriages the importance of subtracting the value of a farm brought into the marriage from the shareable assets was totally eroded. The cost of

buying out the wife's share of the paper increase in value of the farm could threaten its economic viability. This is particularly true in times of high interest rates. In Alberta the regime seems to catch all assets whether owned by the parties prior to or after the marriage, minus the market value at the time of acquisition or marriage, whichever is later, of gifts from third parties, inheritances, property owned prior to the marriage and certain types of insurance or tort awards.[77] This approach may tend to erode the base value of excluded property since any increase in value whether real or only inflationary is shareable unless the court uses its discretion to discount increases in the value of shareable assets after separation.[78] In British Columbia family assets ordinarily used by a spouse or their children for family purposes are shareable. Business assets are not normally shareable unless the non-owning spouse has made a direct or indirect contribution to its acquisition or operation. Indirect contribution, however, is widely defined by the statute. The usual provisions for peeking behind the corporate veil exist, and most notably in Rutherford v. Rutherford[79] pension rights were held to be shareable, though the usual problems of valuation and distribution mentioned below are encountered. In St. Germain[80] the Ontario Court of Appeal held that pension rights were not normally within the definition of family assets available for equal division. However, subsequent caselaw suggests that the exclusion of pensions from family assets may be relevant to an unequal division of family assets under the court's discretion to prevent inequitable results.[81] Legislative reform was, however, promised prior to Mr. McMurtry's departure from politics for a diplomatic career. In

Manitoba all assets other than those acquired (i) after separation, (ii) whilst unmarried unless acquired in contemplation of marriage, (iii) certain gifts, trust benefits, or inheritances, (iv) damage awards for personal injuries or (v) dealt with by spousal agreement, are shareable. The increase in value of excluded assets during cohabitation may nevertheless be shareable, and the right to share in life insurance, annuity policies and pension schemes is expressly provided for by statute.[82]

9. PENSIONS AND HOW TO VALUE THEM

Treatment of Pensions Outside Nova Scotia

When it comes to valuing pensions in other provinces the approach generally seems to be one of giving wives a share in their husband's pension but postponing the wife's right to collect her share until the earliest date at which the husband can retire. By this stage the various contingencies mentioned later will have resolved themselves. If the husband continues to work after he has a right to a pension he must compensate his wife. Alternatively if the husband wishes to buy out the wife's right to his pension earlier, he may be given this option. This desire by courts for a "clean break" is a feature of Fisher v. Fisher[83] and the Saskatchewan Court of Appeal's substitution in Tataryn[84] of a lump sum payment of $25,000 in lieu of sharing the pension payments in the future between husband and wife. Before the appropriate lump sum can be calculated it is important that accurate evidence of the contingencies and assumptions made in the actuarial calculations be led.[85] Production of

such evidence is likely to be expensive. In simple terms[86] calculation of the respective interests in the pension is done by finding what was the proportion of the years payment to the pension made during cohabitation to the total years of payment to the plan to acquire the pension.

e.g. $\frac{20}{40}$ years of marriage
He has years of pension service

Thus the wife gets a quarter of the pension. An alternative approach is to value the employee contributions to the plan during cohabitation plus an estimated rate of interest.[87] In many cases, however, there is no very direct relationship between the amount of contributions and the amount of benefits payable.[87] Equally, statutory provisions[87] may preclude the sale or pledge of pension rights so as to make a market value of such rights impossible and it may not be clear whether the spouse has enough years of pensionable employment to have a "vested" right to the pension at the time of marital breakdown. The May 1985 Budget proposals to encourage earlier vesting of private pensions may help resolve some of these problems.

In order to deal with contingencies such as (i) whether the husband's right to his employer's contributions will 'vest', and (ii) whether he will survive to retirement age, the element of guesswork can be taken out of the calculation by conferring current rights on the wife in her husband's pension but postponing the right to collection until the earliest date at which the husband can retire has been reached. By this time the various contingencies will have resolved themselves, though if the husband elected not to retire he has to compensate his wife.[90] This, however, as has been mentioned, is in some cases in conflict with the desire of the courts and,

no doubt, the parties, to have a "clean break" at the time of divorce so that the parties can go their separate ways after divorce.

In Nova Scotia

Initially in Ryan v. Ryan,[91] Hallett J. wondered whether contractual rights under a pension were within the definition of property as a matrimonial asset within the Act. However, this argument is no longer tenable after the decision in Lawrence v. Lawrence and the traditional definition of property rights may have been overtaken by the concept of the 'new property'.[92] Lawrence acknowledged the problem of valuing assets but shed no light on how to go about it. Several approaches are possible and each has underlying assumptions and has problems associated with it.

a) Cash on the table. Under this approach, usually only appropriate where both the employer's and employee's contributions have vested and can be withdrawn from the fund, the moneys can be divided between the husband and the wife. Of course, if the effect of the totality of the court's orders, including those for lump sum maintenance, is to force the withdrawal of pension funds then a tax obligation occurs. The failure of the Court of Appeal in Lawrence v. Lawrence to recognize this left the husband with a negative net worth. Moreover, if the husband cannot withdraw the funds in the pension it is difficult to regard them as cash on the table.

b) Capitalised value. In some cases, e.g. Bedgood v. Bedgood[93] the argument has been made that the value to the husband of his future pension far exceeds its cash surrender value. Counsel will argue that in order to produce (on a reducing fund basis) an income equal to 70% of the husband's

best three or five years earnings a huge capital sum would be necessary.[94] Various assumptions have to go into such a calculation involving (i) that the employer will stay in business,[95] (ii) that the employee will remain in his present employment until retirement age, and (iii) that he will survive to retirement age. Given those assumptions, it will not be difficult to produce a capitalised value of the pension well in excess of $250,000 and to make an agreement that the wife is entitled to the matrimonial home outright and perhaps other assets. Such a division would, however, leave the husband asset poor in terms of available current assets and the wife would be current asset rich. Moreover, it assumes a number of things which may not necessarily occur. Giving the wife a present right in her husband's pension, is complex, contrary to the 'clean break' theory and raises questions of how this can best be done under the court's powers to redistribute property.

c) A factor to be taken into account in making unequal division. There is no denying that the security of the occupation pension leaves a husband in most cases with a better financial future than his wife. Another approach is to take the pension into account as a factor which might lead to an unequal division of the matrimonial assets,[96] or, less convincingly, in making an award of maintenance.[97] This may well have been in the mind of Hallett, J. when he stated in Mosher v. Mosher:[98]

> "A pension is worth very much more in reality than any amount that could be obtained by a contributor withdrawing his contributions even if he could withdraw the whole amount. In a sense to talk of his having an asset that has a dollar figure the equivalent to what he could withdraw is rather illusionary because it is fairly obvious in cases such as this it would be

> unthinkable for Mr. Mosher to withdraw his contributions even if he could withdraw all of them or to the extent that he could."

Before discussing this statement further it is important to place the comments in context. Mr. Mosher was in the Fire Service and was about 45. He had a senior position and seemed unlikely to change his job or to lose it. His pension contributions plus interest were worth $24,250.00 and he could take those if he ever left the Fire Service except for those made after January 1, 1977, which were required to be held back under s. 22 of the Nova Scotia Pensions Benefits Act. The position with regard to the employee's contributions is not disclosed. Mr Justice Hallett decided that although the pension was a matrimonial asset he ought not to put a firm value on the pension but it should be regarded as a factor to be looked at in the division of assets. One wonders, however, if a 'balance sheet approach' does not require some attempt (however speculative) to put a value on the pension. It is also true that in the Mosher case that the down payment on the home, a number of improvements and the car were paid by Mrs. Mosher from gifts and inheritances and that a case for unequal division was established. The unequal division ordered by Hallett J. left the wife with the equity in the home worth $63,000 less an 8% mortgage in favour of the husband worth $10,000 redeemable three years later, plus R.R.S.P.'s and furnishings, etc., worth approximately $8,000. The husband kept the car subject to a loan (probably almost equal to its value), the mortgage and his pension and occupational life insurance. Hallett J. stated that while the division appeared very much in the wife's favour this was not so much so on closer scrutiny. In 11 years time at age 56 Mr.

Mosher would have the chance of early retirement or, if he continued to work until mandatory retirement at 60, he would have his pension based on 70% of the average of his last 5 year's salary. Herein lies the problem. Even if the pension entitlement arising during marriage is a matrimonial asset, much of the husband's pension value will be attributable to his last 15 years service and contributions which are post separation. This is so even admitting that there is a very precise relationship between contributions into a pension scheme and entitlements. On the other hand the wife's loss of a spouse's entitlement in her husband's pension under s. 13(1) is a factor that the court can legitimately take into account in ordering an unequal division of assets. However, if a wife is able to build up any occupational pension entitlement as a result of contributions made after separation arising from the employment these would not be shareable.[99]

It is submitted that an effort should be made to put some sort of present cash value on the pension entitlement. It may be more appropriate to follow the example of Hallett, J. in MacGregor v. MacGregor[100] and Nunn J. in Tkach v. Tkach[101] and value the amount as the cash surrender value less the tax payable on withdrawal. It does seem that something like a pension can only be properly taken into account under the sections governing the courts' discretion to order unequal division if some attempt has been made to gauge its size. It is submitted that the present vesting in a wife of rights in her husband's pension but postponing her right to collect is both unduly complex and contrary to the 'clean break' principle. Moreover McLeod[102] cautions against courts (a) giving a wife a

share in a pension and (b) making an order for a wife's maintenance extending beyond the husband's retirement date. Upon retirement the husband's income will be dependent on his pension and if the wife has already been awarded an interest in it as a capital asset, should she also be able to obtain an interest in it as an ongoing maintenance obligation?

Finally, in passing, it will be noted that although Canada Pension Plan payments can be split on divorce, a recent case suggests that this cannot be done if the parties have apparently reached a full settlement of matrimonial property matters which does not except the Canadian Pension rights from its application.[103] However, the C.P.P. rights really only operate well for a wife where the couple marry at 18 and divorce at age 65 less one day. The split only divides payments made during the marriage.[104]

10. MATRIMONIAL DEBTS

Although the Act makes no distinction between matrimonial and other debts and although s. 13 does not provide expressly for the division, Hart J.A. had stated in Lawrence v. Lawrence[105] that:

> "If substantial debts were borne by one spouse for the benefit of the whole family it would be unfair to divide assets without providing for the obligations of the matrimonial unit."

It is presumably a combination of this philosophy and s. 13(b) of the Nova Scotia debts "the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred" that leads to the use of the equity in the matrimonial home rather than market value as the basis of valuation.

Apart from Lawrence, the two recent cases which have given the most attention to matrimonial debts are the recent decision of Hallett, J. in Arthur v. Arthur[106] and Pennell, J. in Silver v. Silver.[107] In Arthur, Hallett J. ordered an unequal division of the matrimonial assets ($39,000 resulting from the sale of the matrimonial home) because the husband incurred a number of debts by taking money out of his business in an attempt to prevent a judgment being obtained against the husband's part of the joint interest in the matrimonial home. The reduced income of the family arising from the rearranged family and business financial affairs had led to a number of debts accumulating in respect of family expenses, oil bills, Chargex, etc. In addition after separation the wife incurred debts of $3,600 in an attempt to provide for her children and her need to upgrade her education if she was to support them.

In Silver the situation was broadly similar. The parties had lived beyond their means and the husband, a dentist had in consequence become indebted to both his suppliers and Revenue Canada.

Hallett J.'s approach was not automatically to deduct matrimonial debts from the matrimonial assets on a dollar for dollar basis. Rather it was a factor that a court could take into consideration in the exercise of its discretion under s. 13. The husband's allowing debts to accumulate without cause or having taken over debts, e.g. mortgage repayments in lieu of maintenance would not necessarily warrant the court's discretion being exercised in his favour. Moreover as a general rule:

> "Ordinary household debts such as Chargex, Simpsons, Eatons, Canadian Tire, etc., incurred for necessaries for the family are paid by the husband in the so-called

> "traditional marriage" where the husband works and the wife stays at home. It would not be unfair that he continue to be responsible for these debts after separation. Where both spouses work, as a general rule there should probably be a sharing of ordinary household bills outstanding at the date of separation. Each case must be decided on its own facts considering the circumstances that gave rise to the debts or liabilities of the respective spouses.
>
> What of debts incurred after separation? Generally speaking, these debts should not be considered in determining if it would be unfair to simply divide assets equally. However, there are exceptions. For example, if the spouse having custody of the children while awaiting the hearing of the divorce proceedings (including an application for division of property under the Matrimonial Property Act) was not receiving adequate maintenance from the non-custodial spouse and had to borrow funds or incur debts to maintain the children, then it would seem obvious that it would be unfair to ignore this factor."

The underlying test is (a) fairness and (b) asking whether the debts were ordinary ones. This would enable a court to consider a possible difference between debts arising from the running expenses of the household,[108] and debts arising from occasional expenditures to buy capital items, e.g. expensive appliances to be paid for over an extended period of time.

In the light of this approach to matrimonial and other debts Hallett J. deducted certain debts in the sum of $10,000 from the $39,000 proceeds of sale of the matrimonial home. The balance of $29,000 was split equally between the parties.

In Silver, Pennell J. held that the wife should, in the division of family assets be obliged to share the burden of those liabilities: "who shares the fruit should share the burden of reaping it". An unequal division of family assets was ordered. The approach in Silver and Arthur

contrasts with the view of McLachlin J. in Hauptman v. Hauptman[109] that a husband's tax liability was not a family asset.

11. TRACING

The problem sometimes arises about assets that have changed their classification from business assets to matrimonial assets or vice versa. In Bregman v. Bregman,[110] the Ontario Courts were willing to treat as a family asset a Picasso painting brought home from the husband's office prior to the breakdown of the marriage. It is less clear what they would have done if the transfer had been from the home to the office, though logically the classification of an asset should be made at the time of proceedings. In MacGregor v. MacGregor,[111] Hallett, J. dealt with a situation in which the husband acquired a 25% interest in a company incorporated to acquire a few small apartment buildings. To fund his contribution of $7,000, he used an inheritance of $5,300 plus $1,700 from a joint bank account. At a later date, he advanced a further $600 from the spouses joint account. Hallett J. seems to have treated the $2,300 drawn from the joint account as matrimonial assets and traced it into the company giving the wife a 7.5% share in the company. The company was classified as a matrimonial asset. The result is not unreasonable but it is suggested a more reasonable approach would be to treat the company as a business asset and, as the wife's funds had been used to purchase a business asset, she should have a corresponding share in the company as her business asset. In passing I should note that whether property purchased with funds drawn from a joint account belongs to the spouse in whose name legal title is taken or

to both spouses depends on the intention of the spouses in relation to the joint account.[112] Even if, on this analysis, the husband were taken to be the sole legal owner of a business asset it would not preclude the court from invoking its discretionary points to redress any unfairness.

12. CONDUCT

The Court of Appeal decision in Brown v. Brown[113] led an increased reliance on conduct as a factor to be taken into account in the exercise of the court's discretion, withstanding that conduct was no where mentioned in the statute. In Briggs v. Briggs[114] Hallett J. said:

> "With respect to subsection (i) which provides "the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent", I am satisfied the contribution referred to in that subsection is more than just a financial contribution; I am satisfied this is implied from the preamble to the Matrimonial Property Act. In this case, the respondent walked away from his responsibility as a husband and a father in January, 1983, after a period of several years during which he was seeing his girl friend and, as a consequence, paying less and less attention to his family."

It is respectfully submitted that the conduct of which Hallett J. was talking was conduct that could be seen to have a casual relationship to the matrimonial assets. In the subsequent case of MacGregor v. MacGregor[115] Hallett J. clarified the significance of Briggs when he said that in Briggs the husband's affair prior to separation had resulted in his contribution to the family welfare being substantially below par. In MacGregor there was no evidence that

> "the respondent's contribution to the welfare of the family and the marriage was any less than that of the

> petitioner as a result of the relationship with Mrs. Tyson. Therefore, the respondent's conduct does not demand an unequal division pursuant to s. 13 of the Matrimonial Property Act."

The view that the Matrimonial Property Act was not intended to lead to long 3 day trials spent raking over the dirty linen of the marriage is supported by Devenney v. Devenney.[116] Such irrelevant considerations may be relevant to the questions of costs which are dealt with later in this paper. Burchell J. stated:

> "My view is that Mr. Justice Cooper in Brown v. Brown did not intend to import into the Matrimonial Property Act an absolute concept of marital fault. Instead I think it must be taken from his reference to Connelly v. Connelly that any consideration of conduct under the Matrimonial Property Act must be in accordance with modern precepts concerning marital fault; that is to say, the precepts expounded by Chief Justice MacKeigan in the Connelly decision.
>
> The present case is an example of the kind of abuse that will result from any other approach. Seeking to reduce his wife's entitlement, the respondent has done his best to blacken her character and has paraded before the court an ugly array of unsubstantiated doubts and suspicions stretching back to the earliest days of the marriage. Naturally there was a response on her part and between them they have continued, all to no purpose, a most unpleasant public display of dirty laundry. . . . . instances in which misconduct can be the sole basis for an unequal division under the Matrimonial Property Act must be very rare and exceptional and attempts to use allegations of misconduct as a pretext for needlessly vilifying the other spouse in court should, I think, be resisted by deterrent awards of costs.

This appears to be the position in Alberta.[116] In British Columbia misconduct does not appear to be relevant.[117]

13. COSTS

In Lawrence v. Lawrence[118] Hart J.A. suggested that the time might have come to treat costs of matrimonial proceedings as one of the liabilities of matrimonial property and to arrange any division of matrimonial assets so as to allow each party to pay equally towards the whole amount of the costs. R. 67.06 of the Procedure Rules supplements this by allowing offers to settle and under R. 67.06(4) & (5) the court can consider such offers and their rejection in determining the appropriate costs. It is not, however, clear to what extent in practice formal offers are being made under R. 67. Framing an offer covering all aspects of matters in dispute between the parties is not easy and it may be instructive to hear from judges in other jurisdictions about how such rules can best be used. Nor is it clear even when a plaintiff's oral testimony reveals that she is only asking for a "reasonable or 50%:50% division", when this position was adopted. It is not unusual for a plaintiff to adopt a moderate position at the end of trial. In these cases where it seems likely that for much of the negotiations the wife was asking for an unequal division of everything and the husband was trying to depict everything as a business asset, it may be appropriate to treat the costs as an incident of the ownership of matrimonial assets and to share them.[119] What is also clear is that the mere fact that a petitioning wife gets a divorce and an equal division of matrimonial assets is no guarantee of her entitlement to costs when her position throughout has been that she is entitled to an unequal division.

In Best v. Best,[120] although the husband's claim that the farm was a business asset failed the husband won on the question of costs. His offer in dollar terms (even accepting that the farm was, as the court eventually held, a matrimonial asset) exceeded the division ordered by the courts and became relevant to the award of costs. In DeVenney v. DeVenney[121] the court found that the plaintiff's unnecessary prolongation of the trial by raising the issue of conduct (which could be proved to be relevant on the available evidence) also became relevant to costs. It will be interesting to speculate on how a client's costs will be taxed if a court holds that a substantial amount of a client's costs were only incurred as a result of a lawyer mistakenly advising his client that irrelevant issues should be pursued. In Devenney[122] the wife's award was more favourable to her than the pre-trial offers. Costs were fixed in the amount of $3,000, subject to a set off of the husband's costs on his counter-petition until the wife's adultery was admitted. Counsel argued that taxed party and party costs would have been approximately $2,000 and that an award of 1.5 times the normal costs would be appropriate by analogy with C.P.R. 41A (although that rule was not in force at the time of the offer).

FOOTNOTES

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1. See Divorce: Law and the Family in Canada. Stats. Canada 1983, p. 60.

2. Benjamin Franklin letter to M. Leroy (1787).

3. E.g., A Bissett-Johnson & W. Holland, eds. Matrimonial Property Law in Canada, Carswells, this deals with all provinces including Quebec, or 'The Law and Practice under the Family Law Reform Act of Ontario', MacDonald, Weiler, Mesbur, Perkins (Ontario only).

4. 25 R.F.L. (2d) 130 (N.S.C.A.) annotated in 26 R.F.L. (2d) 200.

5. Maroukis v. Maroukis (1981), 24 R.F.L. (2d) 661 (Ont. C.A.) affirmed by the Supreme Court of Canada. Judgment delivered 17th Sept. 1984, unreported. In B.C. the time at which the statutory tenancy in common arises may be earlier from the time of making the separation agreement or the making of the other court orders specified in s. 43. See some of the cases on death and the B.C. Act e.g., Fong v. Fong (1983), 34 R.F.L. (2d) 337 (B.C.C.A.) reversing in part 28 R.F.L. (2d) 34 and Martens v. Surrey Credit Union 24 R.F.L. (2d) 462 (B.C.S.C.) where the refusal of the Credit Union to allow the husband to withdraw his share of a frozen joint bank account was held to be a breach of contract. Dicta of Muroe, J. suggests that though the mere separation of the parties was insufficient to bring s. 43 of the B.C. Act into operation a certificate of irreconcilable difference or a separation agreement might be. See also the B.C. Chapter in Bissett-Johnson and Holland, op. cit. esp. B.C. 8 to 12. See also Sager v. Bradley (1984), 63 N.S.R. (2d) 386 (N.S.C.A.).

6. In Palmer v. Mulligan, Ont. Weekly Lawyer, May 3rd 1985, p.6, the Quebec Court of Appeal would have been prepared to apply the Saskatchewan Matrimonial Property Act to a couple who had moved from Saskatchewan to Montreal before marital breakdown, had the parties not acquired a Quebec domicil prior to the enactment of the Saskatchewan legislation. The time of 'vesting' of the rights under the Saskatchewan Act was not discussed however. It may be that it is important that the claim in Palmer involved the matrimonial home to which separate rules apply. On the whole topic of mutability or immutability of matrimonial property rights see J.G. McLeon 'Conflicts of Laws" 1983, p. 381.

7. Deloitte Haskins & Sells Ltd. v. Graham 32 R.F.L. (2d) 356 (Alta. Q.B.).

8. See ante f.n. 5.

9. On whether severing of joint tenancies to tenancies in common is a disposition forbidden by the legislation to see Kozub v. Timko (1984), 39 R.F.L. (2d) 146 (Ont. C.A.) and Mills v. Andrewes (1983), 31 R.F.L. (2d) (N.S.C.C.) noted 32 R.F.L. (2d) 344; compare with Lamanna v. Lamanna (1983), 32 R.F.L. (2d) 386. Note also the special provisions in s. 6 of the Newfoundland Act creating a statutory joint tenancy in the matrimonial home.

10. For a more detailed treatment see Matrimonial Property in Canada (Bissett-Johnson & Holland eds.) Carswell. See also the Appendix at the end of this paper for a table showing the basis of each Provinces Act.

11. Some partners in accountancy or legal practices may want to get their spouses, as a minimum, to make a contract renouncing any claims to partnership property. Though business assets are not normally shared in a number of provinces, e.g., Ontario, the Court has a residuary power to make orders binding on property not normally shareable in order to prevent an inequitable result.

12. E.g., see the Nova Scotia Act s. 29. The Nova Scotia Act is ambiguous on whether the inequity or unfairness has to be demonstrated at the time of making the contract or at the time of applying to the court to set the contract aside.

13. E.g., Fraser v. Vincent (1981), 10 E.T.R. 205 (N.S.S.C.); Re Levy (1981), 12 E.T.R. 133 (N.S.S.C.).

14. See J.G. McLeod 'The Conflict of Laws', Carswells 1983, 381, f.n. 72.

15. (1980), 15 R.F.L. (2d) 115 (Ont. Co. Ct.).

16. (1981), 32 O.R. (2d) 146 affirmed 35 R.F.L. (2d) 363 (Ont. C.A.). See also Roome v. Roome 42 R.F.L. (2d) 337 (P.E.I.S.C.).

17. [1900] A.C. 21 (H.L.) see also Beaudoin v. Trudel, [1937] 1 D.L.R. 216 (Ont. C.A.).

18. See B.C. Family Relations Act s. 1(c) exception and the Ontario Family Law Reform Act which has different definitions of "spouse" in Part I and Part II.

19. Contrast the provisions of s. 35 and 36 of the New Brunswick Marital Property Act, s. 32 and 34 of the Newfoundland Act and s. 52 and 53 of the Ontario Famly Law Reform Act, which clearly apply to unmarried persons, with s. 23 and 24 of the Nova Scotia Act which only seem to apply to those who are married or about to marry.

20. See Pettkus v. Becker, [1980] S.C.R. 834; Kiss v. Palachik (1983), 47 N.R. 148 (S.C.C.). See also the Quebec second cousin of the constructive trust: Beaudoin-Daigneault v. Richard (1984), 37 R.F.L. (2d) 225 (S.C.C.).

21. See for example Nova Scotia s. 12(1)(d); New Brunswick s. 4, Newfoundland s. 19(1)(d), Saskatchewan s. 2(iii). Manitoba s. 12 (as explained by Greenberg in Bissett-Johnson and Holland op. cit. p. 51).

22. See for example the British Columbia decision in Fong v. Fong 25 R.F.L. (2d) 349 (B.C.C.A.) where the wife appears to have got a certificate of irreconcilability from the court enroute to hospital to die of cancer. This case emphasizes the legal importance of a dying spouse detouring enroute to hospital to get a certificate of irreconcilable difference thus allowing the waging matrimonial property disputes to proceed from beyond the grave.

23. Alberta s. 11(2).

24. Section 18(1) Manitoba.

25. See New Brunswick s. 5, Saskatchewan s. 30.

26. See Re Morris Estate (1982), 41 Nfld. and P.E.I.R. 320.

27. Sagar v. Bradley (1984), 63 N.S.R. (2d) 386 (N.S.C.A.).

28. Section 19(2) of the Newfoundland Act is to similar effect.

29. S. 6(2).

30. New Brunswick s. 4(2).

31. See further Bowker W. 'Homestead Laws in the Four Western Provinces' in Bissett-Johnson and Holland op. cit. at I-43.

32. Haskins 'The Development of Common Law Dower' (1948-9), 62 Har. L. Rev. 42.

33. See R.S.B.C. 1979, c. 173, s. 3.

34. S. 6(2) Nfld. Mat. Property Act.

35. See for example Ontario Family Law Reform Act, s. 40.

36. Ibid., s. 42.

37. Re Mauro (1983), 41 O.R. (2d) 157 (Ont. H.C.).

38. Sherwood v. Sherwood (1982), 29 R.F.L. (2d) 374 (N.S.C.A.). See also Malhotra v. Malhotra et al. 37 R.F.L. 310 (B.C.C.A.). Prior to a trial involving an application to divide family assets a judgment creditor had registered a judgment against the husband interest in the matrimonial home (then held in joint names). The trial judgment held the husband's interest in the home was only worth $100 in view of the husband's past failure to pay maintenance, the amount of arrears and the husband's lack of cooperation in providing financial information. On appeal, the British Columbia Court of Appeal held that the court could only deal with a spouse's equity in family assets and could not ignore registered change against the real estate and a wife could not acquire an interest greater than her husband held at the relevant time. The husband's arrears could however be used as the basis of an inequal 75 to 25 division of the family assets.

39. (1982), 29 R.F.L. (2d) 374 (Ont. H.C.).

40. Ontario Lawyers Weekly, March 15th 1985. (O.L.W. full text 419-921).

41. Flynn v. Graves oral decision of MacIntosh, J. (N.S.S.C.) not yet reported. The tenants were given time to find suitable alternative accommodation.

42. (1982), 31 R.F.L. (2d) 47 (N.S.S.C.) noted 32 R.F.L. (2d) 344. The decision may be contrasted with Lamanna v. Lamanna (1983), 32 R.F.L. (2d) 386 (Ont. H.C.) though that decision seems unlikely to have survived after Kozub v. Timko (1984), 39 R.F.L. (2d) 146 (Ont. C.A.).

43. Sagar v. Bradley (1984), 63 N.S.R. (2d) 386 (N.S.C.A.) cf. the strange Newfoundland decision in Re Morris (1982), 41 Nfld. & P.E.I.R. 321 which may have the effect of undermining the statutory joint tenancy in the matrimonial home under Newfoundland legislation.

44. 62 N.S.R. (2d) 351 (N.S.S.C.).

45. Such a course of action opens up the spectre of a fraudulent preference or conveyance and an attempt to have the disposition set aside. See Re Bishop 45 C.B.R. (N.S.) 94 (N.S.S.C.), Millwork & Building Supplies v. Marchione 53 C.B.R. (N.S.) 47 (Ont. H.C.) and Re Whetstone 52 C.B.R. (N.S.) 280 (Ont. S.C.).

46. Thistle v. Thistle 42 N.S.R. (2d) 430 at 441, para. 30 (N.S.S.C.).

47. MacKeigan C.J.'s own word in Connelly v. Connelly (1974), 16 R.F.L. 171 (N.S.C.A.).

48. See for example Swift v. Swift 1201-17257, 24th July 1979, unreported (N.S.S.C.) quoted by Bissett-Johnson in Bissett-Johnson and Holland op. cit. N.S. 5.

49. See for example Currie v. Currie (1981), 21 R.F.L. (2d) 340; Partridge v. Partridge 7 N.S.L.N. 68; Ryan v. Ryan (1980), 43 N.S.R. (2d) 423.

50. (1984), 65 N.S.R. (2d) 113 (N.S.S.C.).

51. See Cicero v. C., (1978), 1 F.L.R.A.C. 49 (Ont. U.F.C.); Re Cipens (1978), 21 O.R. (2d) 134 (Ont. U.F.C.); Campbell v. Campbell (1978), 6 R.F.L. (2d) 392 (Ont. H.C.); De Ross v. De Ross (1980), 19 R.F.L. (2d) 359 (Ont. H.C.).

52. Sager v. Sager (1978), 1 F.L.R.A.C. 671 (Ont. H.C.); Goodwin v. G. (1979), 1 F.L.R.A.C. (Ont. H.C.).

53. Grime v. G. (1980), 16 R.F.L. (2d) 365.

54. Weindl v. W. (1981), 23 R.F.L. (2d) 14 (Ont. H.C.).; Toth v. T. (1980), 21 R.F.L. (2d) 74 (Ont. Co. Ct.).

55. E.g., s. 8 of the Ontario Act. A constructive trust may be defined as an interest that a spouse has in property in the legal name of the other spouse by virtue of a contribution in money or work to the acquisition or management of the property in circumstances in which it would be unreasonable to infer a gift of the money or monies worth. The most obvious difference between the equitable constructive trust and its statutory counterpart is that the latter only applies to business assets in which the spouse might not have a presumptive right to share. Some causal though not necessarily direct relationship between the contribution and the property acquired is necessary.

56. (1982), 45 N.R. 40 (S.C.C.).

57. Kiss v. Palachik (1983), 47 N.R. 148 (S.C.C.). An action brought against a deceased woman's estate on the basis of a constructive trust.

58. (1982), 27 R.F.L. (2d) 337 (Ont. C.A.). The first instance decision received late coverage in (1983), 37 R.F.L. (2d).

59. See Bissett-Johonson & Holland, op. cit. I-25.

60. Herman v. Smith 42 R.F.L. (2d) 154 (Alta. Q.B.). See McLeod's annotation to this case.

61. See for example Matrimonial Property Act N.S. s. 21, Alberta Act s. 36, N.B. s. 15, Nfld. s. 21, Ont. s. 11, P.E.I. s. 12, Sask. s. 50.

62. (1982), 29 R.F.L. (2d) 395 (Ont. C.A.).

63. (1983), 27 R.F.L. (2d) 318 (N.S.C.A.).

64. (1984), 37 R.F.L. (2d) 356 (Ont. H.C.).

65. (1978), 7 R.F.L. (2d) 337 (Ont. H.C.).

66. Unreported decision 1201-28515 February 27, 1985.

67. 1 F.L.R.A.C. 467 (Ont. H.C.) affirmed (1980), 31 O.R. (2d) 36 (Ont. C.A.).

68. 61 N.S.R. (2d) 400. On the relevance of the lack of profit compare the case with Wilson v. Wilson, unreported decision of Glube C.J. who treated a set of 4 flats which had never made a profit as a "business asset".

69. In Harwood v. Thomas (1980), 21 R.F.L. (2d) 1, affirmed 22 R.F.L. 2d 167 (N.S.C.A.), a wife who had done some minor work as a secretary treasurer of her husband's corporation, was awarded $1,000. The sum seems small until one looks at the negligible value of the corporation and the fact that it was in partial liquidation. In Mason v. Mason (1981), 23 R.F.L. (2d) 68 (N.S.C.A.) an appeal court allowed a wife $15,000 for her work as bookkeeper and vegetable packer in her husband's wholesale fruit and vegetable business. Although she had been paid small amounts for her work these were not thought to adequately compensate her for her work. Since the company was in a state of decline owing to the husband's illness by the time of trial, and was only worth about $24,000 this was a comparatively generous award. The court justified this by indicating that the husband's other holdings had increased during the relevant period and the wife was regarded as having helped to preserve his business when it might otherwise have diminished substantially in value. This same problem can present itself with professional people where a wife might be employed in the husband's business or given a share in the management company overseeing professional offices. The Courts have held that giving a wife a share in her husband's medical practice in which she worked is possible (Jackh v. Jackh (1981), 18 R.F.L. (2d) (B.C.S.C.), but giving a wife a share in her husband's legal business in which she worked would infringe provincial rules about engaging unqualified persons in the practice of law (Piters v. Piters (1980), 19 R.F.L. (2d) 217 (B.C.S.C.)). The distinction did not seem justifiable and McLeod argued (1981), 19 R.F.L. (2d) 22, convincingly that a personal claim to a compensation can be awarded in such cases, and was vindicated by the B.C. Court of Appeal's decision in Underhill v. U. (1983), 34 R.F.L. (2d) 419.

** For a chart of basic elements of each Province's legislation, see Appendix at end of paper.

70. Though in Saskatchewan a deduction for the value of property brought into the marriage is made, but no allowance is made for inflationary increases in value of such property. See the recent Supreme Court of

Canada decision in Farr v. Farr and J.G. McLeod's annotation of it (1984), 39 R.F.L. (2d) 1, striking down the Saskatchewan Court of Appeal's attempt to invent a "capital base theory" to increase the value of property brought into the marriage.

71. Section 4 of the N.S. Act. Use is not normally relevant in Nova Scotia unless otherwise exempted property is used for matrimonial purposes. The Ontario position is different. Several other provinces exempt gifts from third parties from sharing. E.g., Alberta s. 7(2), Nfld. s. 16(1)(b)(i).

72. See Rocquet v. Rocquet (1983), 1201-27504 decision December 19, 1983.

73. See Gaetz v. Gaetz 1201-27410 December 19, 1983. See further Hart J.A.'s comments in Lawrence v. Lawrence 25 R.F.L. (2d) 130 (N.S.C.A.).

> In my opinion entitlements to insurance pension and other similar benefits pursuant to contractual arrangements would not fall within the definition of business assets contained in the Act. They are not primarily held for the purpose of producing income or profit. They are in reality schemes for saving which divert present income to future use in times of peril or when the ability to earn income has passed.
>
> Nor would schemes, such as registered retirement savings plans, be business assets under the Act. Their primary purpose is to save funds and lessen the income tax which would otherwise be payable on those funds.
>
> It seems to me therefore that the only assets that should be classified as business assets are ones that are purposely held or used for the production of income or profit. Thus an apartment house would be a business asset, wheras a piece of land held in the hope of gain would be a matrimonial asset. A car used in business would be a business asset and a car used for family purposes would be a matrimonial asset. Money invested in savings certificates, stocks or bonds would be business, whereas money resting in current account or accounts used for household purposes would be matrimonial. Works of art would be matrimonial whereas an operating farm would be a business asset. It is not enough to say that some gain or benefit may accrue in the future from the asset, but rather it must be said that it is working in a commercial, business or investment way for the production of income or profit.

This test appears to hint at a distinction between income producing property on the one hand and capital gain or a hedge against inflation on the other.

74. See Lawrence v. Lawrence 25 R.F.L. (2d) 130, annotation 26 R.F.L. (2d) 200. Insurance monies paid to replace matrimonial assets is itself a matrimonial asset. Nova Scotia Act s. 4(2).

75. See ante f.n. 71.

76. A summary of the Saskatchewan Law Reform Commission's tentative proposals for reform of Matrimonial Property Act (Sept. 1984) is as follows:

    1. The presumption of equal sharing of matrimonial property should be retained.

    2. A substantial failure by a spouse to make the contribution that would ordinarily be expected of him or her in the circumstances of the marriage should be a consideration on which a court may base an unequal division; but otherwise the court ought not attempt to compare the relative contributions of the spouses.

    3. Property brought into marriage by a spouse should ordinarily be exempt from division, including any increase in value unrelated to the efforts of the spouses.

    4. Gifts and inheritances received by a spouse after marriage should be exempt from division unless it canbe shown that a gift or inheritance was intended for both spouses.

    5. The conduct of the spouses toward one another during marriage should not be a factor in dividing matrimonial property.

    6. The material date for dividing matrimonial property should ordinarily be the date the spouses separated, with appropriate adjustments made for the use and appreciation of the property from that date until the date of the court order.

    7. The courts should be directed to preserve economically viable farms and businesses, where it is fair and practical to do so, by ordering payments to be made over time or otherwise deferring distribution.

    8. Pensions should be expressly included as matrimonial property, and the court should be empowered to impose atrust on or vest an interest in a pension plan, or divide the value of an interest in a pension plan according to a prescribed formula.

9. The Homesteads Act should be repealed, but the traditional homesteads concept should be modernized and integrated into Part I of The Matrimonial Property Act.

Other changes include new provisions respecting conflict of laws, dissipation, applications after death of a spouse, and contracting out of the Act.

77. See for example Alberta s. 7.

78. As in Hopwood v. Hopwood (184), 37 R.F.L. (2d) 81 (Alta. Q.B.).

79. 23 R.F.L. (2d) 337 (B.C.C.A.).

80. 14 R.F.L. (2d) 186 (Ont. C.A.).

81. Laflamme v. Laflamme (1984), 40 R.F.L. (2d) 366. According to McLeod's annotation to this case in the Reports of Family Law the judicial analysis of White J. may have destroyed any distinction between family and non-family assets. Although McLeod thinks the case is contrary to the weight of authority, it is too soon to say whether the relevance of the case is all encompassing or restricted to its own facts. Certainly the fact that the matrimonial home, a gift from the husband's father, was 'tied up' and not available for the usual division makes the case unusual. The husband had been given a mere life interest in the home so that the remainder could pass to the spouse's mentally disabled son in due course.

82. Manitoba Act s. 1(2).

83. (1983), 21 Sask. R. 235 (Sask. Q.B.).

84. (1984), 30 Sask. R. 282 (Sask. C.A.).

85. As the Court of Appeal observed in Tataryn v. Tataryn: (ibid. at 295)

> [I]t is not enough to have the evidence, alone, of the administrator of the pension plan (or someone else fully conversant with the scheme); his evidence is critical, but there must be more. Several sub-issues have to be addressed: life expectancy; pensionable age expectancy; continued employment expectancy; the prospects for the employer, including the provisions, if any, which have been made for the protection of the employer's [sic] pension in the event of the insolvency of the employer; present value, of the principal pension, as well as any death benefits; the ramifications of any other options available under the plan; tax implications; and the like. Otherwise it is

difficult, if not impossible, to make the distribution contemplated by the Act.

86. For more detail see Maclise and Stark's analysis of Rutherford in Bissett-Johnson & Holland's Matrimonial Property Law in Canada (B.C. 19 et seq.). Note, however, that in Hauptman v. Hauptman (1982), 32 B.C.L.R. 119 (B.C.S.C.), the date of separation was not used as the date of valuation but instead a later date was used to achieve a fairer result.

87. See Boychuk v. Boychuk (1981), 9 Sask R. 82 (Q.B.); Kaine v. Kaine (1983), 30 Sask R. (Q.B.).

88. See Tentative Proposals for Reform of the Matrimonial Property Act. Saskatchewan Law Reform Commission Sept. '84, p. 62.

89. E.g. see the Saskatchewan Pension Benefits Act, R.S.S. 1978, c. P-6 s. 19 though the rules would not catch a court order or an agreement made by the spouses under the Matrimonial Property Acts.

90. See for example Rutherford v. Rutherford, Re Fisher (1982), 31 R.F.L. (2d) 274 (Sask. Q.B.); Tataryn v. Tataryn (1982), 27 R.F.L. (2d) 283 (Sask. Q.B.); Topliss v. Topliss (1983), 23 Sask. R. 289.

91. (1981) 43 N.S.R. (2d) 423 at 435.

92. Mary Ann Glendon, 'The New Family and the New Property", Butterworths, Toronto, 1981.

93. (1982) 28 R.F.L. (2d) 113 (N.S.C.A.).

94. N.b. many of the best payments into the fund will result from contributions made after separation. Are these matrimonial assets within s. 4(g)?

95. The risk is presumably lower in the public sector - see Mosher v. Mosher post.

96. Conrad v. Conrad (1983), 34 R.F.L. (2d) 348 (N.S.T.D.).

97. This approach taken in some earlier Saskatchewan cases was criticised by the Saskatchewan Court of Appeal in Tataryn v. Tataryn (1984), 30 Sask. R. 282.

98. Unreported, 1201-29048, judgment given December 27, 1984.

99. This factor was not likely in Mosher owing to Mrs. Mosher's health.

100. (1984) 65 N.S.R. (2d) 113.

101. Tkach v. Tkach (N.S.S.C.) unreported decision October 15th, 1984; see also Devenney v. Devenney f.n. 74 post where the after tax values attaching to the pension involved a discount of 35% as a contingent tax deduction. The respondent who benefitted from the discount did not dispute that approach. See also Olexson v. Olexson (1983), 32 R.F.L. (2d) 408 (Sask. U.F.C.).

102. See McLeod's annotation to (1980), 18 R.F.L. (2d).

103. See Preece et al. v. Minister of National Health & Welfare C.C.H. Employment & Benefits Guide, para. 8, 914.

104. For more detail see Patricia Horsford "Division of Canada Pension Plan Credits on Termination of Marriage" 13 R.F.L. (2d) 257.

105. (1981), 47 N.S.R. (2d) 100 at 115 (N.S.C.A.).

106. 1201-28515 unreported decision February 27, 1985.

107. 41 R.F.L. (2d) 344 (Ont. H.C.).

108. See also Hauptman v. Hauptman (1982), 32 B.C.L.R. 119 (B.C.S.C.) where McLachlin L.J.S.C. held that it was part of the "family contract that the husband would pay the clothing, food, gasoline and hydro bills.

109. (1982), 32 B.C.L.R. 119 (B.C.S.C.).

110. 7 R.F.L. (2d) 201 (Ont. H.C.).

111. (1984), 65 N.S.R. (2d) 113.

112. Compare Jones v. Maynard, [1951] Ch. 572 with Re Bishop, [1965] Ch. 450. For a fuller discussion see Waters, 'Law of Trusts in Canada', 2nd ed., p. 333 et seq.

113. (1983), 35 R.F.L. (2d) 390 (N.S.C.A.).

114. (1984), 64 N.S.R. (2d) 40 (N.S.S.C.).

115. 65 N.S.R. (2d) 113.

116. See Lown's chapter in Bissett-Johnson & Holland op. cit.

117. See Tratch v. Tratch (1981), 30 B.C.L.R. 98 (B.C.S.C.) and Carpenter v. Carpenter (1983), 17 F.L.D. (B.C.C.A.).

118. (1981) 20 R.F.L. (2d) 414.

119. Lawrence v. Lawrence ante.

120. 61 N.S.R. (2d) 400.

121. Unreported decision of Burchell J. 1201-27203 dated February 8, 1985.

122. Oral decision, March 25th, 1985. As yet unreported.

OUTLINE SCHEME OF DIVISION OF ASSETS BY PROVINCE - QUEBEC EXCEPTED

ONTARIO, YUKON & P.E.I.
ON: "Family assets", i.e., a matrimonial home and property owned by the spouses, alone or jointly, which is ordinarily used or enjoyed by both spouses or by a child while spouses are residing together for shelter, transportation, education, recreational, social or aesthetic purposes; shares or an interest in a corporation, partnership or trust holding family assets; property that would be a family asset over which the spouse has power of appointment exercisable in favor of himself; and property disposed of by a spouse over which the spouse has the power to revoke the disposition or the power to consume or dispose of the property. Other assets may be divided if a contribution has been made by one spouse in money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of the property, or where there are circumstances that would render the result of a division of family assets inequitable. Assets not subject to division as family assets include that part of farm property other than the residence, property acquired after separation, or property which the spouses have agreed by domestic contract is not to be a family asset. Legislative change has been promised. P.E.I.: Same as Ontario, except that the net value of the equity of any property acquired by a spouse before marriage will not be included in family assets.

OTHER PROVINCES ON REVERSE

BRITISH COLUMBIA	ALBERTA	SASKATCHEWAN	MANITOBA	NEW BRUNSWICK	NOVA SCOTIA	NEWFOUNDLAND
Family assets used for family purposes are to be divided equally. Assets that would normally be family assets cannot be "hidden" behind the corporate veil. Pensions, R.R.S.P.'s, money in a savings institution are family assets. Business assets are not shareable unless the non-owning spouse has directly (or indirectly) contributed to the acquisition or management of the business. See the wide definition of indirect in s. 46(2).	All property owned by both spouses and each of them, minus the market value, at the later of the time of acquisition or time of marriage, of property acquired by gift from a third party, by inheritance, or before marriage is shareable, i.e., economic gains of the marriage made by spouses are shareable. Presumption of equal sharing unless this would be unjust or inequitable according to a list of statutory considerations.	Presumption of equal property acquired during the marriage. The value of property brought into the marriage is exempted from sharing at its value at the time of marriage. Special provisions apply to gifts from third parties prior to marriage, or inheritances before marriage not intended to benefit both spouses. Personal injury awards or payments and property acquired after divorce are exempt from division. The presumption of equal sharing can be displaced where a list of statutory factors apply and where equal sharing is unfair or inequitable. The Law Reform Commission of Saskatchewan has just made recommendations for change.	All assets acquired while spouses are married to and cohabiting with their partner are equally shareable unless the assets are statutorily exempted from sharing or subject to a different scheme of sharing. Principal exemptions are gifts, inheritances, etc., received from third parties unless intended to benefit both spouses, damage awards for personal injuries, joint property, property excluded by agreement, special rules apply to the division of commercial (i.e., non-family assets) and the court has a discretion to order uneven sharing according to a list of statutory considerations.	Marital property presumptively equally divided unless statutory criteria apply. Marital property includes property used by a spouse or their children for family purposes and property not used for family purposes but acquired during marriage whilst the parties cohabited are not excepted from sharing by statute. Excepted property includes business assets, gifts or inheritances from third party given to one spouse only, gifts from one spouse to the other, and property covered by a domestic contract.	All property, even property owned prior to marriage, is a matrimonial asset and is presumptively equally shared unless within statutory list of excluded property, e.g., business assets, gifts and inheritances not used for family purposes, payments covering personal injury, property covered by marriage contract, or separation agreement or property acquired after separation. Where equal sharing of matrimonial assets would be unfair to a list of statutory criteria recourse can be made to excluded property. Provision is made for piercing the corporate veil and for compensating a spouse who has contributed to the other spouse's business.	Matrimonial assets are to be equally shared unless this would be grossly unjust or unconscionable according to a list of statutory factors. Matrimonial assets excludes business assets, property exempted from sharing under marriage contract or separation agreement, property acquired after separation, gifts or inheritances received from third parties, personal injury awards, family heirlooms or personal effects. Statutory joint tenancy imposed on matrimonial home.