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CHAPTER

CHAPTER 4

REAL PROPERTY

In Pettitt v. Pettitt the Law Lords stated that there are no special rules applicable to husband and wife cases: the general rules of property law apply. Thus in determining the question of who owns the matrimonial home, the general principles described in Chapter 2 are used, as they would be in determining the question of ownership of any property, real or personal.

Where the couple own a matrimonial home there are three possibilities as to the legal ownership of the home--it may be held jointly, or in the husband's name alone, or in the wife's name alone. The legal title is not necessarily conclusive as to where the beneficial ownership lies, though it is certainly important evidence as to the intention of the parties as to where the beneficial ownership will be, and at least sets up a presumption of beneficial ownership which must be rebutted by evidence.

In England it has been authoritatively stated that where the documents expressly declare both the legal and equitable interests in the property, this is generally regarded as conclusive, in the absence of fraud or mistake, as to where the beneficial ownership will be.[1] (Although elsewhere it has been suggested that an express declaration is conclusive only if it expressed the real intention of the parties and

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[1] Brown and Staniek v. Staniek (1969) 211 E.G. 283; Pettit v. Pettit [1970] A.C. 777 per Ld. Upjohn at 813; Baydell v. Gillespie (1971) 216 E.G. 1505.

was intended to be binding whatever might happen.[2]) Under the Land Titles Act[3] an express declaration of the beneficial ownership of property would have to be separate from the transfer and certificate of title. Thus the general rule that where the document of title is silent to the beneficial interest, the legal interest is not necessarily conclusive evidence of where the beneficial interest is held, will usually be applicable. The presumption that where the legal ownership is, so also is the beneficial ownership, does not affect the creation of resulting, implied or constructive trusts referred to in Chaper 2. It will be an unusual situation where there will be an express written trust (it would have to be in a separate document in Alberta) but where such exists the English decisions will be studied by a Canadian court, and likely the statement of Lord Upjohn in Pettitt v. Pettitt that such an express declaration is generally regarded as conclusive will be applied.

1. Legal Title in One Name

The first case to be considered is the situation where the matrimonial home is in the sole name of one spouse. If there is only one contributor to the acquisition of the property, and that person is the legal owner, then clearly it is the property of that person. If the house is in the wife's name but the husband is the sole contributor, then by

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[2]Wilson v. Wilson [1963] 1 W.L.R. 601 (C.A.); Bedson v. Bedson [1965] 2 Q.B. 666 (C.A.); Wilson v. Wilson [1969] 1 W.L.R. 470.

[3]1970 R.S.A. c. 198, s. 51.

virtue of the presumption of advancement the house is probably the sole property of the wife.[4] On the other hand, if the property is in the husband's name and the wife is the sole contributor, then by virtue of a resulting trust, the wife is probably entitled to the sole beneficial ownership.[5] The question of how strong these presumptions are today was raised in Chapter 2. Certainly the Law Lords, with the exception of Lord Upjohn, in Pettitt v. Pettitt were of the opinion that the presumptions had little or no value today. Lord Upjohn would have applied the presumptions in the situation where only one spouse contributed to the acquisition of property; and certainly there are the policy reasons discussed previously for continuing to apply the presumption of advancement. Quaere, whether the presumption of advancement should also apply to transfers from a wife to a husband.

In a situation where both husband and wife contribute to the acquisition of property which is held in the name of only one of the spouses, it is necessary for the claimant contributing spouse in whom the legal interest is not vested to show both a contribution to the acquisition of the property and an intention that he or she was to share in the beneficial ownership of the property. The controvery is as to whether the law may impute such an intention to the spouses either by an application of the presumptions of advancement and

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[4] Jackman v. Jackman (1959) 19 D.C.R. 317 (S.C.). The use of the word 'probably' is calculated: it still is unclear whether Canadian courts will apply the criticisms of the Law Lords in Pettitt as to the strength of the presumptions of advancement today.

[5] For a discussion of the presumptions resulting trusts and advancement, see Chapter 2.

resulting trusts or by an application of constructive trusts concept, or whether it is limited to inferring an intention from the available evidence, has been dealt with at length in Chapter 2. Certainly there are older cases such as Tschcheidse v. Tschcheidse[6] in which the courts have held that in the absence of any evidence of an intention that the property should be held jointly, the contributing spouse, even if he or she had contributed a "goodly share" of the purchase price, will be denied any share in the beneficial ownership of the property. However with the decision of the Alberta Appellate Division in Trueman v. Trueman[7] where a farm wife was granted a beneficial interest in the matrimonial home and farm on the basis of a contribution to the acquisition of the property even in the absence of any express common intention, it seems to be established, at least until a contrary holding by the Supreme Court of Canada, that a court is at liberty to impute an intention based on a constructive trust.

Where the wife is the sole owner of the property, and the husband and wife jointly contribute to the acquisition of the property, the husband must meet and rebut the presumption of advancement before he can claim his share. It has been said that generally the courts will not apply the presumption of advancement where the husband pays off encumbrances on

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[6](1963) 41 D.L.R. (2d) 138 (Sask.). The claimant 'spouse' here had lived with a man for 12 years falsely believing him to be her legal husband. Since the law is the same for wives and non-wives, this should not be a grounds for distinguising the cases.

[7][1971] 2 W.W.R. 688, 18 D.L.R. (3d) 109. Followed Wiley v. Wiley (1971) 23 D.L.R. (3d) 484 (B.C.).

his wife's estate, though if the contribution is by way of improvements to the wife's property, the court is more likely to presume a gift.[8] On the other hand in the more frequent situations where the husband is the sole registered owner, the wife can claim a share in the beneficial interest on the basis of a resulting or constructive trust.[9] If the contribution is from her capital funds rather than her income, the presumption of resulting trust will be more difficult to rebut.[10] Thus it is more likely that joint contributions with the husband the registered owner will result in a sharing of the beneficial ownership, while if the wife is the registered owner, despite the joint contributions, the legal title may prevail.

The real problem that was not dealt with at any length in Chapter 2 is the question of what constitutes a contribution. No problem arises in the situation where there is a direct financial contribution. However there is some

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[8] Meek v. Meek (1955) 17 W.W.R. 401, 63 Man. R. 283. In 1946 the Supreme Court held that where a husband and wife acquired property by their joint efforts and had the property placed in his wife's name alone, the wife was a constructive trustee for the husband. Pahara v. Pahara [1946] 1 D.L.R. 433 (S.C. on appeal from Alta. A.D.).

[9] There are many examples of successful claims on this basis: Kropielnicki v. Kropielnicki [1935] 1 W.W.R. 249 (Man. C.A.); Gorash v. Gorash [1949] 4 D.L.R. 296 (B.C.); Henry v. Vukasha (1957) 21 W.W.R. 409 (Sask.); Cuthbert v. Cuthbert [1968] 20 R. 502, 69 D.L.R. (2d) 637 (C.A.); Trueman v. Trueman [1971] 2 W.W.R. 688, 18 D.L.R. (3d) 109; Wiley v. Wiley (1972) 23 D.L.R. (3d) 484.

[10] See Chapter 2 at 66-68.

controversy as to the approach to be taken where there is an indirect contribution to the acquisition of property. The approach to be taken by the court was previously discussed:[11] what actually will be considered by the law to be a contribution, and whether it is permissible to impute to the parties a common intention where indirect financial and non-financial contributions rather than direct contributions are involved. The fact that improvements to property can constitute a contribution to the acquisition of property was mentioned, but a lengthier discussion is now called for.

Such improvements must be of a substantial nature--they cannot be just "do it yourself jobs"; generally they must be the kind which normally a contractor is employed to do. They must be works of capital improvement rather than merely maintenance jobs.[12] But once it is established that the improvements are of a substantial as opposed to an 'ephemeral' character, and in the case of improvements performed by the husband the presumption of advancement having been rebutted, there are three approaches which may be adopted by the courts in determining whether such improvements resulted in the improver obtaining some recompense for his efforts. It may be that on the facts of the case the improvements constituted an indirect contribution to the acquisition of the property and thus the property is subject to a resulting or constructive trust; or it may be that the courts can find a contract that the spouse doing the improvements

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[11] Chapter 2 at 59-63.

[12] Button v. Button [1968] 1 W.L.R. 457; Pettit v. Pettitt [1969] 2 W.L.R. 966.

was to be repaid for his or her efforts; or finally it may be that the courts will find that on the basis of the doctrine of equitable estoppel, the spouse doing the improvements is entitled to a lien or some other interest in the property. Depending on the approach adopted by the court different requisites will have to be met by the spouse claiming an interest in the property. Moreover depending on the approach used by the court a different interest will be given to the claimant spouse. Thus it may be necessary to make alternate claims in which alternate remedies are asked for.

The first approach to be considered is the situation in which the improvements constitute an indirect contribution to the acquisition of the property. This will occur where the improvements are such that they free the legal owner to make repayments towards the acquisition of the property. Clearly such an approach cannot be used where the purchase price was paid in a lump sum prior to the improvements being performed by the claimant spouse, unless at the time of the acquisition of the property it can be established that there was a joint venture in which one spouse was to provide the capital to purchase property, and the other spouse was to provide the labour and skill to improve the property.[13] This seems to have been the approach adopted by the Alberta Supreme Court, Trial Division and Appellate Division respectively, in Stanley v. Stanley[14]

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[13] Jansen v. Jansen [1965] P. 478.

[14] (1960) 30 W.W.R. 686.

and Barleben v. Barleben[15], both cases in which a wife was given a share in the beneficial ownership of the property by virtue of making and paying for improvements upon their homes. However these cases are not particularly good examples of the proper use of this approach as regard improvements because of the nature of the improvements in both situations. Both Mrs. Stanley's and Mrs. Barleben's contributions to their homes were of a very insubstantial nature, and do not fall within the requirements as established, it is submitted correctly, by Lord Denning in Button v. Button.[16]

A second approach that can be adopted by a court is to look to see whether the facts of the case bring it within one of the major exceptions to the fundamental principle of the law that persons improving land do not thereby acquire any right against the owners to compensation, and still less to an interest in the house. This exception was best described by Duff J. in Kelly v. Watson[17] when he stated:

> Relief can be granted where an occupier of land makes improvements under the belief created or encouraged by the owner of land that an interest would be granted to the occupier sufficient to enable him to enjoy the benefit of his expenditures. The relief is granted not on the basis of agreement but on ground that it would be unjust to permit the owner to dispossess the occupant in the circumstances without at all events making compensation.

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[15](1964) 46 W.W.R. 683.

[16][1968] 1 W.L.R. 457. See text accompanying footnote 12.

[17](1921) S.C.R. 482, [1921] 1 W.W.R. 958.

Later the law was restated by Ford J. in Jacques v. Hopkins[18]

> [I]f one takes or is put into possession of land and makes extensive improvements thereon equity will intervene for his protection to the extent of declaring the land to be his, or declaring that he shall not be disturbed in his possession thereof, if he can show that conduct of the owner is sufficient to justify the legal inference that he made a gift of the land to the person in possession, or his conduct has been such as to estop the owner from denying that the land is the claimants.

It is necessary that the improvements be done in ignorance of want of title.[19] Since many spouses who make substantial contributions to the property of which the legal title is in their spouse's name alone, consider themselves part owners of such property and are encouraged so to think, many cases could come under this head. The principle is

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[18] 25 Alta. L.R. 372, [1931] 2 W.W.R. 277, [1913] 3 D.L.R. 410 (C.A.).

[19] Equitable estoppel may also take the form of promissory estoppel as opposed to the proprietary estoppel described here. Promissory estoppel occurs where by his words or conduct one party to a transaction makes to the other a promise or assurance which is intended to affect the legal relations between them, and the other party acts upon it, altering his position to his detriment. The party making the promise or assurance will not be permitted to act inconsistently with it. (Snell's Principles of Equity, 26th ed. at 627). Promissory estoppel, unlike proprietary estoppel, however only provides a defence and cannot create a cause of action, moreover, it is not permanent in effect and the promisor may resile from his position by giving the promisee notice so that he has a reasonable opportunity of resuming his former position--only if that is impossible does the promise become final and irrevocable.

based on the doctrine of equitable estoppel, and is subject to a double requirement. For E to be estopped in equity as against C, first, C. must have acted to his detriment in some way. Secondly, E must have been responsible for C acting thus. This might be because E had made some representation or promise on which C had relied or because E, knowing that C was acting under some mistaken belief that he had some right to E's property, actively or passively encouraged C's acts. In either case, equity would restrain E from acting contrary to the belief on which C had acted.

Once the equity is established, effect is given to it in whatever way is most appropriate.[20] The equity of the improver and the estate to be claimed by virtue of it depend on the transaction, that is, on the acts done. Often it suffices merely to restrain the owner from enforcing his rights, as by dismissing the claim of C for possession of the land, but the doctrine has also been used to confer title upon the improver of land, as well as to grant an equitable lien on the property for his expenditure, or for the value of his improvements.[21] Thus in the leading case of Dillwyn and Llewelyn[22] the father placed his son in possession of land for the purpose of providing his son with a dwelling house and the son built such a house at his own expense. Later when the donor claimed the land back,

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[20] Plimmer v. Mayor of Wellington (1884) 9 App. Cas. 699 at 713, 714, 53 L.J.P.C. 104.

[21] Snell's Principles of Equity (26th ed.) 632-633. The doctrine is said to show equity at its most flexible.

[22] (1862) 4 De G.F. & J. 517, 45 E.R. 1285.

the son was granted a fee simple by the court. By this approach then the courts can arrive at a similar remedy as under the first approach discussed--here again the improver can share in the beneficial ownership, though the requirement that the improvements constitute on indirect contribution to the acquisition of property is not an element in the equitable estoppel cases.[23]

The reported English cases have recently adopted the third possible approach--that is they have held that only if a contract between the spouses can be discovered will the spouse making the improvements be granted an interest in the property. The major problem with this approach is the problem as to whether there need be an express agreement between the spouses, or alternatively whether an agreement may be inferred or imputed. In the first modern English case on improvements, Appleton v. Appleton,[24] a husband successfully claimed an interest in the house by reason of the renovations he had made by way of improvements to the matrimonial home, the legal title of which was in his wife's name alone, she having paid the entire purchase price. Lord Denning M.R. stated:

> I prefer to take the simple test: what is reasonable and fair in the circumstances as they have developed, seeing that they are circumstances which no one contemplated before?

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[23]See also Dagley v. Dagley (1905) 38 N.S.R. 313; Campbell v. Campbell 4 M.P.R. 502, [1932] 3 D.L.R. 501 (N.S.C.A.).

[24][1965] 1 W.L.R. 25.

This test appeared to depend upon the breakdown of marriage: in Pettitt v. Pettitt, a case with almost the same facts, the Law Lords stated that the rights of the parties must be ascertained on a strict property basis without regard to the fact that the marriage has broken down. For this reason it overruled the Appleton decision.

A second decision, also of the Court of Appeal at approximately the same time, was Jansen v. Jansen.[25] The facts of this case were very special because the husband stayed at home in order to convert a house into self-contained flats, while the wife went out to work in order to support the family. The house was in the wife's name and it was clearly hers since she had provided all the purchase funds. The flats were sold off at a profit, and the husband claimed he was entitled to a share. The three members of the Court of Appeal took such divergent paths in deciding the case that it cannot be regarded as laying down any general principle. Lord Denning, not surprising, followed is decision in Appleton and found for the husband. Davies L.J. also found for the husband on the ground that the Registrar had found an agreement to share; Russell L.J. dissented. The Law Lords in Pettitt v. Pettitt also considered this decision: Lords Morris, Hodson and Upjohn considered the case was wrongly decided, while Lords Reid and Diplock took the view that it was correctly decided on the grounds that, on its very special facts, it was proper to impute to the parties an intention that the husband should receive some payment for what was after all, something in the nature of a commercial enterprise.

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[25] [1965] P. 478.

The final case which turns on the presence or absence of agreement is Pettitt v. Pettitt,[26] the only decision of the House of Lords on improvements. Three of the Law Lords; Lords Morris, Hodson, and Upjohn[27] held that in the absence of agreement there cannot be an interest; Lords Reid and Diplock felt that an imputed common intention would be sufficient, but on the facts of this particular case it was not reasonable that the court could impute an intention that the particular improvements were to have an effect on the proprietary interest.[28] Since the Alberta Appellate Division in Trueman has decided that it is permissible for the courts to impute an intention to the parties, even where indirect contributions are involved[29] (generally by

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[26][1969] 2 W.L.R. 966.

[27]Lord Upjohn distinguished the cases where one spouse contributes to the acquisition of property and cases such as Pettitt where one spouse expends money and labour by way of improvements on the property of the other spouse. He cited the general rule referred to above that prima facie where A expends money on the property of B, he has no claim to such property. A must show either an agreement to share in the property or show some estoppel on B's part. Here neither mistake nor estoppel was suggested.

[28]In the later decision of Gissing v. Gissing [1970] 2 All E.R. 780, Lord Reid adhered to this view: though he restated the reasonable spouses test in the form of a resulting or constructive trust, he still felt the court could impute an intention where a spouse made indirect contributions to the acquisition of property. Lord Diplock however felt that he and Lord Reid had been overruled on this particular point and felt evidence a little inferior to an express agreement was necessary before a spouse who made an indirect contribution could share in the beneficial interest.

[29]Trueman v. Trueman was recently applied in Wiley v. Wiley (1972) 23 D.L.R. (3d) 484 (B.C.S.C.).

means of a resulting, implied or constructive trust) it is possible that an Alberta court would find that improvements made by a spouse are such that the court can impute an intention that the spouse should either share in the beneficial interest or should be entitled to a lien in the proceeds of sale commensurate not with his costs or valuation of his labour but with the increase in value that he has brought about. (This valuation of the lien was the one adopted, it appears, in Jansen v. Jansen and Appleton v. Appleton: the virtue of this approach is that the husband cannot recover more than the benefit he has given to the property.) It is always possible, for the court to find an agreement that the spouse who made the improvement should share in the beneficial interest in the property itself--such a finding will be dependent on the particular facts of the case.[30]

This sets out the rather complex situation with regard to improvements to property. In England much of this discussion is now academic as a result of the passage of section 37 of Matrimonial Proceedings and Property Act 1970. That Act provided as follows:

> It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal

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[30] In the case of improvements done after the acquisition of the property the court would have to depend upon a constructive contract and determine whether the intention to be imputed to the parties is that the legal owner is to be a resulting or constructive trustee for the spouse who made improvements, or whether, rather than a share in the beneficial ownership, the intention was that the spouse should be entitled to some other form of compensation.

> property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been agreed or, in default of such an agreement, that may seem in all circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings).

This section was passed as a result of the decision in Pettitt v. Pettitt a decision which will likely be followed in Canada. It says that it is only declaratory of the law. The share granted to the English spouse is not intended to be commensurate with or proportional to the cost or value of the improvements; in the absence of agreement, the court is left with the discretion to make an order that is just in all circumstances. In the absence of a general recommendation by the Institute to change the matrimonial property regime or to institute automatic co-ownership of the matrimonial home in Alberta (and thus render it irrelevant who paid for what), it is recommended that a similar provision to the English section 37 be proposed by the Institute Board. This section would bring Alberta a degree nearer some form of community of property, though it would give the courts only a very limited discretion. No general contribution to family welfare would give a beneficial interest: there would have to be a specific contribution of money or money's worth to the improvement of real or personal property. "Do it yourself" decorating

and repairs are excluded by the requirement that such contribution be a "substantial nature". The enactment of such a section would bring more certainty to the law, and would relieve the courts, in this limited area, from the necessity of imputing an intention to the parties which they never had.

Having digressed somewhat in this discussion as to what interest will result to a spouse who makes improvements in his or her spouse's property, it now is necessary to return to the general question of contributions. First, what share will any contribution, direct or indirect, give to the contributing spouse? Once again the presumptions of advancement and resulting trust are involved. If the wife is the sole owner of the property and both husband and wife contribute to the acquisition of such property, it may well be that the presumption of advancement will apply and the wife will be the sole owner of the property. If the presumption is rebutted the husband probably receives a proportionate interest. On the other hand if the husband is the sole owner of the property and the husband and wife both contribute, the wife's contribution as a consequence of a resulting trust will give her an interest in the ownership of the property. This interest too is likely to be proportionate to the contribution that she made. Thus in Grunert v. Grunert[31] the wife was awarded a fifteen per cent interest in property owned by her husband.

In England as a result of criticism in the House of Lords regarding the overuse of the maxim 'equity is equality',

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[31](1960) 32 W.W.R. 509 (Sask.)

recently courts have made more of an attempt to determine the exact contribution by the wife and grant her a proportionate interest. Thus even Lord Denning M.R. in Heseltine v. Heseltine[32] stated:

> In the usual way the court imputes a trust under which the husband is to hold it for both of them jointly in equal shares. That half and half is not a invariable division. In the present case . . . the division should be as to three-quarters and one quarter to the husband. That seems to me to be entirely fair.

It seems unnecessary to add that if the courts determine that the course of conduct of the parties is such that an agreement can be inferred that the husband and wife should share equally in the beneficial interest in the property then such an agreement will be inferred and the court will ignore the difference in the contributions of the spouses.[33]

This of course is the orthodox approach. Lord Upjohn in Pettitt v. Pettitt had an alternative approach.[34] While

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[32][1971] 1 All E.R. 952 at 954, 1 W.L.R. 342 at 345.

[33]In Pettitt v. Pettitt, the decision in Rimmer v. Rimmer [1953] 1 Q.B. was approved though some of the Law Lords seemed to confine the use of the maxim 'equity is equality' upon which that decision is based to cases where there is difficulty in determining the exact contributions of the spouses. It is useful to remember that in the Rimmer case itself there was clear evidence of the exact contributions of the husband and wife, but the court held that the course of conduct indicated that there had been a pooling of resources. There have been subsequent English and Canadian decisions which have made a similar finding.

[34]See Chapter 2 at 80-81.

he felt that if there was only one contributor to the acquisition of property the presumption of resulting trust or the presumption of advancement should apply, where both husband and wife contributed to the acquisition of property, he felt that in the absence of other evidence, and whether the purchase be in joint names or only one, the spouses intended to be joint beneficial owners.[35]

This however leads to the paradoxial result that if the wife, for example, contributes nothing and the property is in her name, by virtue of the presumption of advancement, she will have the whole interest. However if the wife contributes something to the acquisition of the property, no matter how minimal her contribution, then even if the property is in her name alone, Lord Upjohn would find that the beneficial interest should be held jointly with her husband.

2. Joint Tenancy

A second way of holding property is by means of a joint tenancy.[36] A joint tenancy has two essential attributes: the

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[35][1969] 2 All E.R. 385 at 407.

[36]The cases do not seem to distinguish between a joint tenancy and a tenancy in common. Where both the husband and wife are registered owners of property the usual situation would be that the property is held in joint tenancy rather than tenancy in common, and for this reaon I have not dealt separately with a tenancy in common. The difference between the two tenancies would probably be that where parties hold property in common the court will be more likely to find each party's interest is proportionate to the contribution made, whereas with joint tenancies, as will be seen, the courts invariably find that each party has a half interest. Quaere why courts have not found that where there are unequal contributions to the acqusition of property, the parties held as tenants in common?

absolute unity of the tenants consisting of unity of title, time, interest and possession; and the right of survivorship, or jus accrescendi, by which if one joint tenant dies without having obtained a separate share in his lifetime, his interest is extinguished and accrues to the surviving tenants whose interests are correspondingly enlarged. By reason of section 9 of the Transfer and Descent of Land Act,[37] where land is held by two, or more, persons, each shall take as a tenant in common and not as a joint tenant unless an intention sufficiently appears on the face of the letters patent, transfer or conveyance, will or other assurance that they should take as joint tenants.

If there is a joint tenancy and the sole contributor to the property is the wife then by virtue of the presumption of resulting trust, unless the presumption was rebutted she would be considered the sole owner of the property. However it is quite probable that the result will not be this, but rather as Kearney v. Kearney[38] where a husband and wife purchased property as joint tenants with the wife contributing most of the money to the purchase price the court will find

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[37] 1970 R.S.A. C. 368.

[38] [1970] 2 O.R. 152, (1970) 10 D.L.R. 138 (Ont. C.A.); See also, Morasch v. Morasch (1962) 40 W.W.R. 50 (Alta.) where the presumption of a resulting trust was held to be rebutted.
But contra Grzeckowski v. Jedynska (1971) 121 N.L.J. 83. In this case however the husband's contribution was very insubstantial and may well have been regarded by the court as non-existent (he had kept the accounts for his wife's boarding house business and helped decorate the house). Moreover, the court seemed to rely a great deal on its characterization of the house as a business asset rather than the matrimonial home. The wife therefore entitled to entire beneficial interest even though the house was in joint tenancy.

that the wife was entitled only to a half interest in the property. The wife claimed to be the sole beneficial owner of the property: the Ontario Court of Appeal found that there had been a pooling of resources. The court held that there was no evidence of intention not to hold jointly and effect must therefore be given to the joint tenancy agreement which set up a prima facie joint beneficial interest. It is this prima facie joint interest which lends strength to the presumption of advancement. Thus even if Canadian Courts decide to follow the statements made in the House of Lords in Pettitt v. Pettitt which suggested that the strength of the presumptions of advancement and resulting trust was much diminished having regard to present day conditions, the very fact of the joint tenancy will still establish a prima facie presumption as to where the beneficial interest shall lie. Probably the statement in Spratafora v. Spratafora[39] is still good law, at least with regard to joint tenancies.

> When written documents clearly create joint tenancies between husband and wife . . . testimony amount to proof little, if at all inferior to written documents in efficacy, must be submitted to the court to establish a resulting trust in favour of the husband.

The courts will not allow the presumption of advancement to be rebutted by the fact that the joint title was for convenience on death, or was taken out as a result of the

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[39] [1952] O.W.N. 757.

solicitor's advice.[40] The presumption (again at least as regards joint tenancy) must be rebutted by "clear, distinct and precise" testimony, though not necessarily of a documentary nature.

Again where there are contributions by both the husband and wife, if one were to look at the presumption of the resulting trust alone, it would appear that the interest of the husband and the wife should be proportionate to their contributions. But again it has been held that compelling evidence is required to rebut the prima facie case raised by the joint tenancy of the matrimonial home: that is, that the beneficial interest should be held in equal shares.[41] For example, where a wife claimed that because of her greater contributions to the acquisition of property held in joint tenancy she was entitled to a seventy per cent interest in the property, the court did not agree. The court considered the prima facie presumption of joint assets as well as the whole course of dealings of the parties from the outset of the purchase as evidence of their intention to hold the property in equal shares.[42]

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[40] Fetterley v. Fetterley (1965) 54 W.W.R. 218, 54 D.L.R. (2d) 435 (Man.)

[41] Supra footnote 38 and accompanying text.

[42] Germain v. Germain (1969) 70 W.W.R. 120 (Man.) Many of the decisions involving cases where one of the parties to a joint tenancy has claimed more than a half share have applied Rimmer v. Rimmer [1953] 1 Q.B. 63 and stated that where each party has made substantial contributions to the acquisition of property, equality must follow. See Barleben v. Barleben (1964) 46 W.W.R. 683, 44 D.L.R. (2d) 332 (Alta. A.D.). On occasion the maxim 'equity is

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At common law, a joint tenancy might be severed and thus transformed into a tenancy in common by, inter alia, any course of dealings sufficient to indicate that the interests of all the tenants mutually were treated by them as a tenancy in common;[43] or acquisition by one tenant of a greater interest than that held by his co-tenants. A joint tenancy was and is today subject to partition and sale under the Partition Act 1868. Although during the continuance of the tenancy one joint tenant holds nothing separate from his fellows, there was a general rule to the effect that one joint tenant can alienate his share to a stranger. The effect of such alienation, whether by way of sale or charging by mortgage, was to convert the joint tenancy into a tenancy in common, since the alienee and the remaining tenant or tenants hold by virtue of different titles and not under that one common title which is essential of a joint tenancy. The question arises whether, under the

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[continued from previous page] equality' is invoked because of difficulty in determining exact contributions. Morasch v. Morasch (1962) 40 W.W.R. 50 (Alta.). Contra Hine v. Hine [1962] 1 W.L.R. 1124 at 1132 (C.A.) per Pearson L. J. "The fact that husband and wife took the property in joint tenancy does not necessarily mean that the husband should have a half interest in the proceeds of the sale now in contemplation." This may have been overruled in Pettitt v. Pettitt if Pearson L.J.'s statement turned on the fact that the marriage had now broken up.

[43] Flannigan (Wotherspoon Estate) v. Wotherspoon (1952-53) 7 W.W.R. (N.S.) 660, [1953] 1 D.L.R. 768

[44] This might be voluntary or by force of law. The interest of a joint tenant is exigible and may be sold under execution; after the sale the purchaser can obtain a partition order. Morrow v. Eakin (1953) 8 W.W.R. (N.S.) 548, [1954] 2 D.L.R. 593 (B.C.).

Torrens system, an unregistered transfer or charge is operative to sever the joint tenancy.

In the leading case of Stonehouse v. Attorney General for British Columbia[45] the plaintiff and his wife were joint tenants of property. The wife conveyed her interest to her daughter without telling the plaintiff, such transfer not being registered until the day after the wife's death. The husband, claiming that the transfer had been wrongfully registered, brought action against the Registrar for recovery from the assurance fund. It was held that the unregistered transfer was, under the Land Registry Act, expressly good against the grantor and thus was effective to change the plaintiff's title to that of a tenant in common. The wife had no interest in the land at the time of her death to which her husband might survive. The case to a large extent turned on the wording of the British Columbia Land Registry Act which stated that unregistered transfers, charges, etc., were inoperative except "as against persons making the transfer."

The Alberta Land Titles Act does not contain such a provision. However it has been suggested that this particular clause is merely a codification of an exception to the Torrens system that has been accepted in many courts. Certainly in Torrens jurisdictions other than British Columbia, there has been a recognition of equitable rights as against the grantor.

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[45] [1962] S.C.R. 103; See also Re Mee (1971) 23 D.L.R. (3d) 491 where it was held that where one joint tenant made a written declaration of trust in respect of his interest in the joint tenancy, the joint tenancy was severed.

It would seem clear then that a unilateral alienation by one joint tenant would not be accompanied by the requisite consent which under section 26(2) could only exist where there is a joint alienation of the property. Thus the Stonehouse case could not occur in Alberta.[49]

If there was any doubt that this was not the position and Stonehouse could occur here, then the simplest remedy would be to pass legislation similar to that passed in Saskatchewan in 1963 to prevent such an occurrence in that province. Section 240 of the Saskatchewan Land Titles Act,[50] states that

> (1) Notwithstanding anything in this or any other Act, where any land, mortgage, encumbrance or lease registered under this Act is held by two or more persons in joint tenancy, other than as executors, administrators or trustees, the joint tenancy shall be deemed not to have been severed by any instrument heretofore or hereafter executed by one of the joint tenants, or by more than one but not all the joint tenants, unless the instrument has been registered under this Act.
>
> (2) The registrar shall not accept for registration an instrument purporting to transfer the share or interest of any such joint

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[49] In a later decision, McWilliam v. McWilliam and Prudential Insurance Co. (1960) 31 W.W.R. 480, Smith J. expressly disagreed with this decision of Egbert J. However, the point of disagreement was not whether the Dower Act applied to joint tenancies and tenancies in common, but whether a partition and sale under the Partition Act was a "disposition" under the Dower Act.

[50] 1965 R.S.S. c. 115.

> tenant unless it is accompanied by the written consent thereto of the other joint tenant or joint tenants, duly attested in accordance with section 65 or 66, as the case may require.

The question which arises both in Saskatchewan and Alberta is whether the prohibition on unilateral alienation extends to involuntary dispositions by execution judgments and so on. The wording of section 240(2) does not appear to extend to such an involuntary disposition. In Alberta, a creditor can likely get an order dispensing with dower consent of the non-debtor spouse. The question then is whether or not there should be exemption for the matrimonial home from execution for debts (beyond the exemption already provided for in the Exemptions Act of houses to the value of $8,000). This is a policy decision to be made by the Board. If such protection is desired, a form of tenancy by the entireties, as it exists in New York, New Jersey, Ohio and Arkansas, might be studied.

The tenancy by entireties in those states has been developed by the courts. Many of the incidents of the tenancy at common law have disappeared because they have been judged incompatible with the equal position of married women after the passage of the Married Women's legislation in those states. What remains is an unseverable joint tenancy which postpones the rights of creditors to the right of survivorship of the non-debtor spouse, but allows a creditor to seize the debtor's life estate in the property, and to receive the contingent right of survivorship. The courts have thus achieved a balancing off of the rights of creditors with the goal of the protection of the matrimonial home (though

admittedly in those states any property owned by a husband and wife jointly would be entitled to such protection).[51]

This description of the law relating to real property, and in particular the matrimonial home, has again pointed out the artificiality, technicality and uncertainty of the law. The problems arise in two basic cases: where the legal title to the property does not represent the financial contributions of the parties, and where one spouse puts his income and, or alternately, his labour into property owned by the other. Again the courts have to determine the question what is a contribution to the acquisition of property--must it be direct? must it be of a financial nature? Again the courts must determine how to decide what is the intention of the parties--can it be imputed or must it be only inferred? The English Law Commission confidently asserted that the technicalities and uncertainties could be reduced within the framework of the present law, and probably they were right.

Yet such changes would not meet the fundamental objection to our present matrimonial property regime--the inequity of any law based on financial contributions. Such a law is necessarily unfair, for it ignores the fact that today husbands and wives often have different roles in life--that usually only the husband has the real opportunity to make financial contributions to the acquisition of the home. Moreover the law ignores the efforts of the spouse who remains in the home to care for the family. His or her efforts are not only considered by our society to be beneficial, but

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[51] J. F. English "Concurrent Estates in Real Property II." (1963) 12 Catholic University Law Review 1.

not wide enough to effect any meaningful change in that it applies to only one half the population.

The English Law Commission considered five basic alternatives for the reform of the laws relating to the ownership of the matrimonial home. It was first suggested that provision might be made under which a spouse is restrained from dealing with the house without consent of the other spouse. In Alberta we have achieved this aim by means of our Dower Act. Even with its failings, it is submitted that this legislation is necessary, and while it might be amended to prevent persons from reneging from contracts made in good faith, the basic concept embodied in the legislation should remain.

It was next suggested that a system for the registration of matrimonial homes as the joint home of the parties might be enacted. Such a provision would be similar to the New Zealand Joint Family Homes Act 1964, under which if a home is registered as the joint family home, the spouses become legal and beneficial joint tenants, subject to any existing mortgages or encumbrances, and become jointly liable for the performance of covenants. During their joint lives they have equal rights as to the possession, use and enjoyment of the property. Neither spouse may dispose of his or her undivided share, though both may concur in the sale or disposition of the home itself. While the settlement remains registered, the interests of the husband and wife are unaffected by bankruptcy or assignments for the benefit of creditors. On the death of one spouse, the survivor becomes the sole proprietor.

However, it was pointed out that the real difficulty in attempting to introduce joint ownership of the home through a system of registration is that even if incentives could be offered to induce registration (the New Zealand incentives included estate duty exemptions and limited protection from creditors), it would not necessarily follow that all homes would be registered. The owner spouse would not be bound to take advantage of the incentives, and a non-owner spouse could not require registration. If the owner spouse declined to register, he might effectively deprive the non-owner spouse not only of a joint interest, but also of whatever other benefits registration would bring. In the absence of incentives, a system of registration of the matrimonial home in joint names would not represent any great advantage on the present law, since spouses are free now, if they agree, to put their homes in their joint names and to share the beneficial interest in whatever proportions they think fit. Even if there were incentives, in the view of the Law Commission to allow a spouse's interest in the home to depend on an act of registration by the other spouse would not go far enough. This proposal then was not considered to be a real alternative to the present system.

A third alternative considered was the vesting in the courts wide discretionary powers to determine the ownership of the home, taking into account not only financial contributions but also contributions to the welfare of the family and other factors. In other words, the court would have a general discretion to decide what

was just and equitable between the parties.[53]

The Law Commission suggested that this alternative would meet the objection to the present law that it is inequitable because of its dependence on financial contributions. One objection to this particular alternative is that while a wide discretionary power may be appropriate for re-allocating or transferring property when a marriage breaks down or terminates, it would not initially establish definite proprietary rights. Until an action was brought and the court reached a decision, it would be uncertain whether a spouse who had the legal title would be entitled to beneficial interest. There is a need for the courts to have discretionary powers: however, to leave the court with so much discretionary powers would be to leave too much uncertainty in the law. Although admittedly such a discretionary system might introduce greater justice, having in mind that the present principle of financial contribution is potentially unfair, it would encourage litigation as all spouses would have to go to court to determine their property rights. When the action is heard at the same time as proceedings ending the marriage or a maintenance action, this would not be a problem, but in some cases a couple who had not wanted to finally end their marriage, might be encouraged to go to court and get a divorce at the same time as they received a determination of their property rights.

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[53]See for example the New Zealand Matrimonial Property Act 1963. This Act is similar to section 17 of the English Married Women's Property Act 1882. It states that the court may make such order as appears just "notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property."

The essential difference between this system and the discretionary system considered above is that here the court would start from the presumption that the home is jointly owned; the discretion would be limited to considering whether the presumption of co-ownership had been rebutted. In the absence of any evidence, the presumption would operate. If it were considered that it was necessary to rid the law of as much uncertainty as possible, it could be enacted that the only ground for rebuttal of the presumption would be an express or implied agreement or common intention of the spouses.

The Victorian Act has a very narrow application: it applies only in respect of proceedings between the husband and wife under section 161. It was recommended by the Law Commission that if this alternative were accepted, the presumption that the beneficial interest in the home was shared should operate in all circumstances, the same way as presumption of advancement. For example, there might be cases where the issue was raised between a spouse and a third party in relation to estate duty. Legislation would also have to make clear whether the provisions apply only to the most recent home, or to every home; whether it applies to a home acquired by gift or inheritance; whether the beneficial interest of a spouse attaches to the proceeds of sale; and, how far would third parties be bound.

Moreover, this presumption as to joint ownership would have to be complimented, as in Victoria, with other legislation which either establishes a presumption of co-ownership of all assets owned by husband or wife, or alternatively grants complete discretion to the courts to settle such property on whoever it thinks fit. This legislation is necessary in

view of the narrow scope of the presumption, and the fact that in few cases the presumption might cause undue hardship.

The final alternative suggested, and this appears to be the one towards which the English Law Commission was most favourable (Para. 1.127) is a system under which in the absence of express agreement the spouses would automatically share the beneficial interest in the home. The beneficial interest of each spouse would be determined not by discretionary principles, nor by a rebuttable presumption, but by fixed rules.

The uncertainty of discretion would thus be avoided--each spouse would have an interest in the home by virtue of the marriage relationship itself, without the need for any financial contribution or for any inquiry into the circumstances of acquisition. Whoever paid for, and whoever held the legal estate would be irrelevant: both spouses would have the same beneficial interest in the home. The Law Commission listed the following arguments in favour of co-ownership: that it would eliminate the uncertainty associated with discretionary powers; and it would insure that each spouse had a share in an important family asset, without the necessity of determining whether the spouse had been able to make a financial contribution or having to inquire into past transactions to establish the extent of such contribution. No burden of proof would be imposed on either spouse to establish or to rebut co-ownership; there would, therefore, be no need to have recourse to the court for this purpose. (Perhaps this is the strongest reason in favour of this type of a system of holding the matrimonial home.)

It was also suggested that since for a great many families the home is the only substantial asset, co-ownership would, in effect, impose a form of community or sharing limited to the principal family asset. This argument in favour of this automatic co-ownership ignores, however, the fact that a great many people do not own such a home, and as was suggested before, in future years at least half the urban population will be in a situation where they are renting the matrimonial home. For many the fact that there is no matrimonial home is not a matter of choice. But in some cases the husband may choose to invest in other property while living in rented accommodation rather than invest in a matrimonial home. Automatic co-ownership might well act as an inducement to a spouse who did not want to share to refrain from buying a house. Although this is more an indication of the limitations of co-ownership rather than an argument against it, this problem could be avoided by introducing sharing on a wider basis. The arguments for and against sharing on a wider basis will be discussed in the concluding chapter.

The Law Reform Commission listed as the main reason against any automatic co-ownership rule the fact that such a system cannot take account of all special circumstances. It is true the rules could exclude sharing in specified cases (for example, where the home was inherited property, or business premises) but it could not hope to cover every case where sharing the home might appear unfair. For example, should a husband or wife who has persistently neglected his or her duties and finally deserted the home be entitled to a share in it? Should a spouse who had substantial assets of his own which need not be shared be entitled to a share in the other spouse's only asset, the home? Should

the home be shared where the marraige has lasted only a short time, or where the home had been owned by one spouse before marriage?

Yet a recognition of this limitation is not a ground to reject the system. It merely points to the need already discussed that such a form of automatic co-ownership would have to be enacted in conjunction with legislation which gives to the courts a residual discretion to determine at some point or other what is just and equitable as regards the property of the spouses. Such legislation already exists in England in the Matrimonial Proceedings and Property Act 1970 under which the English courts have a wide discretion in cases of divorce or nullity of marriage to make orders for the transfer and the settlement of property and for variation of settlements. Such legislation is needed in Canada today though under our present system this discretion would be used far more frequently than in conjunction with any community scheme. As a complement to a community system--whether limited to the matrimonial home or not--it would have to be limited to the exceptional cases where it would be inequitable to find a partnership. But still it would be a necessary and vital requirement.

Secondly, and equally damning, is the criticism that such an automatic form of co-ownership ignores the concept of the husband and wife in a partnership working together to build up assets: it would mean that as a result of a marriage of even a few weeks, a spouse could gain a half share in the beneficial ownership of what was, for a brief time, the matrimonial home. In actual fact, if such were the case, it is likely that a court would exercise the discretion proposed above to remedy such a situation. Thus

while the basis of the co-ownership scheme is a partnership based on the fact of marraige, not on the joint efforts of spouses in acquiring property, in view of the discretion of the courts to transfer property such a scheme would not necessarily do violence to the principle of "by their joint efforts they shall gain".

In the view of the writer of this paper the Law Commission's preference for the system of automatic co-ownership should be supported, mainly for the reason that it would best meet both objectives of certainty and fairness in the law. Some of the other proposals could have increased the fairness in the law if the courts liberally exercised the discretion given to them by such schemes; only the scheme of automatic co-ownership by law would achieve any real certainty in the law and discourage litigation. The Law Reform Commission gave a detailed analysis of the scope and mechanics of their proposal for co-ownership of the matrimonial home. This analysis is appendixed to the chapter with some additional comments on the recommendations.

Finally, consideration must be given to the question of whether co-ownership of the matrimonial home is both a sufficient reform having regard to the inadequacies in our law, and a fair reform if it is the only major change enacted. As mentioned before, because of the growing trend towards rental of the matrimonial home, this proposal will probably affect about half the married couples. This, however, is a substantial proportion, and one may not base serious criticism on this ground.

But a more fundamental objection can be raised when considering the fairness of limiting sharing to one asset,

rather than allowing all assets acquired during the marriage to be shared. Where there are no substantial assets other than the home, the effect of the limited co-ownership proposal and the larger community proposal would be the same. But where there were other assets a principle of sharing limited to one asset could lead to anomalies: for example, where one spouse owned assets of similar value which did not have to be shared. The decision then must be made whether a full community of acquisition with its more complicated rules is to be preferred to the simpler, but less equitable, co-ownership of the matrimonial home proposal.

Alternatively, the co-ownership and community proposals could co-exist. The Law Reform Commission felt that a system of co-ownership of the matrimonial home would be compatible with either a system of separate property, or a system of full community of property. The difference between the proposed co-ownership of the matrimonial home and the proposed community of acquisitions would be that the latter would give a non-owner a deferred equalization claim, while proposed co-ownership would give an immediate interest in the house. Mechanically there would be no problem: the value of half the house could be included in each spouse's estate when determining the net values of each estate for the purpose of the equalization claim. The advantage of co-ownership in giving an immediate interest in property may be such that a combination of the proposals is the best alternative, although the net result on property of the spouses at the end of their marriage will likely be similar under a simply partnership of acquisitions regime or such a regime combined with the proposed co-ownership of the matrimonial home.

3. Additional Comments

1. The Law Commission recommended that opting out by express agreement be allowed (para. 1.86). I agree with the Law Commission that this is an essential requirement. The Law Commission also suggested that certain houses be automatically excluded--it suggested however, that houses owned prior to a marriage not be included in the automatically excluded property, pointing out that the spouses are free to expressly agree that the house not be subject to the matrimonial trust (para. 1.97-1.98). I also agree with this recommendation and would like to point out that in addition to the fact that the spouses might expressly opt out of the co-ownership provisions, if other recommendations in this paper are followed, there will be a wide discretion vested in the court to settle either spouse's property on the other (in England such discretion already exists in the Matrimonial Proceedings and Property Act 1970).

2. In Alberta presumably the definition of a homestead in the Dower Act will apply to the definition of the matrimonial home.

3. The Law Commission recommended that there should be no power of unilateral disposition while the marriage is subsisting. Even where the marriage had broken down it was their provisional view that neither severance nor sale of the interests should be permissible unless both spouses consent or the court gives leave. It was not clear whether this prohibition on unilateral dispositions extended

to involuntary dispositions, for example, by way of execution judgments. The remarks in para. 1.96 are only consistent with a limitation of the scope of the prohibition to voluntary dispositions.

If the Law Commission meant to include both voluntary and involuntary dispositions in this prohibition, the full implications of such a recommendation were not commented upon by the Commission. Such a proposal would have serious repercussions for creditors. Such an effect must be considered and a policy decision made as to whether the postponement of the rights of creditors should be allowed.

Although the English Law Commission did not recommend the granting of a life estate to the surviving spouse, in Alberta by virtue of the Dower Act a spouse would have such a life interest. This could result in a further postponement of creditors.

The reference to the need for leave of court for a unilateral voluntary disposition raises the question of the Partition Act. Later in this paper there is a detailed discussion of the Partition Act, 1868, under which the courts at present give leave for a partition or sale of land held jointly. This leave must be granted as of right. According to the decision of Egbert J. in Robertson v. Robertson (1951) 1 W.W.R. 183 there is also a need to make an application to dispose of dower consent at which time a court may use its

discretion if there is, for example, a finding of malice on the part of the applicant (see following chapter). New legislation is required, whether or not the co-ownership proposal is accepted, in order to clearly give the courts discretion to grant possession of the matrimonial home to one co-owner as opposed the other. This legislation should include the right to postpone a sale of jointly held property in order to protect this right of possession for as long as the court deems that it is equitable.

4. The recommended proposals for the protection of co-ownership are applicable to our Land Titles Act. If the proposal for co-ownership by law is accepted by the Institute, the new provisions could be amalgamated into a new Dower Act. Many of the recommendations are directly analogous to Dower Act provisions: for example, the requirement of a declaration by a vendor spouse that the house is not subject to a matrimonial trust, and the penal sanctions arising from a false declaration. The opportunity could also be taken to rationalize once again the Dower Act and the judicial decisions thereunder, as well as perhaps to enact a wide curative section. (See proposed legislation in final chapter.) One improvement on the English recommendations would be to make the registration process extremely simple and inexpensive. Thus instead of requiring a caveat which may make a lawyer's fee necessary,

it is suggested that the filing of an affidavit and a copy of a marriage certificate with the Land Titles Office should be sufficient to register a home as the homestead. The Ontario Law Reform Commission in the Family Law Project, Volume III, p. 568 (rev.) made a similar recommendation

5. Presently partition and sale of a joint tenancy is governed by the Partition Act, 1868. This is an Act that many Alberta laywers feel should be superseded by an Alberta codification of the applicable law. Such a codification should contain provisions regarding accounting between joint tenants on partition of the property. For the applicable accounting principles see Mastron v. Cotton [1926] 1 D.L.R. 767, 58 O.L.R. 251 (C.A.); followed McWilliam v. McWilliam and Prudential Ins. Co. of America (1960) 31 W.W.R. 480 (Alta.); McCormick v. McCormick (1921) 40 N.Z.L.R. 384; Osachuk v. Osachuk (1971) 18 D.L.R. (3d) 413 (Man. C.A.). This latter case contains an exhaustive discussion of the authorites.

6. It is recommended that Alberta enact similar provisions to those contained in the Matrimonial Proceedings and Property Act 1970, sections 2 and 4. The lump sum and periodic payments are presently awarded in connection with divorce, though not in nullity proceedings, and there are no provisions for lump sum payments on judicial separation. These provisions are more in the area of maintenance

and thus not really within the scope of this paper, though the lump sum payments and the discretion to transfer property are a necessary complement to any partnership scheme proposed for matrimonial property.

The lump sum payments as they presently exist under the Divorce Act are an example of the possible use of judicial discretion to achieve a partnership between spouses. Several times remarks have been made regarding the inadequacy of such judicial discretion partially because of the limited use made of the discretion (a criticism not really applicable to Alberta courts, but according to Kahn-Freund one which can be applied to English courts). Alternately it can be said that the fact that such a discretion is the only way that a spouse who has made little or no recognized contribution to the acquisition of property, can obtain a share in the ownership of the matrimonial property, will encourage litigation. But where partnership is imposed by law, litigation is not necessary to obtain a half interest. However, a limited discretion in the court, it is suggested will complement such automatic co-ownership provisions in cases where one spouse felt that it is unjust for the non-contributing spouse to obtain half of the matrimonial property (because, for example, the husband was lazy, did not work outside the home and did not look after the house and children properly). In such cases it is necessary for the courts at some point to be able to either directly

transfer property back to the person who purchased the property, or else provide compensation by means of a lump sum payment. The only problem that could arise is that every spouse may feel that in his or her marriage special circumstances exist. The courts will have to define the special circumstances narrowly to avoid a great amount of litigation.

4. Summary of Recommendations made in Chapter IV

1. It is recommended that a new Matrimonial Property Act prescribe that in the absence of an express agreement the spouses share automatically in the beneficial interests in the home. This co-ownership principle should be implemented along the lines of the English Law Commission Report as modified in the comments appended thereto.

2. In the alternative it is recommended that the Matrimonial Property Act establish a presumption that the property occupied as a matrimonial home should be owned beneficially in equal shares by the husband and wife.

3. In the alternative, the minimal recommendation of the Institute should be to enact a section similar to section 37 of the Matrimonial Proceedings and Property Act 1970 which is as follows:

> It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, to be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, and that beneficial interest of such an extent as may have been agreed or, in default of such agreement, as may seem in all circumstances just to any court before which

> the question of the existence or the extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or any other proceedings).

4. It is recommended that Alberta enact as complementary legislation to the automatic co-ownership of matrimonial home legislation similar to that contained in the Matrimonial Proceedings and Property Act 1970, sections 2 and 4. By such legislation the courts on the granting of the decree of divorce, nullity or judicial separation would have the power to transfer the property of the spouses between them as it thinks fit.

CHAPTER V

RIGHTS OF OCCUPATION OF THE MATRIMONIAL HOME

Possession is in a strict sense a matter of property law. The difficulty here is in deciding what, if any, accommodations ought to be made in respect of that body of laws to the relationship of matrimony. If a system of co-ownership of the matrimonial home is adopted in accordance with one of the major recommendations of this project, the problems of possession may be handled with the relative ease of any dual ownership. Reform of a lesser magnitude requires further confrontation with many of the difficulties in balancing the interests of discordant spouses with a bona fide purchaser for value. And perhaps the greatest difficulty of all is to accommodate the balance of interests in proper accord with the true intent of a Torrens land holding system.

In dealing with the problems of rights to possession of the matrimonial home whether under circumstances of marital stability, desertion, judicial separation or upon divorce a distinction must be drawn between title registered in the name of one spouse and land held in joint ownership. Although joint tenancies do confer prima facie a mutual right of occupation as a present vested interest, conflicts will naturally arise. These shall be discussed later. For present purposes legal and beneficial ownership is restricted to a single spouse. Historically concern has been focused on the wife's claim upon property in the course of marriage. But depending on which spouse has registered ownership, the nature of the non-titleholder's claims presents a variety of possible alternatives--certain of which may or may not be applicable in Alberta.

1. Sole Ownership

(1) The deserted wife's equity

The origin of the doctrine that a deserted wife was entitled to occupy the matrimonial home is commonly attributed to Bendall v. McWhirter.[1] In that case the entire Court of Appeal in exercise of a broad and equitable discretion, established clearly the right of a deserted wife to occupy against her husband. The court went even further to hold that the wife's claims must prevail over the trustee in bankruptcy. As a representative of the interests of the deserting husband, a trustee could take no better position than that held by the bankrupt. Lord Denning characterized the nature of her claim in various terms: "She has only a personal privilege with no legal interest in the land, and she is only a licensee";[2] "analogous to a contractual license to occupy land";[3] "[the trustee] takes subject to her right, for it is an equity";[4] "The wife has an equitable interest to stay which is binding on the trustee in bankruptcy".[5]

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[1] [1952]1 All E.R. 1307.

[2] Id. p. 1311.

[3] Id. p. 1312.

[4] Id. p. 1315.

[5] Id. p. 1316.

Subsequent cases have struggled with the nature of this clog or fetter on title; in Ferris v. Weaven[6] a ten year separation agreement was held to confer a contractual right under license binding upon a purchaser with full notice through whom the husband was willingly attempting to defeat the wife's rights.[7] Upjohn J. was squarely faced with the equities of a deserted wife's claim in Westminster Bank v. Lee[8] and classified the claim as a personal equity which does not amount to an equitable interest in property. Actual or constructive knowledge must be proved against a bona fide purchaser for value. Notice at common law was stated by his lordship in the following terms:

> [T]he purchaser or mortgagee will be bound by constructive notice if knowledge of the particular matter (in this case desertion) would have come to his knowledge if such inquiries and inspection had been made as ought reasonably to have been made by him. That is the question to be answered and each case must depend on its own facts. . . . In my judgment the law does not require an intending purchaser or mortgagee who has no reason to believe that a wife is deserted to make any inquiries upon the footing that it is conceivably possible that she may be; that is not a reasonable inquiry.[9]

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[6] [1952] 2 All E.R. 233, see also Street v. Denham [1954] 1 W.L.R. 624 and Churcher v. Street [1959] 2 W.L.R. 66.

[7] The setting aside of a sham transaction, i.e., with proof of actual fraud is still valid law, but cannot be supported under a deserted wife's equity. See Miles v. Bull (No. 1) [1968] 3 All E.R. 632.

[8] [1955] 2 All E.R. 883.

[9] Id. p. 889.

Subsequent cases developed a vague concept of "palm tree justice" wherein the court would resolve disputes with all fairness demanded by the circumstances. It was a broad discretion in the court whereby justice was administered between conflicting interests without strictly categorizing the claims. It was this arbitrary approach to the question of rights to possession which compelled the House of Lords in National Provincial Bank v. Ainsworth[10] to delve into the legal rationale behind the deserted wife's equity. The court held that the right to occupation arises out of marital status and is not in the nature of an irrevocable license acting as a clog on transferability.

The deserted wife's equity, if it can exist at all in Canada, must stand on the footing set down in the Ainsworth decision. This does not undermine the importance of earlier decisions when considering law reform, however, because the purpose of "palm tree justice" was clearly to assist the status of married women. The pressure which led to the development of the equity in the Court of Appeal may be uniquely attributed to housing and legal conditions in the United Kingdom during the 1950s.[11] The applicability of it in Canada, particularly in Alberta, will be considered after the basis for, as distinct from the sources of, the deserted wife's equity has been summarized.

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[10] [1965] A.C. 1175.

[11] See "The Tempest in a Teapot" J. M. Farley (1965) 23 Faculty of Law Review 106. As to the non-applicability of the concept in Scotland, see Temple v. Mitchell [1956] S.C. 267.

Before detailing the rationale behind the claim, it will serve well to point out the two basic tangents from the decision in National Provincial Bank v. Ainsworth.[12] The one is that the disputes between spouses may still be subject to the applicability of the deserted wife's equity. The other is that as between the deserted wife and third parties it no longer operates as a clog or fetter upon the transferability of land interests.

The right of occupation is by virtue of the wife's right to pledge her husband's credit for necessities. Axiomatically it is an irrebuttable presumption of law that the husband is obligated to support the wife. The right is, therefore, personal to her and cannot be assigned. The right of a husband to consortium is insufficient to maintain a claim for occupation.[13]

When does the right arise and how may it be terminated? Under the old common law, when a husband deserted his wife or they separated owing to his misconduct, she had an irrevocable authority to pledge his credit. The right of occupation, therefore, depends upon desertion.[14] This is logical inasmuch

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[12] Supra, n. 10.

[13] Rowlings v. Rowlings [1964] P. 398.

[14] Since the right is seemingly based on marital status, many writers have contended that it arises upon ceremony, and that desertion makes it irrevocable. See "The Deserted Wife's Equity in the Matrimonial Home: A Dissent" Bora Laskin (1961-62) 14 Univ. of Tor. L.J. 67; and "After the Deserted Wife's Equity Part I: The Present Law" F. R. Crame (1965) 29 Conveyancer 254. The cases have not clarified this point at all; see Lloyd's Bank v. Oliver's Trustee [1953] 1 W.L.R. 1460.

as prior to any marital misconduct both spouses are under a duty of cohabitation so that where the husband reasonably decides to change accommodation for the entire family the doctrine cannot be applicable.[15] Termination of the right will naturally occur upon divorce or the death of either spouse. Also, as it is an equity, its duration is dependent upon the proper conduct of the wife. A matrimonial offence will revoke her license. The determination of such revocation must, however, come before the court, and this raises the importance of section 17 of the Married Women's Property Act 1882.[16]

It was actually in relation to the scope of this section that the Ainsworth case pointed out the absence of an unfettered discretion conferred by the legislation. Section 17 is a summary procedure for the adjudication of conflicting rights of spouses in relation to the matrimonial home and other marital property. The discretion conferred is to prevent one party exercising proprietory rights contrary to matrimonial duties. Of itself it confers no right to occupation. Such a right must still, if it exists at all, be related to the deserted wife's equity.

Canadian decisions based on this section as incorporated into the Ontario Married Women's Property Act[17]

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[15]For decisions as to the location of the matrimonial home, see Dunn v. Dunn [1949] P. 98; McGowan v. McGowan [1949] L.J.R. 197.

[16]See Appendix B.

[17]1960 R.S.O. c. 229.

serve in part to illustrate the possible applicability in Canada of a right to occupation upon desertion. Prior to National Provincial Bank v. Ainsworth[18] there were only six Canadian decisions even roughly on point,[19] although none dealt with the wife-third party conflict. In Thompson v. Thompson,[20] Mr. Justice Judson restricted the use of unfettered discretion under the Married Women's Property Act in relation to a family assets concept; this foreshadowed the decision of the House of Lords in Ainsworth that if it was deemed proper that a deserted wife should have a claim to the matrimonial home binding on third parties, whether in the nature of a proprietory right or a contractual license, appropriate legislation must create the change. It is now clear[21] that whatever the wife's right to claim for support against a deserting husband may be, there is no right of occupation enforceable against a third party whether he be a purchaser or a mortgagee, even with notice of the wife's occupancy.

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[18] Supra, n. 10.

[19] Carnochan v. Carnochan [1955] S.C.R. 669; Re Jallow and Jallow [1955] 1 D.L.R. 601; Rush v. Rush (1960) 24 D.L.R. (2d) 248; Willoughby v. Willoughby [1960] O.R. 276; Kay v. Kay (1963) 36 D.L.R. (2d) 31; Thompson v. Thompson [1961] S.C.R.3

[20] Supra, n. 19.

[21] Re Smyth & Smyth [1969] 1 O.R. 617; Stevens v. Brown (1968) 2 D.L.R. (3d) 687; Goad v. Goad [1970] 1 O.R. 346; Audras v. Audras (1970) 9 D.L.R. (3d) 675.

The problem in Alberta is even greater for the deserted wife in the absence of any summary application by which to enforce claims against her husband. Not infrequently the Alberta courts have faced such claims under applications for interim non-molestation orders, but as discussed below[22] the purpose of such orders does not encompass occupation as of right. A husband is in no less awkward a position procedurally where he wishes to take occupation of the home to the exclusion of his wife. The decision in Minaker v. Minaker[23] is still binding in Canada and denies either spouse the right to an eviction order at common law, ejectment being a tort-like action to which both parties are immune. The need for a court procedure to resolve proprietary claims in light of matrimonial duties of support and consortium and tort immunities is readily apparent. Reference should be made to the first recommendation of this paper where it was recommended that a procedural section of the nature enacted under section 17 of the Married Women's Property Act 1882 in the United Kingdom be adopted in Alberta, including amendments. The discretion so provided under such a section allows the court to give effect to the intentions of the parties relating to the beneficial interest in property.[24] Although Ainsworth has decided the section can confer no new substantive interests in either spouse, it is still open to argument

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[22]See p. 221, infra.

[23][1949] S.C.R. 397.

[24]Per Evershed M.R., Rimmer v. Rimmer [1953] 1 Q.B. 63 at p. 71.

that the exercise of a power to interfere with the legal enforcement of a substantive claim amounts in practice to a variation.[25]

The scope of orders under such a section can include the restraint of either party from selling or assigning any interest held in property to the detriment of the other.[26] The court can order the sale of property at any time and in such a manner as it directs, i.e., conditional upon a husband finding a deserted wife an alternate accommodation.[27]

In summary then the deserted wife's equity, if applicable at all, must be adjudicated under a summary procedure and can only apply to disputes between husband and wife with respect to occupation. However, it may in practice affect third party rights temporarily since the court has judicial discretion to postpone rights. The judicial equity thus developed does not apply to husbands nor to mistresses.[28]

Factors which indicate that the deserted wife's equity is not applicable include:

1. Dower legislation which is non-existent in England where the equity developed, provides either spouse with a contingent claim to possession. Dower is more fully discussed

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[25]See National Provincial Bank v. Ainsworth, supra, n. 10 at p. 1246.

[26]Lee v. Lee [1952] 2 P.B. 489.

[27]Stewart v. Stewart [1948] 1 K.B. 507.

[28]Pinckney v. Pinckney [1966] 1 All E.R. 121. See also Rawlings v. Rawlings, supra, n. 13.

later in this chapter, but as it relates to the deserted wife's equity, consider:

> The right of the deserted wife arises from necessity. If this necessity is removed the right is extinguished. If alimony adequate to support the wife according to the station which she previously enjoyed, is paid, the right to remain in the matrimonial home should be revoked.[29]

It is submitted that the terms of the Dower Act provide for the spouse in such a way as to remove this element of necessity upon which the equity is based. It should be noted however that the Act is a restriction on transferability with curative provisions, not a direct legislative right of occupation.[30]

2. No American jurisdiction with homestead legislation appears to have acknowledged a claim to occupation, arising out of necessity upon desertion unless such right has been expressly conferred under a homestead Act.[31]

3. In a Torrens Land System, an equitable claim to occupation based on desertion and terminable by the conduct of a spouse could never deem notice to a third party, and knowledge of the circumstances cannot of itself be imputed as fraud.[32]

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[29]Donnelly, J. in Richardson v. Richardson [1970] 3 O.R. 41 at p. 46.

[30]See Heiden v. Huck [1971] 5 W.W.R. 446.

[31]See Brooks v. Hotchkiss 4 Ill. A.C. Rep. (Bradwell, Ill.) S.C. (1879); also Moore v. Dunning 29 Ill. (Peck) 130 S.C. (1862; Montgomery v. Dane 98 S.W. Rep: 715 S.C.A. Ark.(1906).

[32]Land Titles Act R.S.A. 1970, c. 198, s. 203.

4. Alberta does not face the housing shortage which is evident in England so the courts here can more frequently rely on maintenance orders.

5. The discretion which the Court of Appeal extracted from section 17 in developing the deserted wife's equity and which may be cited as a contributing factor in the origin of the doctrine (although based on a fallacious interpretation),[33] does not at present exist in Alberta, even in a procedural sense. The confusion in the English courts between a statute conferring a substantive right, and a procedural remedy cannot be imputed to a jurisdiction where the courts are without access to such a statutory provision.

Finally the comments of Bora Laskin are worthy of note:

> In England where there is no longer any dower, and which knows neither homestead legislation nor a regime of community property, the support of the wife's equity can only be ascribed to judicial chivalry. In those parts of the United States and in Canada where there is homestead legislation and community property, the notion of a deserted wife's equity is both superfluous and impossible to mount on existing precepts.[34]

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[33] See "The Deserted Wife's Right to Occupy the Matrimonial Home" R. E. Megarry 68 L.Q.R. 379 at p. 380.

[34] Supra, n. 10 at p. 73.

(2) Restraining orders[35]

The jurisdiction of the court to grant interim orders is derived from two sources.

The Divorce Act 1968 contains provisions as follows:

> 10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just. . .
>
> (c) for relieving either spouse of any subsisting obligation to cohabit with the other.
>
> 12. Where a court makes an order pursuant to section 10 . . . , it may . . .
>
> (b) impose such terms, conditions or restrictions as the court thinks fit and just.

In addition to statutory powers of restraint the Supreme Court is vested with power to ensure that a spouse may seek matrimonial relief

> . . . free from threats or pressures or intimidation by a respondent or defendant or anyone else who seeks to have the action abandoned or modified. . . . Except where property is involved (such as the use of the matrimonial home), the order should not interfere to the rights of the husband. It only protects the rights of the wife.[36]

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[35]The information contained under this heading was compiled to a large extent by Professor J. D. Payne, University of Alberta, and has been edited for adaption to this project.

[36]Hastings v. Hastings (1971) 21 D.L.R. 244 at pp. 244-245.

It is important to keep in mind that considerations which are placed before the courts with jurisdiction to grant these interim orders must be pending divorce or judicial separation. The power exercised by the court in a judicial divorce proceeding appears to arise from the exercise of discretion to grant injunctions under section 34(9) of the Judicature Act.[37] The terms of the section allow the court to grant unconditional orders, or subject to terms as deemed just in all cases where an order is appropriate. In practice the Alberta courts grant restraining orders under the legal rationale of aiding the continuance of matrimonial proceedings without fear or intimidation. It has been pointed out[38] that such a procedure is incorrect in law because the courts are preventing assault and battery between spouses without proper resort to the Criminal Code and the issuance of peace bonds. However by virtue of such interim applications the Canadian courts have made judicial observation in relation to a non-owner spouse's right to occupy the matrimonial home.

There is no general rule that either spouse has an absolute right to remain in the matrimonial home; this observation of matrimonial law applies irrespective of proprietory rights of possession--each case must be decided on its particular facts. But the court will only interfere with an owner's proprietory rights by way of injunction where it concludes that such an order is the only sure means of preventing the wife from being molested.[39]

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[37] R.S.A. 1970, c. 193.

[38] "The Ex Parte Injunction in Matrimonial Cases" D. P. MaGuire (1970) 21 A.L.R. 151.

[39] Cook v. Cook [1971] 2 All E.R. 791 at p. 795.

The right to exclude a respondent husband from the matrimonial home in which he has an exclusive or joint title would further appear to be exercisable only in circumstances where the petitioner's supporting affidavit establishes prima facie evidence not only of cruelty but also of desertion. The relevant English and Canadian authorities in this context are examined in Duggan v. Duggan[40] wherein Ferguson, J. stated:

> I have been referred to Donnelly v. Donnelly (1885), 9 O.R. 673. That was a case involving the wife's property. In this judgment, Rose, J., had occasion to say [p. 674]:
>
> > 'In this case the order asked for is not to exclude the defendant from the house. Had such relief been asked, I think, on the facts, I would have granted it. I cannot see what right a man has to enter a house owned by his wife for the purpose, not of seeking the comforts of a home, but to abuse, annoy, injure, and maltreat her, destroying her comfort and peace of mind, and putting her in peril of her life or health. By marital rights, cannot be meant the right of a man to act as a brute towards a woman, in most cases practically defenceless. . . . Where the home belongs to him, she must, I suppose, withdraw if he illtreats her. Where it is hers . . . he can only . . . "enter this house as a husband, to enjoy the society of his wife, or to consort with her as his wife".'
>
> In this, Rose, J., seems to be stating what is said in the later English cases, namely that a husband can enter his wife's house as of right only so long as he is not guilty of a matrimonial offence, but if he himself is the owner of the matrimonial home, the only recourse open to his

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[40] (1965) 51 D.L.R. (2d) 576.

> ill-treated wife is to leave him. The judgment in the Silverstone case [[1953] P. 174, [1953] 1 All E.R. 556] seems to be clear that the husband who owns the matrimonial home can be restrained only if in addition to ill-treatment he has deserted the wife and seeks to return.

The Silverstone decision points out the well-defined limits of the court's discretion to exclude an owner spouse, and the conditions required are much stricter than for any deserted wife's equity, which is based in part on an interpretation of a broad power conferred upon the court under the Married Women's Property Act. It can only be attributed to judicial history that the deserted wife's equity and applications for restraint as between spouses are now based on different findings of fact. When one examines the legislative terms of delegated discretion neither procedure is, in theory at least, any more restricted than the other.

In summary, there can be no doubt that the Alberta courts have power under the Divorce Act and the appropriate section of the Judicature Act to consider the equities of occupation of the matrimonial home. But the circumstances under which an order will be granted to exclude the owner severely limit the procedure as a general protection of the claim to occupation.

(3) Dower rights

In considering the possible alternatives under which a non-owner may effectively assert a claim to possession of the matrimonial home, dower raises various points for consideration. Greater coverage is given to this aspect in

relation to joint ownership where partition orders threaten the inchoate rights of a spouse, but refusal of applications under section 11 dispensing with consent may in a practical sense recognize an equitable right of the wife to remain in occupation.

> 11.(1) A married person who wishes to make a disposition of his homestead, and who cannot obtain the consent of his spouse
>
> (a) where the married person and his spouse are living apart, . . .
>
> may apply by notice of motion to a judge for an order dispensing with the consent of the spouse to the proposed disposition.
>
> . . . . . .
>
> (4) On any such application a judge may hear any evidence and consider any matters as in his opinion relate to the application and without restricting the generality of the foregoing, he may consider
>
> (a) in the case of a husband and wife who are living apart, the circumstances of the separation and the financial resources of the parties and their mode of life, . . .
>
> . . . . . .
>
> (5) A judge by order may dispense with the consent of the spouse if in the opinion of the judge it appears fair and reasonable under the circumstances to do so.

There is nothing in the present Dower Act which affects the holding in Essery v. Essery, Tactko v. Leifke (Tactko Estate)(no. 2).[41] It was held that the interest of a

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[41] [1947] 2 W.W.R. 1044.

spouse in a homestead is merely contingent while the couple are alive and married and that the Act confers no vested right to possession in any circumstances.[42] But noting the provisions under section 11(5) and the broad discretion there conferred, much as with the applications under section 17 of the Married Women's Property Act, the exercise of judicial discretion will be in accordance with the conduct of spouses under all other relevant circumstances. The limited number of cases which have dealt with the consideration of "relevant circumstances" has done little to predict the security of a non-owner spouse in occupation vis-à-vis the right to remain against the other spouse's intentions to sell.

Re Rudiak Estates[43] considered section 23 of our Dower Act which provides that a spouse takes no benefit under the Act if that person was living apart from the married person at death in circumstances that would disentitle a wife to alimony. The court decided that the question of desertion is not relevant to a determination of disentitlement to alimony; the question dealt with is that of uncondoned adultery. The problem under the broader terms of section 11 is whether desertion is a relevant consideration there. No decision has been passed in Alberta on this point, although section 11(4)(a) confers sufficient scope to examine desertion.

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[42] Jackman v. Jackman (1958) 25 W.W.R. 131; see also Proskurniak v. Sawchuk (1960) 30 W.W.R. 407.

[43] (1958) 25 W.W.R. 38.

In Manitoba, exercise of discretion in a similar section was decidedly to be without regard to the fault for the breakdown in marital relations.[44] The reasons are that a number of years may have elapsed since the separation and that fault often exists on both sides. Where fault can primarily be attributed to one spouse, the court appears to have the power to protect the "innocent" party. This power can conceivably cover the situation under which a deserted wife's equity is said to be applicable. By denial of the dispensing order, the court's broad discretion can protect either spouse in occupation of the matrimonial home. The obvious defects in such a protection are:

(1) It is unnecessarily indirect and in a section not expressly intended for the purpose, so that it fails to provide the court with the guidelines of proper legislative intent.

(2) It is an application which may not afford the parties adequate procedures to disclose factors relevant to the equities of occupation but more remotely concerned with consent to disposition.[45]

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[44] Re Dower Act: Re Rodick and Rodick (1958) 24 W.W.R. 38.

[45] i.e., The availability of alternate accommodation for the spouse; whether maintenance is being received or not; whether the children (if also in the home) would have to change schools at a poor juncture; how long the spouse has been in occupation before the application.

(3) It has no application to a constructively deserted spouse outside of the matrimonial home insofar as providing a right of occupation.

So that while applications under the Dower Act may afford some provisions to protect the non-owner in Alberta, the need for legislative enactment appears fairly evident.

The Dower Act also serves as a basis for discussion in principle of conflicting interests between a spouse in occupation and a third party. The intention of our present legislation is to balance the claim to the homestead of a bona fide purchaser who is protected by the registration of a transfer by sale; and the unregistered spouse by giving the spouse a personal right of action against the married partner for one-half the value of the property transferred under sale and registered without her consent.

The problems of Torrens land registration are no less cumbersome in relation to the rights of occupation as well. It therefore seems logical to adopt the policy decision of the legislature incorporated into the 1948 Dower Act, and to protect a bona fide third party purchaser whose transfer of ownership is registered. The problems pointed out by Professor W. F. Bowker in his article on "Reform of the Law of Dower in Alberta" will be equally apparent for possession. All that need be said here is that the position of mortgagees, lessees, and parties under part performance of agreement for sale is a topic for future consideration in this jurisdiction. For now, our law ought at least to be consistent.

It is therefore recommended that in respect of third pary interests the tenor of the Dower Act be adapted to the provision of any rights to possession such as may be adopted in Alberta.

2. Joint Ownership

Jointly held property may be severed in three ways at common law:

(1) acquisition of a greater interest;

(2) mutual agreement; and

(3) alienation of interest (by sale, mortgage or lease), any of which will have the effect of creating a tenancy in common and destroying the right to survivorship.

(1) Dower Consent

Looking again at alienation by one spouse of a part interest in jointly held property, it must be noted that this deprives the remaining spouse in the final result as a tenant in common with a *bona fide* purchaser, of any possible right of occupation in the home at common law. This is in addition to the loss of a right to survivorship to the legal title of the whole.[46] However as was stated in Chapter IV, alienation of a part interest may be expressly within the terms of the Dower Act. The definition of a disposition includes "a transfer, agreement for sale, lease for more than three years, or any other instrument intended to convey or transfer an interest in land."

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[46]Such a result is due to the fact that the third party will likely seek partition and sale of the property.

Section 26(2) expressly contemplates the holding of matrimonial property in joint ownership. Somewhat less clear is whether by the alienation of interest, property ceases to be a homestead within the meaning of the Act. Having regard to section 4(2)(a) matrimonial property will cease to be a homestead when a transfer is registered in the land titles office. Since the spouse's name as co-owner would appear on the deed, it seems that the absence of dower consent as required under section 26(2) will therefore protect the right of occupation in Alberta under an attempted alienation. It is settled that the court may dispense with consent to the disposition of an interest in jointly held property where an application is made under section 11 of the Dower Act.[47] That the discretion to be exercised by the court is in accordance with the terms under that section as specified earlier.[48] Summarizing briefly a severance as defined is within the contemplation of the Dower Act as specified under the definition section of a disposition and the court's discretion under section 11 may in the result protect the rights of occupation against the alienation of a partial interest in jointly held property. However does the exercise of this same discretion apply to a partition application as distinct from a severance?

(2) Partition and sale

The difference between a severance and a partition for our purposes is that the latter is less clearly within the definition of a disposition under the Dower Act. It was precisely on this point that Smith J. in the case of McWilliam

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[47] McWilliam v. McWilliam (1961) 34 W.W.R. 476.

[48] Supra, p. 225.

v. McWilliam[49] expressly disagreed with Egbert J. in Robertson v. Robertson.[50] It would appear that the points of view of the two judges could be harmonized in some respects if Egbert J.'s analysis were to be examined closely. The basis for his decision is not dependent on the scope of the definition section but rather the general purpose of the Act.

> The broad general purpose and intent of these Acts, including the Alberta Act, is to preserve to the spouse of the owner of the homestead the right to have and to keep a home, and so they provide that this home cannot be disposed of, nor the right of the spouse to occupy that home taken away, unless the spouse consents in writing to release his or her claim.[51]

Then relying on Wimmer v. Wimmer[52] he holds that homesteads, however owned, must be subject to the broad and general purpose of the legislation to preserve a home. Although the decision does not come out clearly to state that a partition is a disposition within the Act, the effect is the same. Inasmuch as this point has precisely been challenged in the later decision of McWilliam v. McWilliam it seems appropriate that legislative enactment declare the preferred position to be taken in the law of Alberta. It is therefore

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[49] Supra, n. 47.

[50] (1951) 1 W.W.R. (N.S.) 183.

[51] Supra, n. 50 at p. 186.

[52] [1947] 2 W.W.R. 249.

recommended that for judicial clarity section 26 dealing with joint property be amended to include a subsection declaring that partition and sale of property be treated as a disposition within the Dower Act for the purposes of homesteads held jointly between spouses under section 26(2).

Having clarified that point a further problem in relation to partition and sale is as to the nature of the court's power under the Partition Act itself and what effect the conferring of a right of occupation will in practice have upon the exercise of such power. A full examination of the Partition Act of 1868, c. 40,[53] which is in effect in Alberta will reveal that the Act of itself is merely an amendment of earlier legislation in England and does not express the nature of the court's power to be exercised thereunder.

Apart from the discretion given by the Partition Act 1868 as to sale in lieu of partition, a decree is as of right without court restriction--except where certain acts may be required to be performed as a condition precedent under the doctrine of "he who seeks equity must do equity". Such was the position taken by the Alberta Court in Wilkstrand and Mannix v. Cavanaugh and Dillon.[54] But the court went on to qualify that right as being restricted or waived by express or implied agreements in the nature of a binding contract.

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[53]Refer to Appendix D

[54][1936] 1 W.W.R. 113; aff'd [1936] 2 W.W.R. 69.

In the matrimonial context, a joint tenant in the ownership of a homestead could be interpreted as just such a modification. The purpose of acquisition is to provide adequate shelter which is a contractual obligation of the husband to his wife. The question would then arise whether a wife as co-owner who is under no obligation to maintain shelter is bound by an implied agreement not to apply for partition and sale of the matrimonial home.

As already pointed out, Robertson v. Robertson[55] binds both the spouses as joint tenants to the provisions of the Dower Act, thereby protecting the rights conferred by the Act as against applications for partition. In relation to any present claims to occupation as against a spouse (as distinct from the vested right to possession as a joint owner), partition as a right under the Partition Act as suggested by the decision of Wilkstrand and Robertson must be re-examined.

It is worthy of note that the Wilkstrand case was not dealing with matrimonial property, and it cites no authority nor any section within the Act in support of the contention that partition is as of right. But noting back to the statute 32 Hen. 8 ch. 32 A.D. 1540 (Chitty's Statutes Vol. IX, p. 3) "all joint tenants . . . shall and may be compellable from henceforth by writ of partition . . . to make severance and partition". Having regard to the obvious ambiguity in the use of the words 'shall' and 'may', reference to the Ontario case of Re Hutchinson and Hutchinson[56] indicates historically

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[55] Supra, n. 50.

[56] [1950] O.R. 265.

courts have interpreted the use of such legislative language as conferring no power in the court to exercise any judicial discretion whatsoever. Subsequent amendments in Ontario which have affected such cases as Re Hutchinson and Hutchinson are of no applicability in Alberta at the present time, but are useful for recommendations in legislative reform.[57]

It may also be worthy of note that the Robertson decision assumes a right of occupation is protected within the scope of the Dower Act, and that partition orders cannot be applied against the homestead. It is arguable that inasmuch as the Partition Act of 1868 was passed in a point of British history under which spouses held matrimonial property as a rule as tenants-of-the-entireties, such a tenancy could not be severed. But since spouses today in Alberta may hold and usually do as joint tenants or tenants-in-common, it cannot be disputed that the Act in its terms applies to joint tenancies between spouses. The question then becomes one of reform. If the law as set down in Robertson v. Robertson can be said to be clearly established, then the court's power of discretion under section 11 will amply protect the equities of a claim to occupation of the matrimonial home. But again, as with sole ownership, it is suggested that dower rights

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[57]It was noted in Chitty's statutes, vol. IX, p. 3, footnote (f) that before the passing of 3 and 4 Will. 4, c. 27, it was said that a decree in equity for a partition was a matter of right; but that on the other hand it has also been said that, as a plaintiff had a legal title it was discretionary in the court whether they would grant partition or not. The possible applicability of such a comment to the Alberta position points all the more dearly to the need for legislative reform.

and rights of occupation are separate and distinct, and that if separate provision is to be made in Alberta for the claim to occupation of the matrimonial home, partition applications and summary motions for possessory rights should be harmonized.

In Ontario the court may stay over partition proceedings pending application under the Married Women's Property Act whereafter the matter of the rights of joint tenants will be judged accordingly. This is an obvious accommodation of property laws in a matrimonial context. In Manitoba where discretion is conferred the applicant has a prima facie right to partition. The onus is on the respondent to satisfy the court that it would be improper to direct the sale of land. Factors which the court will consider under the partition application include malice in the applicant's conduct and evidence of oppression. Factors such as blameworthiness in respect of separation of spouses or inconvenience to the other co-tenant are irrelevant.[58] It is therefore recommended that a new Act in Alberta include provision that applications of spouses in respect of partition and sale of the matrimonial home be expressly subject to the discretion of the court to protect the rights

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[58]Ref. cases in other jurisdictions where statutes confer a court discretion, see: Ontario, Mastron v. Cotton (1925) 580 L.R. 251, Szuba v. Szuba [1950] O.W.N. 669, Re Hutcheson and Hutcheson [1950] O.R. 265, Re Roblin and Roblin [1960] O.R. 157, Rush v. Rush (1960) 24 D.L.R. (2d) 248, Re Cates and Cates [1968] 2 O.R. 447, Re Hearty and Hearty (1970) 10 D.L.R. 732. Manitoba, Klewkowich v. Klewkowich (1955) 14 W.W.R. 418, Steele v. Steele (1960) 67 Man. R. 1270, Felterley v. Felterley (1966) 54 W.W.R. 48. British Columbia, Watts v. Watts (1951-52) 4 W.W.R. 566, McGeer v. Green (1960) 22 D.L.R. (2d) 775.

of occupation to the same extent as previously declared for dower right including the right to postpone partition and sale pending arrangements for alternate accommodation.[59]

3. Leaseholds

(1) Transfer of Tenancy

Currently in Alberta there exists no law either in statute or arising out of litigation which allows for the right of a spouse to a tenancy registered in the other spouse's name under a lease. A line of cases in England appears to have protected a deserted wife in possession of a tenancy under particular circumstances[60] and much is with the examination of the deserted wife's equity, the applicability of such a concept in relation to tenancies in Alberta is doubtful at best.

"She is there in this special capacity of a licensee. Her license cannot be revoked by the husband and her possession cannot be assailed by the landlord so long as he receives the rent."[61] However it must be pointed out that this

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[59] In the course of research on the partition of matrimonial property, it appears worthy of note that a discretion in the court to deal with all partition applications is a useful recommendation.

[60] Brown v. Draper [1944] 1 All E.R. 246; Taylor v. McItale [1948] Estates Gazette Digest 299; Old Gate Estates v. Alexander [1949] 2 All E.R. 822; Middleton v. Baldock [1950] 1 K.B. 657. Cf. Stewart v. Stewart [1948] 1 K.B. 507; Walse v. Taylor [1952] The Times July 8; Twickenham Rent Tribunal Ex. p. Dun [1953] 2 Q.B. 425; Seel v. Watts [1954] C.L.Y. 2861; Penn v. Dunn [1970] 2 Q.B. 686.

[61] Brown v. Draper, supra, n. 60 at p. 247.

doctrine (which was not overruled by Ainsworth) was developed in reference to the Rent Acts in England and under which there was recourse afforded to the landlord to terminate a tenancy. By obtaining a court order of possession against the husband, the landlord successfully deprives the wife of any rights to remain in occupation. In Alberta no provisions equivalent to the Rent Acts have been passed, and the equity of occupation cannot likely be applicable here. The position at common law is that the landlord is entitled to treat the wife as a trespasser and may accordingly evict her.

Inasmuch as Alberta will continue and likely expand its public and low rental housing program, a spouse supported by but threatened with the prospects of welfare should be given the opportunity to remain in inexpensive accommodation. Factors such as family schooling and the spouse's place of employment (if any) should be available for the court's consideration too if required. A summary procedure could provide the spouse the opportunity to apply to the court to have the tenancy registered in his or her name. This would be binding on the landlord only to the same extent as any other tenancy, i.e., subject to notice under the Landlord and Tenant Act.[62]

It is therefore recommended that a summary application be made available to a non-registered tenant to convert the leasehold in circumstances of separation.

(2) Furniture

Another problem which can often arise in tenancies is the right of the use of furniture and other household chattels

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[62]R.S.A. 1970, c. 200.

left by the deserting spouse.[63] Since the right to use furniture is important in any separation the discussion is not strictly confined to tenancy occupation.

Use of household goods is perhaps as important as a right of occupation in respect of proper enjoyment of possession. The cost of replacement of goods is far more than the proceeds of their sale, so that curative provisions of the nature of the Dower Act are of reduced practicality. But provision should be made to prevent disposition at least of essential items.

As discussed previously the present state of law in Alberta is that a spouse who has made no financial countribution to the purchase of furniture or appliances secures no rights whatsoever, and the purchasing spouse may dispose at any time.

Changes in the law should therefore contemplate a right to use and enjoyment of household goods when in occupation of the matrimonial home. Such a right would be subject to terms set by the court since it acts in the nature of a substitute for maintenance payments. In dealing with movable property no concern need be paid to the theory of the Torrens System, so that no basic contrast exists in Alberta with the position faced by the United Kingdom.

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[63]The problem is discussed here because furniture is used in certain tenancy cases as an indication whether the deserter impliedly agreed to leave the remaining spouse in occupation under license. See Taylor v. McNale and Old Gate Estates v. Alexander, supra, n. 60.

The tentative proposals of the Law Commission Working Paper No. 42 suggest that:

> On an application relating to the use and enjoyment of household goods, the orders which the court is empowered to make should include the following:
>
> (a) an order requiring either spouse to allow the other spouse to have the use and enjoyment of the household goods;
>
> (b) an order restraining either spouse from removing the household goods from the use and enjoyment of the other spouse or from making any disposition with the intention of depriving the other spouse of their use and enjoyment;
>
> (c) an order requiring a spouse to restore or deliver household goods to the other spouse;
>
> (d) an order regulating or terminating the right of either spouse to the use and enjoyment of any of the household goods.[64]

In addition the position taken by various European countries is worthy of consideration. In Denmark, for example, a third party purchaser is protected in the transfer of chattels but he carries the burden of proving that he is a bona fide purchaser and for value.[65] The Dutch Acts also contain provisions protecting household furniture.[66]

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[64]Family Law Family Property Law 26 October, 1971 at p. 152.

[65]Act Concerning the Legal Effect of Marriage (no. 56) para. 19 -- March 18, 1925.

[66]See "Matrimonial Property in Denmark" I. Pedersen (1965) 28 M.L.R. 137.

> In France, neither spouse may, without the consent of the other, dispose of his or her interest in the matrimonial home or the furniture.[67] This provision is one of several governing the mutual rights and obligations of the spouses which apply regardless of whether the spouses are subject to a regime of community or to a regime of separate property. A spouse who has not consented to a disposition may apply within one year from the date of discovering it to have it set aside. Although third parties dealing in good faith with one spouse are protected in regard to movables, this protection does not extend to those that are classed as household goods.[68] If a spouse refuses consent to a transaction the other spouse may, if the refusal is not in the interest of the family, apply to the court for authority to act alone.[69] [70]

Before making any formal recommendations the provisions under the Dower Act section 24(1) should be noted. Under that section a life estate in such property of the deceased as is exempt from seizure under the Exemptions Act is conferred upon a surviving spouse for necessary use and enjoyment. The interest is therefore contingent upon the death of the owner spouse and is subject to the restrictive terms of the Exemptions Act as an arbitrary assessment of equity.

It is therefore recommended that the right of occupation if adopted include the right to protect by application to the court such personal property in the

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[67] C.C. 215 al. 3 (as amended by the law of 13 July, 1965).

[68] C.C. 222 al. 2.

[69] C. C. 217.

[70] Working Paper No. 42, supra, n. 64 at pp. 138-39.

matrimonial home as is required for the proper enjoyment of the premises. It is further recommended that in respect of third party purchases any transfer be deemed valid but that the onus be placed upon such third party purchaser to prove that he acquired the property without notice, and that the spouse in occupation be left with a personal remedy against the spouse who has transfered in contempt of a court order.

Conditional sale contracts raise more complex difficulties, since ownership is not in either spouse but remains with the third party contingent upon proper payments. In order then to confer upon a spouse who was not a party to the agreement the rights of use and enjoyment, provisions must also stipulate the obligation upon that person to continue payments as required. Provision could be included in every conditional sale contract obligating any spouse who wishes to use the goods to make the appropriate payments, but this raises unnecessary problems of defining what goods are "essential". The better approach would be to confer only the right to apply to the court to bind the third party to acceptance of the payments. The court can thereby decide for the parties whether property is essential and whether payment should be accepted. This leaves the question of rights to the property between spouses after completion of the agreement to be decided as with any other property obtained during matrimony.

It is therefore recommended that the spouse of a party to a conditional sales contract be given the right to apply to the court to be placed in the position of the married party to the contract including (1) the right

to make payments under the terms of the agreement, (2) the right to defend a claim for repossession, and (3) the right to take title to the property upon full payment.[71]

4. Reform

(1) Matrimonial Homes Act 1967

In order to draw together the recommendations under this chapter on rights of occupation and use, legislative provisions in England in the same area provide a condensation of possible reforms. The provisions of the Matrimonial Homes Act deal primarily with the situation where one spouse is the legal owner, and confer rights upon the non-owner spouse as follows:

> (a) if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section;
>
> (b) if not in occupation, a right with leave of the court so given, to enter and occupy the dwelling house.

Either spouse may apply to the court under section 1(2) for an order declaring, enforcing, restricting or terminating

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[71] Subject to the right to apply under the procedure recommended supra, p. 241 to decide rights of ownership or possession. Note; in W. v. W. [1951] 2 T.L.R. 1135 (KBD) the court in granting the husband's right of ownership of the furniture, stated that desertion is not as important a consideration with respect to furniture as with the home.

the rights conferred above. The rights of the owner spouse in respect of occupation can also be regulated, but not extinguished.[72] The considerations of the court in the exercise of a broad general discretion include: (1) the conduct of the spouses inter se, (2) the respective needs and financial resources of the parties, and (3) the needs of any children.

The provisions of the Act dealing with rights in relation to third parties allow the non-owner spouse to register the right of occupation as conferred. The third party is bound thereby to the same extent as the prior owner-spouse from whom the interest has been derived. One further provision is made in relation to third parties. Section 1(5) allows a non-owner spouse with rights of occupation to make mortgage or rent payments owing on the matrimonial home and these payments shall be accepted as if from the owner spouse.

(2) Problems

The rights between spouses under the Matrimonial Homes Act disclose two matters which ought to be avoided in Alberta:

(a) The right to apply under the English Act is conferred only on spouses who do not hold under a co-tenancy. That is, despite the careful language used to ascribe to the court the discretion to consider the needs

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[72] Tarr v. Tarr [1971] 1 All E.R. 817.

of the family etc., a spouse who is part owner cannot apply to restrict the rights of occupation of the other spouse in the best interests of the family, i.e., confining one spouse to occupation of that part of the home where a business practice is maintained. If Alberta similarly denied the right of a co-tenant to apply, resort to the restraining orders would continue as a necessary practice.

(b) A non-owner spouse who is out of occupation has no right capable of registration until a court order grants leave to enter.[73] The English Law Commission has proposed "that a spouse who has made such an application should be permitted to register the application as a lis pendens under the Land Charges Act 1925". While the effect of such an amendment would be a favourable improvement, perhaps the onus should at all times be on the owner spouse to apply for the removal of the right as a charge on the land. In this regard either spouse should be allowed to file a marriage certificate and a form affidavit that the property is a matrimonial home. The Registrar would then be required to file the order on the title deed.

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[73] Rutherford v. Rutherford [1970] 1 W.L.R. 1479.

The English Act also raises for discussion two questions surrounding its applicability to current Alberta law in its approach to protecting rights of occupation against third parties.

(a) The provisions of the Dower Act already protect the non-owner spouse from any disposition without his or her consent except a completed and registered sale. The only protection that a right of occupation could add to that Act would be a postponement of the purchaser's possession.

(b) The registration of a lis pendens in Alberta gives notice of pending litigation in the nature of a dispute over title. Since a non-owner spouse has no claim to title in the property, a lis pendens would be wholly inappropriate.

5. Summary of Recommendations made in Chapter V

(1) General

At present in Alberta there appears to be no legal right to protection in the occupation of the matrimonial home for either spouse irrespective of legal or beneficial interests. At best the position at common law can be stated to extend a right of occupation binding on a husband for his failure to support a deserted wife. To clarify and update the Alberta position, it therefore seems appropriate to

confer a substantive right binding on both spouses, and to be interpreted by the court for the general benefit and welfare of the family unit.

Irrespective of the manner in which the legal and beneficial interests are held, a right of occupation in the matrimonial home should be conferred on both spouses during marriage. Such a conferred right should include the right to apply to the court to protect against the disposition of personal property in the home to such an extent as the court might deem detrimental to the proper use and enjoyment of the matrimonial home.

A summary procedure should be provided to adjudicate disputes between the spouses in respect of conflicting rights of occupation to the matrimonial home and its contents. The court should be empowered in such an application to make any orders suspending or extinguishing the rights of either spouse having resort to any factors which the court deems appropriate; but especially it should be concerned with the general benefit and welfare of the family as a whole.

The rights of occuption should be binding upon the spouses inter se and subject to penal sanctions for any act leading to the disposition of that interest to a third party. The spouse so deprived should be conferred with a personal right of recovery in the event of improper disposition of the property which has been registered. A person should be required to declare whether the property to be disposed is the matrimonial home and if so to undertake to dispense with the consent necessary by application to the court. Any disposition which does not comply with the above required declarations or which does not attach a separate form of

the other spouse giving consent should be null and void unless properly registered.

There should be a broad curative provision for the court to interpret the intention of all the parties and to declare the disposition valid in all respects. A discretion should also be conferred on the court to postpone the rights of a third party to immediate possession. Either spouse should be entitled to register the property as the matrimonial home by way of marriage certificate and a standard affidavit filed with the Registrar at the appropriate land titles office.

The right of occupation, then, would be automatic whether in actual possession or not, and regardless of legal and beneficial rights. It would accrue upon marriage or upon the acquisition of the homestead whichever is latest; and it would terminate upon the death of either spouse, divorce, or a court order.

(2) Specific

It has been recommended:

(a) that a procedural section of the nature enacted under section 17 of the Married Women's Property Act 1882 in the United Kingdom be adopted in Alberta for adjudication of disputes in respect of possession;

(b) that in respect of third party interests the tenor of the Dower Act be adapated to the provisions of any right to occupation such as may be adopted in Alberta;

(c) that section 26 of the Dower Act be amended to include a subsection to the effect that partition and sale of property be treated as a disposition within the Act for the purposes of a homestead held jointly between spouses under section 26(2);

(d) that the Partition Act of 1868 be repealed and a new Act in Alberta include provision that applications of spouses in respect of the matrimonial home be expressly subject to the discretion of the court;

(e) that a summary application be made available to a non-registered tenant to convert the leasehold in circumstances of separation;

(f) that the right of occupation if adopted include the right to protect by application to the court such personal property in the matrimonial home as is required for the proper enjoyment of the premises;

(g) that in respect of a third party purchaser any transfer be deemed valid but that the onus be placed upon such third party purchaser to prove that he acquired the property without notice, and that the spouse in occupation be left with a personal remedy against the spouse who has transferred in contempt of a court order;

(h) that the spouse of a party to a conditional sales contract be given the right to apply to the court to be placed in the position of the married party to the contract.

CHAPTER 6

SOME CONCLUSIONS

In the preceding chapters the present law of matrimonial property has been outlined in some detail, along with some critical remarks and suggestion for partial reform. In the opinion of many who have studied this area, the basic complexity in practice (in contradistinction from its apparent simplicity on paper), the inequity, and the uncertainty of the separation of property regime can be remedied only by an overall change in our matrimonial property law. At present the law treats married persons as strangers--what is needed is a recognition that marriage in fact does produce fundamental changes in the property relationship of a man and a woman--what is needed is a recognition of the community of interest and property within a family. What form such recognition should take is the very problem which this paper was commissioned to study.[1]

There are four basic alternatives which should be considered when recommending any reform in the law. It is first said that it would be sufficient to simply enact a section which gave to the courts unlimited discretion on the

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[1] On March 8, 1971, the Alberta Legislature passed a resolution asking the Institute of Law Research and Reform to study the feasibility of legislation which would provide that, upon the dissolution of marriage, each party would have a right to an equal share in the assets accumulated during the marriage, otherwise than by gift or inheritance received by either spouse from outside sources.

dissolution of a marraige (or at some earlier point) to transfer property between the spouses. This solution is subject to the objections that it would create much uncertainty in the law and consequently much litigation. More harshly it has been stated that whereas[2]

> . . . [a] legislature which leaves nothing to the discretion of the decision maker proclaims that it can foresee everything and is guilty of hubris, a legislature which leaves everything to the discretion of the decision maker proclaims that it cannot foresee anything and declares its own bankruptcy. Both policies defeat themselves.

It is said that it is for the legislature to lay down the norm, for the judge to adjust it to the needs of the individual case which is before him and of which he knows the facts. Such a wide discretionary section is needed, but it must be in conjunction with more fundamental changes.

Perhaps then a second alternative reform should be considered by which the legislature could enact a presumption of joint assets, the presumption developed by Lord Denning in the "palm tree justice cases" and rejected in Canada by the Supreme Court and in England by the House of Lords.

The presumption would be limited in its application to family assets. These have been defined by Lord Diplock to mean[3]

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[2]O. Kahn-Freund, "Matrimonial Property--Where Do We Go from Here?", The Josef Unger Memorial Lecture (1971).

[3]Pettitt v. Pettitt [1969] 2 W.L.R. 966 at 994.

> . . . property, real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels. It does not include property acquired by either spouse before the marriage but not in contemplation of it.

The operation of the presumption was described by Lord Denning M.R. in Gissing v. Gissing[4] as follows:

> It comes to this: where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their conduct that the house and furniture is a 'family asset' in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what: or who goes out to work and who stays at home. If they both contribute to it by their joint efforts, the prima facie inference is that it belongs to them both equally: at any rate, when each makes a financial contribution which is substantial.

Each case could be considered on its merits, with the judicial discretion confined to facts relating to the acquisition of the property, not matters of fault as regards the marriage breakdown. For further certainty such legislation could include a provision similar to that contained in the Family Codes of the Ukrainian, Byelorussion and Georgian Soviet Republics by which the housework of a wife and the care of

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[4] [1969] 2 Ch. 85 at 93.

children are to be equated with the husband's work for the purpose of evaluating contributions to the marital property.[5]

The problem with this alternative is the same as that with the proposal discussed in Chapter 4 whereby there would be a presumption of joint assets limited to the matrimonial home. The fact that the right to an equal, or any, share in the home is not an established one would leave a large element of uncertainty in the law, and the consequent need for litigation to ascertain exactly what are the property rights in a family asset. One aim of any reform must be to achieve some modicum of certainty in the law.

A third alternative is the community property regime. Under such a property regime a special body of property is created--the community--in which spouses have rights as from the date of marriage. The community in some cases consisted of the entire property, both ante-nuptial and post-nuptial of both husband and wife; in other cases, such as Quebec prior to the 1970 reform, of all movables plus the acquests or gains made during the marriage; more commonly, as in the American civil law jurisdictions, the community was limited to acquests. Some characteristics common to all community of property regimes are[6]

> (1) all contain some provision whereby persons about to be married can contract in relation to the property to be held or acquired during the proposed union;

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[5]John N. Hazard "Matrimonial Property Law in the U.S.S.R." in Matrimonial Property Law (W. Friedmann, ed.) (Toronto: 1955) at 212-14.

[6]W. J. Brockelbank, The Community Property Law of Idaho (Idaho: 1962).

(2) all set up a special regime for the property of the husband and wife during marriage. A special mass, called the common property or the community property is to be governed by special principles and is to be distinguished from the separate property of each spouse which is not so governed. The elements of this common mass vary from one state or country to another. Often it is composed of gains or acquisitions made by the spouses during marriage.

(3) all contain special rules for the disposition of the community property upon the termination of marriage by death or divorce. If the marriage is terminated by death, and there is no will, the surviving spouse will at least take one half and sometimes take all. If there is a will, it may cover only one half the community property and even as to that half it is usually confined to a restricted list of beneficiaries. If the marriage is terminated by divorce, the usual pattern is an equal division of the common property between the spouses but the court in some cases is given discretion to make an unequal division.

Both the full community and community of movables are subject to the objection that even a marriage of a short duration can result in great enrichment due to the inclusion of property owned prior to marriage in the property shared on the dissolution of marriage. However, since this could be remedied by including a provision in the law whereby the courts could have a general discretion to "adjust" the matrimonial property of the spouses (the first alternative considered in this section on reform), the basis for rejection of these community systems must be the fundamental objections applicable to all community property systems.

To some the most real objection is that a community of goods is in practice incompatible with the equality of the

sexes. Historically, the administrator of the community property and in fact the wife's separate property, has been the husband. Kahn-Freund has suggested that although this power may be limited by restrictions on gifts, the ultimate power to administer the community must remain with one person in order to prevent an increase in family feuding over decisions relating to business property.[7] He suggests that it is no coincidence that in U.S.S.R. the only country providing for joint administration of the community property, there is little or no investment property.

Whether in fact the supposition that the subjection of one spouse to another is a necessary concomitant to a community system is correct,[8] the existence of a community during the course of the marriage also creates problems with regard to creditors who must always ensure that the spouse dealing with property has power to do so.[9] Inevitably the law where community of property is the legal regime, becomes

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[7]Kahn-Freund "Matrimonial Property--Some Recent Developments" (1959) 22 M.L.R. 241 at 243, 245.

[8]A contrary view was espoused by the minority of the Royal Commission on Marriage and Divorce who envisaged a workable community property system based on a joint administration of the community. Cmd. 9678, Para. 652(ii) p. 175. Joint administration is also provided for as a contractual regime in West Germany and the Scandinavian countries.

[9]For example, a wife would probably have power to pledge only her separate property (though sometimes also her reserved property). Her husband would have complete control over his separate property and usually limited power over the community property. A creditor would thus have to check into which category the property pledged fell.

very complex. This complexity lends strength to the conclusion that rather than accept the risk of the horrors paraded by Kahn-Freund regarding the "intolerable" situation of joint administration of the community property in a society where there is a great deal of investment property,[10] a fourth alternative property system which avoids the problems of joint administration as well as the dominance of a single administrator, may well be the solution.

Both separate and community regimes in practice can be unjust and complicated. What then is the solution? The answer it is suggested is some kind of partnership of acquests or deferred community. This regime, with minor variations, has been recommended by common law[11] and accepted by civil law[12] countries. In all the systems the basic principle is that of separate administration during the course of marriage and on the end of marriage, or in special circumstances before, an equal sharing of the matrimonial property, which is variously defined in different countries. Rather than describe separately the property system as adapted in each country, this report will deal with individual details

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[10]Kahn-Freund, supra n. 7 at 243. Kahn-Freund felt that often a husband and wife will not be able to agree on investment decisions and will thus have to resort to frequent court action, thereby undermining an otherwise healthy marriage. How healthy such a marriage would be in the first place would be debatable.

[11]Ontario Family Law Project; English Law Commission Working Paper.

[12]Denmark, Sweden, Norway, Finland, West Germany, Iceland, Netherlands, Quebec. In effect France has achieved this type of property system though the property regime is referred to as a community system.

that have to be resolved by the Institute if the general principle behind the system is accepted;[13] in considering the alternative solutions, it is useful to consider how the established systems have resolved the particular issue.

The Proposed System

The basic structure of the proposed partnership of acquisitions would be as follows. During marriage, each spouse would be free to acquire and dispose of his or her own property, subject only to certain restraints enumerated below that are necessary to protect the other spouse and the family. On the termination of the marriage, or in other special circumstances, there would be a sharing of certain of the spouses' assets. The principle of sharing would be that the spouse with the least assets would have a money claim against the other spouse or his estate for an amount sufficient to equalize the value of the spouses' assets.

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[13] For an excellent comparative analysis of the Scandinavian, as exemplified by Denmark, the West German and Dutch matrimonial property systems, see I. M. Pedersen "Matrimonial Property in Denmark" (1965) 28 M.L.R. 137. For a detailed description of the Swedish system see A. Malmstrom, "Matrimonial Property Law in Sweden" in Friedmann, Matrimonial Property Law (1956). In the same volume there is a good analysis of the problems considered by the West German legislators when attempting to reform West Germany's matrimonial property law, many of the issues being common to Alberta. See F. Massfeller "Matrimonial Property Law in Germany".

The English Law Commission includes some studies of a comparative nature. One source material apparently relied upon heavily by the Law Commission was the Ontario Family Law Project, Volume II "Property Subjects". This study included among many others descriptions of the French, Danish, Dutch and West German property regimes all of which were considered in recommending the proposed system.

In applying the system it is recommended that the property regime be optional. This is in accordance with all the civil law systems which allow the parties to agree on what law should govern their respective property rights. The trend in these jurisdictions is more and more towards allowing the spouses to change their minds after marriage as to which property regime they should be subject to. Thus the French reforms of 1965 included a provision whereby the marriage contract is immutable for only two years after which it might be changed with the approval of the court. Provisions allowing for subsequent changes are a recognition of the fact that today the social, economic or professional status of a couple might be transformed in the course of a few years.

Both the English and Ontario Reports recommended that the spouses should be free to contract out of the legal regime, both at the time of marriage and subsequently. Ontario suggested that the legislation establishing the deferred community also include a contractual regime which the spouses would be subject to if they do not execute a marriage contract or settlement. This contractual regime would be separation of property. It is recommended that Alberta legislation contain a similar provision since this would aid people in inexpensively opting out of the legal regime.

If such a contractual regime were established by the legislation, opting out of the legal regime of partnership can be a simple matter. When two persons apply for a marriage license they could be informed by a written document which employed the simplest terms possible, of the existence and implications of the legal and contractual regimes. A form

should be appended whereby the prospective spouses could declare their intention to be subject to the contractual rather than the legal regime. It is recommended that this document would have to be notarized to be effective. Perhaps additional requirements such as presently apply to dower consents may also be appended for the protection of weaker spouses.

The Ontario recommendations suggested that after marriage spouses wishing to change the matrimonial regime to which they are subject would have to attain a court order.[14] Similarly in Quebec and other civil law jurisdictions any agreement between the spouses modifying their matrimonial regime must be contained in a notarized document and has no effect until it is homologated by the court of their domicile.[15] Possibly legislation which included only the requirement of independent legal advice for a notarized document modifying the matrimonial regime to be valid would achieve the same result as legislation requiring court approval. Once the document was challenged, the person seeking to uphold the document would have the onus of showing that each spouse had had independent legal advice.

A second category of problems which would arise regarding the application of a new matrimonial regime are those of a conflicts nature. A preliminary investigation of the areas

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[14]Volume III Family Law Project, p. 529 (rev.)

[15]Article 1266. Other jurisdictions have similar requirements. For example, France requires that there must be a two year period elapse before application can be made to the court for a change in the matrimonial regime. Arts. 1396(3) and 1397 C. civ.

in which the problems would arise indicated that if the Alberta legislation clearly established that acceptance or rejection of the legal regime resulted in an implied contract between the spouses and the legislation should then establish rules as to the capacity of the parties and requirements for the formal validity and essential validity of the contract, conflicts problems would be minimized.

The main conflicts problems would then centre around any rules which prohibited excessive gifts, and the effect of such rules on gifts outside the jurisdiction. For example, would a gift of real property situated in Saskatchewan be subject to the Alberta law relating to compensation of the spouse making a balancing claim and would the donee be subject to the right of the claimant spouse to have the gift put aside? Ontario in its report suggested that as the recommendations on excessive gifts are really principles of forum public policy, as such it would seem right that they should be applied in all cases coming before the Ontario courts. It was therefore recommended in Ontario that the recommendation as to excessive gifts take effect wherever an Ontario court has jurisdiction, irrespective of the choice of law rule.[16] These and other issues raised of a conflicts nature should be the subject of a separate study to determine whether the new legislation should contain its own conflict rules, and what these rules should be.

A final problem affecting the application of the system is of a transitional nature only. Should the new matrimonial regime be retroactive? The Ontario Report felt

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[16]Volume III, Family Law Project at 575 (rev.).

that the new scheme should apply only to marriages made after the coming into effect of the suggested new legislation.[17] The English Law Commission on the other hand felt that, provided that the spouses did not contract out, the new regime should apply to all marriages, including those in existence on the date which the new Act came into force.[18] It was suggested that proper transitional provisions might be required to avoid possible unfairness in the case of existing marriages. In addition to the right the spouses always have to contract out, it was thought that it might be necessary, to go further, for example, by allowing either party unilaterally to exclude community during a prescribed period after the new law came into force. Since the partnership of acquests is closest to the view of marriage that most spouses have, it is recommended that the English suggestion is adopted, rather than the ontario suggestion. The existence of the possibility of unilateral opting out should protect those spouses who do not agree with the concept behind the proposed matrimonial regime.

To describe the way in which the new matrimonial regime would be applied is not sufficient. To describe the general principle behind the regime is not sufficient. In making the decision to accept or reject the system as a whole, the Board should be aware of some of the major provisions of such a system so that the system as a practical alternative can be evaluated. These provisions are solutions to the following:

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[17] Id. at 529 (rev.).

[18] Working Paper, No. 42, para. 5.31.

(1) Is all the property of both spouses to come within the community, or are only certain categories of property to compose the community?

(2) Having accepted the principle of separate administration, are there to be any restraints on the powers of either spouse to deal with (a) the community fund or (b) the separate property?

(3) To what extent is a spouse liable for the debts incurred by the other spouse before and during the marriage?

(4) In what circumstances will the community be implemented and the assets divided between the spouses?

(5) When the community is ended, does either spouse have a claim to any specific assets, or only a money claim?

(6) Has the court any power to vary the shares of the spouses and, if so, on what grounds?

(1) The Property to be Shared

It was pointed out by the English Law Commission that a system under which all the property of both spouses was shared at the termination of the marriage would be the simplest to operate, since complicated accountancy and identification of funds would be avoided. Such a rule might, however, be unfair where the marriage has been short

and one spouse had substantial assets before the marriage. Under the Scandinavian matrimonial property systems all property not falling into the narrow category of separate property is divided. Separate property under these systems is confined to property declared to be such under a valid marriage settlement, property which was required by the donor or testator of the property to remain the separate property of the beneficiary, and any property substituted for either of these two categories of separate property.

The result is that in most Scandinavian marriages there is no separate property which is excluded from the sharing. There has been much controversy over this fact for while a system which allows property acquired prior to marriage to be shared was probably the best one available for the more stable society of the early twentieth century, Scandinavian society is much changed today. Of the marriages dissolved in Sweden in the period 1916 to 1920 (when the Swedish code was prepared) about ninety-seven per cent of the marriages were dissolved by death and only three per cent by divorce.[19] The system thus combined simplicity with equity.[20] But by 1955 about eighty per cent of the marriages were dissolved by death and twenty per cent by divorce. The system which is good if the marriage

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[19]A. Malmstrom "Matrimonial Property Law in Sweden" in Matrimonial Property Laws (W. Friedmann, ed.) (Toronto, 1955) 410 at 429.

[20]The English and Canadian spouses who survived their husbands or wives were not in a particularly inequitable position vis a vis the Scandinavian spouse due to the extremely generous protection in our intestate succession and family relief legislation. In civil law jurisdictions very often the rights of the surviving spouse were limited to his or her share in the community property.

is ended by death, has many faults if the marriage ends in divorce. The obvious example is a marriage of a few months between a rich man and a poor woman. At the end of a few months the husband's fortune is halved (unless there was a marriage contract abolishing all joint property) and the wife is no longer poor.

In some of the Scandinavian countries this problem has been solved by a new amendment under which the court may depart from the principle of equal shares in cases where the assets of the community estate have been acquired mainly by one of the spouses before marriage or by gifts or inheritance during marriage.[21] But it is a condition to the exercise of the judicial discretion that division into equal shares would result in a clearly unjust, that is unreasonable, result. The Danish Act on this point lays down the additional requirement that such a rule is to be used chiefly where the marriage has lasted a short time only and no financial community of any importance has been established.[22]

Despite the improved provisions in the Scandinavian countries, it is not the view of this researcher that property

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[21] See, for example, Denmark, Act No. 412, December 18, 1963, Para. 69A. A similar provision is contained in the West German Civil Code, para. 1381, whereby a spouse is entitled to refuse to pay the half share of its surplus if equalization of the surplus would cause serious injustice. Serious injustice is especially indicated if the spouse with the smaller estate has for a considerable time neglected his other financial duties arising out of the marriage.

[22] See, further I. Pedersen "Matrimonial Property Law in Denmark", (1965) 28 M.L.R. 137 at 146-147.

owned by the spouses before the marriage should be shared. It is recommended that the community be limited to acquisitions made during the marriage.

It has been suggested by Kahn-Freund that rather than defining the property to be shared as the acquisitions made during the marriage, the community should be limited to "family assets".[23] The criterion of selection for the aggregate to be shared is not to be their origin, but their purpose. (Thus property acquired prior to marriage might be subject to sharing.) Kahn-Freund stated that the test would be as follows:[24]

> My question would not be whether they have been acquired before or during the marriage, or acquired through work or thrift or through inheritance or gift. I should ask: What object are they intended to serve? Are they assets for investment, acquired and held for the income they produce or the profit they may yield on resale? Or are they household assets, family assets which form the basis of the life of husband, wife and children?

This particular criterion for the selection of community assets was proposed as being the closest to the legal expression of the community of the matrimonial home and of household assets in general. Kahn-Freund suggested that it would not be wise to adopt the civilian criterion of a community of gains, because the purposes of the customs

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[23] Supra, n. 2 at 20.

[24] Id. at 23

and the legislation which produced the common law and the continental community property schemes are not the same as the purposes of the present proposed changes in legislation. He stated that the purposes of the old community system belong to "the dust heap of history and are irrelevant to our society."[25] While it is true that the purposes of the present recommendations are not the same as the purposes behind the old community of property regimes, it is not the old community of property system which is recommended.

Moreover, the difficulties which the scheme proposed by Kahn-Freund would give rise to are such that it is not felt that this particular scheme can be legislatively enacted. The English Law Commission also considered Kahn-Freund's new approach,[26] but came to the similar conclusion that it did not seem practicable to attempt to define the property to be shared in terms of specific assets, such as the home and its contents, or property used for the benefit of the family. The scheme proposed by Kahn-Freund went far beyond the difficulties which arise even if one is to say that the community should be confined to the matrimonial home and its contents. It is a difficult enough question to answer whether the Picasso on the living room wall should be subject to a community as being part of the matrimonial home, rather than an asset held for investment reasons. Kahn-Freund went further: under this scheme one would have to look at the

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[25] Id. at 24 to 31.

[26] The approach is new in terms of existing legislation in any country. The approach is not new insofar as it incorporates to a large extent the family assets approach of Lord Denning in the "palm tree justice" cases.

bank account and investment property to determine whether the bank account was earmarked for the repairs, redecoration, replacement of furniture or even for the purchase of a future home. Such a recommendation would again result in a dependence on the non-existent "intention" of the spouses even if the proposed presumptions relating to specific property were employed.

The Law Commission also raised the following problem. If the income from a spouse's investments or the profits of a spouse's private business were used by the family to pay their normal living expense, could the investments for business be regarded as family assets? If so, then the term "family assets" would be capable of almost unlimited extension. If not, then if one spouse owned a home and the other owned investments of an equal value, the former would be shareable and the latter would not.[27]

Rather than accepting this proposal from Kahn-Freund then, it is recommended that the proposal of the English Law Commission be adopted. That proposal read as follows:[28]

> In our view the assets to be shared at the termination of the marriage should represent, as far as possible, the property built up by the efforts of the spouses during the marriage. The simplest way of achieving this would be to adopt a rule similar to the German one, under which the value of property owned by a spouse before the marriage, or acquired thereafter by gift or inheritance, would be deducted from the value of the assets owned at the end of the marriage. The balance would be the shareable property.

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[27] Working Paper No. 42, para. 5.35.

[28] Id., para. 5.36.

This proposal is in accord with the recommendation of the Ontario Family Law Project as well as the system which was recently implemented in Quebec. Article 1266(d) of the Quebec Civil Code is as follows:

> The acquests of each consort include all property not declared to be private property by a provision of the present section, and in particular:
>
> (1) the proceeds of his work during the marriage,
>
> (2) the fruits and revenues which fall due or are received during the marriage and arise from all his property.

Article 1266(e)

> The following are the private property of each consort:
>
> (1) property owned or confessed by him on the day when the marriage is solemnized;
>
> (2) property which falls to him during the marriage by succession, legacy or gift, as well as the fruits and revenues which arise therefrom if the testator or donor has so expressly provided;[29]
>
> (3) property acquired by him in replacement of private property;

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[29]The English Law Commission did not create the necessity that a testator or donor specify such property should be separate for the legacy or gift to be separate property. Such a requirement, similar to the Scandinavian requirement, reduces the category of separate property. A policy decision is required between the two provisions.

> (4) his clothing, personal linen, as well as decorations, diplomas and correspondence;
>
> (5) all amounts, rights and other benefits accruing to him as a beneficiary designated by the consort or by a third party, under a contract or a plan of annuity, retirement pension or life insurance.

The following sections contain further amplification on what things compose a partnership of acquests. If the partnership of acquests scheme is adopted for Alberta, study should be given to Articles 1266(f) to 1266(n) as well as paragraphs 5.40 to 5.46 of the English Law Commission report. These rules would provide adequate guidelines for establishing rules of exactly what will compose the property to be shared on the dissolution of marriage.

One of the most important rules, and one which must be included, is that found in Article 1266(n) which is as follows:

> Property with respect to which neither consort can establish exclusive ownership is deemed to be an acquest held in undivided ownership each for one half.

It is most important that a presumption is included in any law that all the property of each spouse is shareable, perhaps in the absence of an inventory taken at the beginning of marriage as in Germany,[30] or more preferably in the absence of proof that the property was separate property. Such a rule makes for simplicity and encourages a spouse to

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[30]See for example, German Civil Code, para. 1377.

waive deductions where the amounts involved are negligible, or to make a record of pre-marriage assets if he or she did not want them to be shared. It has been pointed out that such a presumption accords with the realities of life in an industrial community in which the majority of people start life without appreciable assets.[31]

An additional point was raised by the Law Commission. It was suggested that the exclusion from sharing of property acquired by way of gift during the marriage should be limited to third party gifts. For example, it was pointed out that if a husband bought a home and put it into joint names, it would be inequitable for a wife to keep her share exclusively for herself at the end of marriage and ask that the husband's share be divided. A spouse should not be entitled to deduct the value of a gift received from the other spouse unless this had been agreed between the spouses. A further point was made that there need be no special mention of personal chattels since the system envisaged by the Law Commission would involve the sharing of "values" rather than the redistribution of items of property. There would thus be no reason to exclude an item from valuation merely because it was personal; if it had been acquired by gift or inheritance, its value could be deducted from the assets of the spouse. The scheme proposed for Alberta is also a sharing of "values" as is the scheme implemented in Quebec: the specific mention of personal property in Article 1266(e) thus only serves to create an additional category of property to be added to the separate property of each spouse. A policy decision is therefore required as to whether the Law

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[31] O. Kahn-Freund "Matrimonial Property--Some Recent Developments" (1959) 22 M.L.R. 241 at 255.

Commission's proposal as to what should constitute separate property should be adopted, or whether an Alberta equivalent to Article 1266(e), subsections 4 and 5, should be included in the Alberta legislation.

(2) Restraints on Powers on Administration

The next problem to be considered is whether any restraints should be placed on the powers of either spouse to deal with (a) the community fund; or (b) the separate property. Prior to the termination of the legal regime, the position of the spouse is equivalent to that under separation of property. Just as under the present law it is possible for a spouse, who is so minded, to defeat the operation of The Family Relief Act by arrangements such as an irrevocable inter vivos trust,[32] it is possible that the recommendations as to the winding-up of the legal regime could be rendered nugatory by a vindictive spouse, unless there are certain controls on transfers of property whether absolutely or in trust. Ontario in its report recommended controls on transfers of property under the legal regime limited to two situations: (a) a matrimonial home; and (b) excessive gifts.[33] Even if the recommendations as to co-ownership of the matrimonial home by law are not accepted, our present Dower legislation, and its adaptation to include protection of occupation rights, make no further reference to the matrimonial home necessary at this time. In order

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[32] A problem with which the Uniformity Commissioners have long struggled.

[33] Ontario Family Law Project, Vol. III, at 566 (rev.).

to prevent a spouse from squandering his assets, or giving them away, even to the point of insolvency, and then asking to share in the other spouse's final assets, it is necessary to provide some restraints on alienation.

Several systems have provisions covering adverse dealings. Under Danish law it is the duty of each spouse to exercise his or her power in such a way that they do not unduly cause injury to the other spouse's interests.[34] Provisions are included which restrict the power of a spouse to dispose of the matrimonial home and its contents. But besides these provisions a spouse may claim compensation when the communal estate is distributed, if the other spouse has abused his rights to administer the estate and thus caused considerable loss of assets.[35]

German law provides that a spouse may not dispose of an asset which constitutes his total property, unless he or she has the consent of the other spouse. This provides indirect protection against sale of the matrimonial home as well as direct protection against an excessive gift. Furthermore the final or shareable assets of a spouse are deemed to include the amount by which the spouse had decreased his assets by any of the following means: (1) disposition by way of gifts, unless made in satisfaction of moral obligations; (2) dissipation of assets; (3) transactions intended to deprive the

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[34]Act concerning the Legal Effects of Marriage, No. 56 (1925), para. 17.

[35]I. Pedersen, "Matrimonial Property in Denmark" (1965) 28 M.L.R. 137 at 140-42.

other spouse of benefits. Only transactions made within the previous ten years and without the consent of the other spouse are taken into account. Furthermore if a spouse is unable to satisfy his or her equalization claims because the other spouse's available assets are insufficient, that spouse is entitled to make up the deficit by claiming directly from a third party to whom the other spouse has made a voluntary disposition with the intention of defeating the claim.[36]

These provisions were endorsed by both the Ontario and English Reports and it is recommended that Alberta enact similar provisions. In its discussion of the problem the Ontario Family Law Project suggested that the type of property transfers which should be prevented are: transfers for no consideration or an inadequate consideration, with the exception of usual and customary gifts. No dollar limit was suggested as a criteria for an excessive gift; rather it would be in the discretion of the court to determine whether the gifts were or were not excessive. Rather than make such gifts completely void, a provision which would affect those who should acquire the property in good faith and for value from or through the donee, and would not really benefit the other spouse who would not likely be able to recover an excessive gift, having had no property interest in it, it was recommended that the provisions should strike at an intentional attempt by a spouse to defeat, in whole or in part, the reasonable expectations of the other spouse on the winding-up of the legal regime.[37]

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[36]Working Paper No. 42, para. 5.54.

[37]Ontario Family Law Project, Vol. III at 570-73(rev.).

It was recommended that in the case of any transfers of property which the court categorized as "excessive gifts" the court might, in its discretion, include in the valuation of the net estate of the donor spouse the value of such excessive gift or gifts as at the date of the donation, and if the court considers that the donated property might have a higher value at the date of the court proceedings than at the date of the donation, it may take into account that higher value in its calculations in connection with the liquidation of the legal regime and the assessment of any balancing claims. It was further recommended that if a transfer of property is considered by the court to be an excessive gift, the transfer might be declared void by the court effective from the date of donation, if, in the court's opinion the transferee is other than a bona fide transferee for value and without notice. Thus a bona fide transferee for value and without notice would obtain a good title.

Those property regimes which contain protection against the abuse by one spouse of the powers of administration, not only provide for compensation and in certain circumstances the voiding of excessive gifts, but also contain provisions allowing a spouse to apply for an earlier sharing.[38] Both England and Ontario recommended that such a provision should be included in any reform legislation in those jurisdictions. The English Law Commission recommended that included in the situations which would give the spouse the right to apply before the end of the marriage for the community to be implemented

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[38] See Pedersen, (1965) M.L.R. 137 at 141-42. Denmark and West Germany are two countries containing such provisions. The Quebec Civil Codes does not contain such a provision.

and the assets to be shared should be circumstances:[39]

> (a) where the other spouse has wasted his assets in a way which puts the first spouse's equalization claim in substantial jeopardy;
>
> (b) where the other spouse has abused his powers by dealing with his assets in a manner inconsistent with his matrimonial obligations, e.g., the sale of the matrimonial home without consent;
>
> (c) where the other spouse has become bankrupt.

Once there had been a sharing the spouses would revert to separation of property.

(3) Debts Before and During the Marriage

The English Law Commission suggested that there is no justification for imposing on one spouse liability for debts incurred by the other spouse before the date of the marriage. It was pointed out that neither the Scandinavian, German, nor French law imposed upon the spouse a liability to contribute to the pre-marriage debts of the other spouse.[40] The Ontario Family Law Project recommended that the pre-marriage debts be considered an allowable deduction in determining the net value of the initial estate, the value of which is necessary to be found in order to determine the amount, if any, of the balancing claim. If the debts

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[39]Working Paper No. 42, para. 5.56.

[40]Working Paper No. 42, para. 5.47.

exceed the pre-marriage assets, the initial estate will be assessed as nil. This means that a spouse will never have to lose more than half the value of his property at the end of marriage in order to pay for ante-nuptial debts of the other spouse.

Approaches differ as regard debts incurred during marriage. In the Scandinavian and German systems only assets are shared at the end of marriage, not liabilities.[41] A spouse does not in any way become responsible for the debts of the other spouse. Under the Dutch regime however each spouse is, at the dissolution of the community, entitled to a half share of the assets belonging to the community, and while each continues to be liable for debts for which he was liable before the dissolution, and becomes liable for half the amount of other debts in the community, there is also liability for one half the debts for which the spouse was not liable before termination of the regime. If he has paid the debt in full to the creditor, he has a claim against his (former) spouse for half the amount. Thus a Dutch spouse may lose his whole estate if the other spouse is insolvent. Moreover if he has to take the responsibility for half the amount of other spouse's debts, he may become liable for sums that far exceed his share in the community, although he may avoid this by renouncing that share.

It was pointed out by the English Law Commission that the main rationale for requiring a spouse not only to share his or her net assets with the other, but also to make a

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[41] See Pedersen (1965) M.L.R. 137 at 144-46.

contribution to the other spouse's debts is that some of the debts may have been incurred for benefit of both spouses or for the family. If, for example, the assets were vested in one spouse, while the family liabilities had been undertaken in the name of the other, the absence of any rule concerning contribution would mean that on termination of the marriage a creditor would have recourse to no more than half the joint assets. It could be argued that, in principle, he might be better off than under the present law, since a creditor cannot normally have recourse to any of the assets of the debtor's spouse during, or on the termination of marriage.

It was added as a secondary argument that if marriage is to be a partnership, is it fair to share only the profits and not the partnership debts? Further, it was suggested a spouse might be tempted to put assets in the name of the other spouse knowing that, if things go well he can claim back half on termination of the marriage, but if things go badly, his creditors have recourse to no more than half?[42]

The Ontario Family Law Project gave consideration to the possible effects in practice of permitting negative estates, that is of continuing the analogy of marriage and a professional partnership wherein there exists the possibility of sharing losses as well as gains. Although logically it was said this might be an attractive position because it produces a symmetrical scheme, the suggestion was rejected. It was stated that "by and large, introduction of negative

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[42]Working Paper No. 42, para. 5.50.

estates would mostly have an effect on the position of creditors of the spouses rather than on the property position of the spouses inter se."[43] The Ontario Family Law Project considered some statistics regarding average Canadian household debt positions and some arguments for and against including negative estates, and concluded that

> Although it has no very strong views on the point, the Family Law Project feels that the change from the present law might be less if negative residuary estates are not permitted.

It is suggested that the preferrable solution was the one of English Law Commission which took a middle position. It was recommended that two not necessarily exclusive principles be introduced into English law: first, a principle of joint liability of husband and wife in respect of certain household and family debts; second, at the time of sharing, both spouses should contribute equally to the household family debts outstanding at that time, irrespective of which spouse had contracted the debt.[44] This would be a right of contribution between the spouses, but would not give the creditor of one spouse direct rights against the other spouse. It was suggested that the task of defining "family debts" would not be insuperable, since the debts would, in principle be the same as those for which a wife under the present law is presumed

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[43] Ontario Family Law Project, Vol. III at 555-57 (rev.).

[44] Supra, n. 42.

to have authority to pledge her husband's credit. It was added however that in due course the question of direct joint liability of spouses for household debt should be considered in detail.

In order to examine the different results under the Ontario recommendation, the English recommendation and a system similar to the Dutch matrimonial system the following example was worked out.

Example

Neither Mr. nor Mrs. A had property of any value when they married. In divorce proceedings the court finds it necessary to determine the value of Mrs. A's balancing claim. Mr. A has matrimonial property worth $5,000 but owes $2,000 on a car. Mrs. A has property worth $500 but has incurred a debt of $1,500 from a charge account used to purchase household items. (This example ignores the effect of a wife's agency of necessity. The example is only intended to show the result of not requiring a spouse to make a contribution to the debts of the other spouse. The example could have had the charge account debts belonging to the husband, the more usual case in Canada, in which case the agency argument would not be a factor.)

(a) Ontario Recommendation

	Husband	Wife
Matrimonial Property	$5,000	$ 500
Deduction for Debts	2,000	1,500
Net Estate	3,000	Nil

Balancing claim of wife is 1/2 ($3,000 - 0) = $1,500. Since she is still liable for the remainder of the charge account debt ($1,000), the wife is left with an estate of $500 as opposed to her husband's estate of $1,500.

(b) English recommendation

	Husband	Wife
Matrimonial Property	$5,000	$500
Deduction for Debts	2,750	750
Net Estate	2,250	Nil

Under the English recommendation the husband is liable for an equal share of family debts outstanding at the time, irrespective of which spouse has contracted those debts. The balancing claim of the wife is 1/2 ($2,250 - 0) = $1,125. Since there is still $250 outstanding on the charge account debt, the wife is left with a net estate of $875 as opposed to the husband's $1,125.

(c) Sharing of negative estates (similar to Dutch system)

	Husband	Wife
Matrimonial Property	$5,000	$500
Deducation of debts	2,750	750
Net Estate	2,250	-250

This example assumes that the both spouses are required to contribute to family debts. The wife's balancing claim is 1/2 ($2,250 - [-$250]) = 1/2 ($2,500) = $1,250. The wife is liable for the $250 balance of the charge account debt so her estate is $1,000 which is what her husband's estate is worth.

The example makes it clear that the English recommendation of sharing those debts which are incurred on behalf of the family achieves a fairer result than the Ontario recommendation which made no provision for the sharing of family debts. The final example which involved a sharing of negative estates, achieved a fairer result in this particular example. However the alternative of sharing those debts which were not incurred on behalf of the community must be rejected on the basis that while such a system would be fairer to the creditor, it would invariably create hardship for the other spouse especially where one spouse is insolvent and the other might have to share not just half the estate but be reduced to insolvency as well. Most frequently the negative estate is acquired through the husband's business or professional work, activities which often the married woman whose duties are frequently centred around the home, may have no real control or even knowledge. That the wife should be required to share in a misfortune to which she did not contribute and to which she had no means of preventing has been found unfair by most of the reformers in this area.

The Nordic Matrimonial Law Committees set up in 1957 have discussed whether it is equitable that a spouse may be obliged to give up of his or her own property in favour of the other spouse's creditors. The Danish committee held that, though there might be some cases where the present state of the law might cause injustice to a spouse, the principle of sharing positive net estates equally was a fundamental element in the present Danish system and ought to be preserved as such.[45] The general rule that should be adopted

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[45]Pedersen (1965) M.L.R. 127 at 145.

then is that only the net positive assets of a spouse should be shared.

(4) Termination of the Legal Regime and Implementation of the Community

It is recommended that the community be implemented and the assets shared in the following situations:

(1) in proceedings for divorce, judicial separation or nullity;

(2) on a joint application by the spouses to the court for a winding-up of the legal regime;[46]

(3) on an application to the court, where the spouses have been separated and living apart for one year at least and where, in the opinion of the court, normal cohabitation between them has terminated;[47]

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[46]This provision was adopted from the Ontario recommendations. In the Ontario scheme it dovetails with the requirement that a change in the matrimonial regime governing the parties requires court approval. If the Institute accepts the proposal from this paper such court approval would not be necessary. However, there should be provision for application to a court when disputes arise as to the amount of the balancing claim. If no disputes arise, the parties should be free to determine without court interference the amount of the balancing claim.

[47]Ontario Family Law Project, Vol. III at 547 (rev.).

(4) on an application to the court by one spouse for winding-up of the legal regime on the grounds that the spouse's legitimate expectations of a balancing or equalizing claim are jeopardized;

(5) where the other spouse has become bankrupt.

In addition of course, the death of one of the spouses will result in the implementation of the community. Once the balancing or equalizing claims are settled according to the principles enunciated in this report, the spouses, if they continue to be married will live under the contractural regime, that is, separation of property.

The sharing would proceed as follows. The total assets of each spouse would be valued. The value of any gifts or other dispositions made in abuse of power should be added. Outstanding debts should be deducted in order to determine the net final estate. In the case of any debts for which spouses should share responsibility, contribution could be claimed. The value of pre-marriage property and property acquired by gift or inheritance during the marriage should be deducted.[48] Finally the balance, if any, would be shareable. If a negative balance were arrived at, it would not be taken into account and that spouses residuary estate will be listed as nil.

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[48]Whether all gifts or inheritances should be allowable deductions will depend upon whether the legislation requires the donor or testator to have made that a condition of the gift as is required under the Quebec Civil Code.

A spouse does not have to claim an allowable deduction that is, the fact he or she had an initial estate which was acquired before marriage, or any property acquired by gift, inheritance, etcetera. The onus of proof in regard to allowable deductions will be upon the spouse making the claim. If an allowable deduction is not claimed or proven this simply means that all of the spouse's property including any ante-nuptial and post-nuptial property is subject to the balance or equalizing process.

When the sharing of the assets is the subject of a court application, the existence and value of allowable deductions should be left to the discretion of the judge hearing the application or the proceedings in which the question of winding-up the legal regime has arisen. The Ontario Family Law Project in its Report recommended that the court be given adequate powers to require such evidence of persons, documents, etc., as it may consider necessary for the consideration of the winding-up of the legal regime, including the discretionary determination of the existing value of any allowable deductions that may be claimed. The courts are not however required to undertake an investigation ex proprio motu to ascertain allowable deductions. The onus of proof is on the spouse claiming, and as was pointed out failure to do so brings the spouses under a "Swedish style" method of liquidating legal regime.[49]

Some examples of the mechanics of balancing or equalizing claims are contained in the Ontario Family Law

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[49]Ontario Family Law Project, Vol. III at 550-52 (rev.).

Project and have been xeroxed off and appended to this chapter.

Basically the community system recommended would not alter the position of third parties. During the subsistence of the legal regime or upon an earlier sharing, the claim of the creditors of one spouse would have priority over the equalization claim of the other since only the balance left after deducting sufficient funds to meet outstanding debts would be shared between the spouses. The creditors of spouses would be in an improved position insofar as a spouse's equalization claims could increase the assets available to meet his debts.[50]

Special considerations arise when the termination of the matrimonial regime is the result of the death of a spouse. In contrast with the position where the marriage is ended by a decree, litigation would not normally be in progress, and every effort should be made to avoid it. Thus the English Law Commission suggested that rules for sharing the death of the spouse should be framed so as to allow the equalization claim to be ascertained by the survivor and the personal representatives without resort to the court. Ontario also dealt separately with the winding-up consequent on the death of a spouse and made certain proposals aimed at keeping the procedure simple on death.

One problem considered by the Ontario Family Law Project was that[51]

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[50]Working Paper No. 42, para. 5.57.

[51]Ontario Family Law Project, Vol. III, at 558-59 (rev.). The case of a winding-up on death was distinguished from a winding-up on a court application or proceeding. In the latter case: (a) the spouses are still alive and are, therefore, able (continued on next page).

> In the case of liquidation on the death of a spouse, the average duration of the marriage will be greater, and perhaps substantially greater, than the average duration of the marriage prior to liquidation of the regime on a court application or proceedings. An allowable deduction being a fixed value, is effected by inflation and the depreciation of money, so that it is likely to have substantially less purchasing power on the dissolution of a marriage by death than it was at the time of the marriage. It has been said that the value of fixed income now tends to fall by around fifty per cent every eighteen years. Hence if the ante-nuptial property of the spouses is taken into account, in the case of dissolution on death, in a similar manner to an allowable deduction in the case of dissolution of the legal regime on a court application of proceedings the real effect of it is likely on the average to be rather small.

The Ontario Law Reform Commission therefore recommended that in the winding-up of the legal regime on dissolution of the marriage by death, in calculating the balancing claim, no allowable deductions be permitted, so that in all cases where marriage is dissolved by death, the net estate will equal the residuary estate. This proposal would increase the simplicity of the system and so it is recommended that it be adopted in Alberta.

Both the Ontario and the English reports considered that in circumstances where there is a balance owing by the

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[continued from page 283] to settle matters between themselves by agreement if disposed to do so, and (b) the matter is in court and the judge can be given the necessary powers and discretion to make a reasonable determination of the case.

survivor to the estate, the survivor should not be called upon to make a balancing payment into the estate.[52] The question of a balancing claim in favour of the estate is likely to be of practical importance only in those cases where the deceased has made a will leaving substantial bequests to third parties. If, in such cases, the estate could make a balancing claim against the survivor, the survivor might have to surrender his or her assets for the benefit of a stranger. This recommendation too gave a simpler character to the winding-up process on death.

The English Law Commission also considered the relationship of the obligation of the estate to meet the survivor's equalization claim and the rights the survivor may have on intestacy or under a will. It was stated that the rules of intestate succession should on principle be independent of any rights the survivor may have to apply for a balancing claim. However, it was stated that if a system of community were introduced into England the rules of intestate succession would have to be reconsidered, in order to take into account the possible rights a survivor might have to an equalization claim. Due to the fact that some parties would not be governed by the community system having contracted out, inconvenience would result if there were different rules of intestacy depending on which property system governed the parties. It was first suggested that a simple solution would be to regard the survivor's share of the community assets as being partial (or full) satisfaction of the rights due on intestacy. Alternatively it might be provided that

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[52]Working Paper No. 42, para. 5.67; Ontario Family Law Project, Vol. III at 563 (rev.).

on an intestacy the survivor would have no equalization claim, the intestacy rules being drawn in a way sufficiently favourable to the surviving spouse to cover any such claim. It was added however that such matters while requiring detailed consideration, did not really present any great difficulty.[53]

No great difficulty was considered raised by the relationship of the English Family Relief legislation and the introduction of a community system. It was provisionally suggested that even if a new property system were introduced, it would be necessary to retain family provision law, just as it is necessary to retain maintenance provisions effective on divorce.[54] The right of the survivor to apply for family provision from the estate being founded on the continuing obligation of each spouse to maintain the other, an obligation which was not necessarily brought to the end on the termination of the marriage by divorce or by death. However it was suggested that the number of applications might be reduced by the introduction of a community system, since the surviving spouse whose assets were less than those of the deceased would be entitled to make an equalization claim. The surviving spouse should in the English Law Commission's view be entitled to apply either for a sharing of assets or family provision from the estate or for both.

In situations where other dependents made claims under the family provision legislation it was recommended that the

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[53]Working Paper No. 42, para. 5.68.

[54]Id., para. 5.70.

survivor's equalization claim not be reduced for their benefit. The survivor's equalization claim would not normally exceed half the assets, so that the estate could never be reduced by more than one half. It was suggested that the interest of the survivor in the equalization claim should be regarded as a propriatory right which takes precedence over the deceased's obligations to other dependents.[55]

The English Report suggested that there should never be a power in the court to vary the amount due to the survivor on the equalization claim. The Ontario Report however recommended that the claim on application to the court might be reduced or cancelled altogether at the discretion of the judge, on the ground that prior to the death of the spouse, the spouses were separated for a considerable time, or the surviving spouse was ordinarily resident outside Ontario at the date of death.[56] Again this would require a policy decision by the Institute.

(5) Settling the Claim: Specific Assets or Money Claim

Under the proposed system it is envisaged that the spouse will be entitled to claim the amount of his share of the surplus from the other spouse as a money payment, but he has, in the normal case, no claim on any particular

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[55] Id., para. 5.71.

[56] Ontario Family Law Project Vol. III at 564 (rev.).

piece of property belonging to the other.[57] This is the situation in Germany, but is not the situation under the Scandinavian regimes.[58] Under these property systems there is a difference in the rules to be applied depending upon whether the distribution of the estate takes place while both spouses are living, or on the death of one of them, but either way specific assets may be claimed.

The majority of the estates in Norway are distributed by private settlement, though it has been suggested that this does not mean that the formal rules are without importance--both spouses are probably considerably influenced by the knowledge that if they cannot agree the whole problem of the distribution of the estate will be taken over by the Distribution of Estates Court. Once the court takes over, where the community is being dissolved as a result of divorce, separation etcetera, assets belonging to the community may be sold, though this apparently rarely happens. If they are not sold they must be valued. Each spouse may may put in a claim for any article belonging to the community and may take it over at the value fixed by the court. But if both want the same article, the one who originally acquired is as a general rule entitled to keep it.

This particular rule was criticized as being too unfavourable to the housewife who would rarely have been

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[57]Unless the Institute adopts the proposals which would either automatically give a spouse an interest in the matrimonial home, or set up a presumption of joint ownership.

[58]Pedersen, (1965) M.L.R. 137 at 149-151.

the person to have acquired the particular item, and would have to procure money to buy new articles at a much higher price than the comparatively low valuation assigned by the court to the used chattels to which her husband is now solely entitled. As a result, recent amendments while preserving the main rule have given the courts power to exercise their discretion when there is a dispute about a home that is being exclusively or almost exclusively used as a matrimonial home, the holiday home, household furniture, and certain other assets.

Where the community is dissolved by the death of one of the spouses the position of the surviving spouse was, even before the amendment, much better than that of a spouse who has to divide the community estate with the other spouse. If the surviving spouse and one of the co-heirs claim the same article from the estate the wishes of the spouse must always prevail, even if the particular piece of property originally belonged to the deceased. The surviving spouse is also entitled to claim assets exceeding his share in the community estate, if he or she pays the additional amount into the estate of the deceased.

Generally however it has been recognized that one of the advantages of the German regime has been that it avoids the problems which arise in connection with the distribution of specific assets. For this reason it is suggested that the general rule initially suggested should be adopted in Alberta--that is, that the equalization claim will be settled by a money payment.

It was admitted that in some cases it might be in the interests of the payee spouse to have a specific item of

property (the obvious example being the matrimonial home) rather than a lump sum payment. The court should have the power to allocate specific items in settlement of an equalization claim.[59] This power should be considered in relation to the recommendation that the courts be granted the power to transfer and settle property of the spouses on a divorce, judicial separation, or nullity hearing. The provisional view of the Law Commission was that similar principles should apply to each power. If the value of a specific asset allocated to a spouse exceeded the amount of the spouse's equalization claim (and could not be independently justified under present powers) the court should have power to allocate on terms as to repayment of the balance by that spouse.

Again special considerations are applicable when the community system is implemented as the result of the death of one of the spouses. The English Law Commission made some provisional comments upon this happening with regard to the equalization claim and specific bequests as well as claims by the survivor to specific items, and these should be studied with a view to implementation in Alberta.[60] The basic principle upon which these recommendations were made is that in most cases it should be possible for the equalization claim to be settled between the survivor and the personal representative without resort to the court. It is likely that new rules will have to be added to these rules presently governing the administration of estates.

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[59] Working Paper No. 42, para. 5.73.

[60] Id., para. 5.74-5.75.

It was pointed out by the Law Commission that in some cases an immediate cash payment would cause hardship to the payor, for example, where the only substantial asset consisted of shares in a private company.[61] The equivalent case in Alberta would be the situation where the only substantial asset consisted of the family farm. In such cases the court should have power to order payment by instalments on whatever terms seem reasonable, or order the creation of a charge or mortgage. The interests of both spouses should be considered. This power would be of particular importance in the case of an application for division before the end of the marriage, as in this case the court's power to order financial provision would not come into operation.

(6) Powers of Variation of the Shares of the Spouses

In some countries there is no power in the courts to vary the shares to which a spouse is entitled upon the termination of the community; in other countries a limited power of variation now exists. The English Law Commission considered the powers presently in courts under the existing English legislation. Such powers are contained in the Matrimonial Proceedings and Property Act 1970 and several times have been adverted to in this report. It has been recommended that Alberta pass legislation of a similar nature to the English legislation.

The English courts have very wide powers to make transfers or settlements of any property of either spouse.

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[61] Id., para. 5.72.

In exercising these powers the court must have regard, inter alia, to the means (including property) and the needs of the parties, the length of the marriage, the contributions of each party to the welfare of the family, and the loss of any benefits such as a pension as a result of divorce. The courts must exercise its powers "to place the parties as far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each have properly discharged his or her financial obligations and responsibilities towards the other."

It was envisaged by the Law Commission that in the majority of cases a spouse would apply for both a division of property and financial provision.[62] The equalization claim would be calculated (by agreement or by the court) before the court would consider whether any order for financial provision should be made. In some cases, however, a spouse may not wish to claim equalization, for example where there was not any property, or where the assets of each spouse were equal. Failure to make an equalization claim would not prevent a spouse from applying for financial provision: but having elected not to claim, a spouse could not later claim equalization, for example, if dissatisfied with the order for family provision. In other cases a spouse might elect to apply for equalization without asking for financial provision, for example where the spouse was largely the blame for the breakdown. The two powers, one for financial provision and one equalization, the latter

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[62] Id., para. 5.63, 5.64.

being essentially a proprietary right, will complement each other. They are both necessary components of an equitable property system.

CONCLUSIONS

The proposed system has been recommended in order to bring about some fairness and certainty in the matrimonial property area. It may be objected to on the basis that it is a complex system. But the questions that have to be solved in matrimonial property law <u>are</u> complicated, and any system that wants to solve them cannot avoid a certain degree of complexity. It has been pointed out that simplicity may well have to be bought at the expense of the spouses, especially that of the wife. Pedersen in her article stated that

> Whether the Danish regime is complicated or not, it is at least a fact that it has caused comparatively little litigation. The great majority of conflicts are solved by settlement between the parties--and this is also the case in Holland and West Germany. Undoubtedly some of these settlements are obtained only after great efforts by advocates or courts, but all in all this must show that the fundamental principles of the three systems not only provide a theoretical solution to a number of the problems of modern matrimonial property law, but are also fit to be applied by advocates in courts when they deal with financial problems arising out of marriage.[63]

It did not therefore, come as a surprise to Danish lawyers that the Matrimonial Law Committee in its first report advocated the preservation of the basic rules of the Nordic reform legislation of the 1920s.

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[63]Pedersen (1965) M.L.R. 137 at 152-53.

There is, of course, a case for saying that discretionary powers are all that is needed when a marriage ends in divorce, nullity, or judicial separation. But as the Law Commission stated, the relative advantages and disadvantages of the system of fixed shares, such as community, and a system of discretionary powers should not be considered only in legal terms.

> It is important not to forget the advantages of security and status which a community system would give to the spouse who, because of marital and family ties, is unable to acquire an interest in the assets by a financial contribution. Instead of being, as now, regarded as a dependent, who must apply to the court, such a spouse would become an equal partner in the marriage, entitled at the end of the marriage to claim an equal share in the net assets acquired during the marriage. The pattern of social development in the future may be that on the end of a marriage an able-bodied spouse would be expected to become self-reliant and independent as soon as possible, rather than to look to the former marriage partner as a source of support for life. A system of sharing on fixed principles may be more in harmony with this idea than the present system of separate property, reinforced in certain situations by the enforcement, possibly over a long period, of maintenance obligations determined with regard to discretionary factors.[64]

It has been suggested that any form of matrimonial property must be consistent with the economic and social structure of the country wherein the regime is to be instituted. It is interesting to note that the partnership of acquests regime has been implemented and recommended by

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[64]Working Paper No. 42, para. 5.85.

countries with varying social and economic structures; it is suggested that this regime would be equally suitable to Alberta. It was suggested by the Morton Commission in England that the community system would be an unfamiliar and novel concept to England. Perhaps this is so in England, but from the non-statistical, but empirical, studies which this researcher has conducted it would not be inconsistent with the views of married persons in Alberta. Many Albertan spouses already think that we have a community system, a feeling re-enforced when they learn of the existence of the Dower Act. Many spouses feel that the Dower Act gives them a proprietory interest in the matrimonial home--too often it is too late when they find out that this is in fact not so.

If the Institute finds that the partnership of acquests cannot be implemented in Alberta, certain other reforms must necessarily be implemented. Priority should be given to provisions whereby the spouse is directly guaranteed some kind of right in the matrimonial home. Appended to the end of each chapter is a summary of the recommendations that were made in each chapter. These recommendations are mostly presupposed on the condition that if the Institute does not recommend an overall reform of the law relating to matrimonial property, the various piece-meal reforms should at a minimum be implemented. The separate property regime must at a minimum be rationalized and some elements of equity inserted.

Attached to the end of this chapter is a draft of a draft bill which could include most of these recommendations. The draft bill enables one to see how the proposals would fit into the present Alberta legislation, particularly the Dower legislation, as well as how each recommendation could complement the other in an omnibus bill.

APPENDIX A

THE MARRIED WOMEN'S ACT

CHAPTER 227

Short title

1. This Act may be cited as *The Married Women's Act.*
[R.S.A. 1955, c. 193, s. 1]

Capabilities of married women

2. Subject to the provisions of this Act a married woman

(*a*) is capable of acquiring, holding and disposing of any property,

(*b*) is capable of making herself and being made liable in respect of a tort, contract, debt or obligation,

(*c*) is capable, without her husband being joined as a party, of suing and being sued, either in contract, including a contract made between her and her husband, or in tort or otherwise, and

(*d*) is subject to the law relating to bankruptcy and to the enforcement of judgments and orders,

in all respects as if she were an unmarried woman.
[R.S.A. 1955, c. 193, s. 2]

Remedies for protection of property

3. (1) A married woman has, in her own name and without joining her husband as a co-plaintiff, the same civil remedies against all persons, including her husband, for the protection and security of her own separate property as if she were an unmarried woman.

(2) Except as provided in subsection (1), no husband or wife is entitled to sue the other for a tort.
[R.S.A. 1955, c. 193, s. 3]

Acquisition, etc. of property

4. A married woman is capable

(*a*) of acquiring, holding, disposing of or otherwise dealing with every kind of real and personal property, and

(*b*) of contracting, and of suing and being sued in any form of action or proceeding,

as if she were an unmarried woman.
[R.S.A. 1955, c. 193, s. 4]

Right of husband to sue

5. A husband has no right to sue in respect of a tort done to his wife except where and in so far as he has sustained any separate damage or injury thereby.
[R.S.A. 1955, c. 193, s. 5]

Property rights of married women

6. (1) Subject to the provisions of this Act all property that

(*a*) immediately before March 25, 1936, was the separate property of a married woman or held for her separate use in equity, or

(*b*) belongs at the time of her marriage to a woman married after March 25, 1936, or

(*c*) after March 25, 1936, is acquired by or devolves upon a married woman,

belongs to her in all respects as if she were an unmarried woman and may be disposed of accordingly.

(2) Nothing in this section interferes with or renders inoperative a restriction upon anticipation or alienation attached to the enjoyment of any such property.

[R.S.A. 1955, c. 193, s. 6]

Husband not liable for torts of wife

7. Subject to the provisions of this Act the husband of a married woman is not, by reason only of his being her husband, liable

(*a*) in respect of a tort committed by her whether before or after the marriage or in respect of a contract entered into or a debt or obligation incurred by her before the marriage, or

(*b*) to be sued, or made a party to a legal proceeding brought, in respect of any such tort, contract, debt or obligation. [R.S.A. 1955, c. 193, s. 7]

Declaration for avoidance of doubt

8. For the avoidance of doubt it is hereby declared that nothing in this Act

(*a*) renders the husband of a married woman liable in respect of a contract entered into, or debt or obligation incurred, by her after the marriage in respect of which he would not have been liable if this Act had not been passed, or

(*b*) exempts the husband of a married woman from liability in respect of a contract entered into, or debt or obligation, not being a debt or obligation arising out of the commission of a tort, incurred by her after the marriage in respect of which he would have been liable if this Act had not been passed, or

(*c*) prevents a husband and wife from

(i) acquiring, holding and disposing of any property jointly or as tenants in common, or

(ii) rendering themselves or being rendered jointly liable

(A) in respect of a tort, contract, debt or obligation, and

(B) of suing and being sued either in tort or in contract or otherwise,

in like manner as if they were not married, or

(*d*) prevents the exercise of a joint power given to a husband and wife.

[R.S.A. 1955, c. 193, s. 8; 1958, c. 82, s. 2 (*g*)]

APPENDIX B

MARRIED WOMEN'S PROPERTY ACT 1882,

17. Questions between husband and wife as to property to be decided in a summary way

In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any such order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

MATRIMONIAL CAUSES (PROPERTY AND MAINTENANCE) ACT 1958

7. Extension of s. 17 of Married Women's Property Act, 1882

(1) Any right of a wife, under section seventeen of the Married Women's Property Act, 1882, to apply to a judge of the High Court or of a county court, in any question between husband and wife as to the title to or possession of property, shall include the right to make such an application where it is claimed by the wife that her husband has had in his possession or under his control—

(*a*) money to which, or to a share of which, she was beneficially entitled (whether by reason that it represented the proceeds of property to which, or to an interest in which, she was beneficially entitled, or for any other reason), or

(*b*) property (other than money) to which, or to an interest in which, she was beneficially entitled,

and that either that money or other property has ceased to be in his possession or under his control or that she does not know whether it is still in his possession or under his control.

(2) Where, on an application made to a judge of the High Court or of a county court under the said section seventeen, as extended by the preceding subsection, the judge is satisfied—

(*a*) that the husband has had in his possession or under his control money or other property as mentioned in paragraph (*a*) or paragraph (*b*) of the preceding subsection, and

(*b*) that he has not made to the wife, in respect of that money or other property, such payment or disposition as would have been appropriate in the circumstances,

the power to make orders under that section shall be extended in accordance with the next following subsection.

(3) Where the last preceding subsection applies, the power to make orders under the said section seventeen shall include power for the judge to order the husband to pay to the wife—

8. Interpretation

(1) In this Act, except in so far as the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

"disposition" does not include any provision contained in a will, but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise;

"property" means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, and any other right or interest whether in possession or not;

"will" includes a codicil.

(2) Except in so far as the context otherwise requires, any reference in this Act to an enactment shall be construed as a reference to that enactment as amended by or under any other enactment.

MATRIMONIAL PROCEEDINGS AND PROPERTY ACT 1970

Extension of s. 17 of Married Women's Property Act 1882

39. An application may be made to the High Court or a county court under section 17 of the Married Women's Property Act 1882 (powers of the court in disputes between husband and wife about property) (including that section as extended by section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958) by either of the parties to a marriage notwithstanding that their marriage has been dissolved or annulled so long as the application is made within the period of three years beginning with the date on which the marriage was dissolved or annulled; and references in the said section 17 and the said section 7 to a husband or a wife shall be construed accordingly.

APPENDIX C

ENGLISH LAW COMMISSION WORKING PAPER #42

4 CO-OWNERSHIP OF THE MATRIMONIAL HOME

(a) Scope of co-ownership: The matrimonial home

1.76 The term "co-ownership" is used in this Paper to describe a system under which in the absence of an express agreement the spouses would share automatically the beneficial interest in the home. Before a principle of co-ownership could be introduced it would have to be decided when and in what circumstances it should operate. Our preliminary view is that it should apply to both freehold and leasehold property,[148] and that, as under the Matrimonial Homes Act 1967, section 1(8), it should apply only when the property was occupied as the matrimonial home. One of the spouses must have a beneficial interest in the home, and co-ownership would attach to that beneficial interest.

1.77 If a co-ownership principle were implemented it should, in our view, apply to matrimonial homes already owned at the date when the new law came into force, as well as to those acquired thereafter. If existing homes were excluded it would be many years before the principle applied to all homes, and we think it would be undesirable to create distinctions between married couples. Obviously, there would have to be a suitable transitional period to allow spouses to arrange their affairs, for example, by contracting out. It would be very important to ensure wide publicity for a new law which potentially could affect more than half the married couples in England and Wales.

148. The extension of co-ownership to such items of personal property as caravans or boats would need to be considered, but we do not go into that at this stage.

(b) The interests of the spouses

1.78 The effect of co-ownership would be that a spouse's beneficial interest in the matrimonial home would be shared between the spouses. If the home were held on trust for one spouse,[149] or for one spouse and a third person, co-ownership would attach to the beneficial interest of the spouse, but would not affect the third party's beneficial interest. If one spouse had a legal estate in the home as well as a beneficial interest he or she would be regarded as a trustee for both spouses. Third parties who held the legal estate for the benefit of one spouse would become trustees for both spouses.

1.79 Automatic co-ownership would also apply, in principle, where the beneficial interest in the home was already shared by the spouses as joint tenants or tenants in common, whether or not the legal estate was vested in joint names. However, if there were an agreement between the spouses to hold their beneficial interests in a certain way, this might amount to a variation or exclusion of some of the terms of co-ownership.[150] Proposals made below concerning the matrimonial home trust,[151] could apply whenever the beneficial interest in the home is shared, whether or not co-ownership applies.

1.80 How should the beneficial interest be shared under the co-ownership principle? Under present law beneficial ownership in property can be shared by two persons either as joint tenants or as tenants in common. Under a beneficial joint tenancy both spouses have the same interest in the home during their joint lives. On the death of one spouse the survivor becomes entitled to the whole beneficial

149. For special rules concerning life interests, see below, para. 1.101.

150. As to contracting out, see para. 1.86 below.

151. Para. 1.115 ff.

interest. A beneficial joint tenant may at any time during joint lives sever the joint tenancy by notice to the other party. The effect of severance is that each becomes entitled to a "separate" half interest which may be disposed of by will or otherwise; the spouse who dies first may then leave his or her interest to the other spouse or to a third person. But he or she has nothing that can be disposed of by will unless there has been a severance. A joint tenancy cannot be severed by will.

1.81 Under a beneficial tenancy in common, each spouse has a "separate" share,[152] which can be dealt with or disposed of independently during life or by will. During marriage there is little difference in effect between this and a severable joint tenancy. On breakdown or divorce the court has in either case the same powers to deal with the home. On the death of a spouse, however, there is no automatic survivorship in the case of a tenancy in common. A spouse is free to leave his or her interest to the other spouse or to anyone else. This is the principal difference between a tenancy in common and a joint tenancy. Another difference is that tenants in common may share the beneficial interest in any proportions, such as ⅔-⅓, or ¼-¾, though it is usual for the shares to be equal.

1.82 It seems clear to us that under automatic co-ownership neither spouse should have a greater interest in the home than the other, at least during the marriage. In deciding whether co-ownership should be implemented through a joint tenancy, a tenancy in common or by some other means, there are two principal questions to consider.

152. See the comments of Lord Denning M.R. in Bedson v. Bedson [1965] 2 Q.B. 666, 678 (C.A.). See also Jones v. Challenger [1961] 1 Q.B. 176 (C.A.), at 183-184, per Devlin L.J.

(i) Power to dispose 3.

1.83 Under present law, a beneficial tenant in common has power to dispose of his or her beneficial interest by inter vivos disposition or by will. A beneficial joint tenant, by severance during his or her lifetime, can acquire the same power. Should either spouse be entitled to dispose unilaterally of his or her interest under co-ownership during joint lives? It would, in our view, be inconsistent with the purpose of the proposals to allow such a disposition without the consent of the other spouse, at least while the marriage subsists. It would be wrong to allow a third party to be brought in and to acquire the same rights as a spouse to occupy the home. Even when the marriage has broken down, it is our provisional view that neither severance nor sale of the interests should be permissible unless both spouses consent or the court gives leave.

(ii) Survivorship

1.84 Should co-ownership do more than give each spouse an equal beneficial interest during joint lives? Should it give the survivor any interest in the deceased's share, or should the first spouse to die be free to dispose of his or her interest by will, subject only to the survivor's right to apply for maintenance from the estate? An unseverable joint tenancy would, of course, give the survivor the whole interest in the home. It could be argued that this would be too generous to the survivor, especially where the home had been originally the sole property of the deceased (e.g. where it had been owned before marriage). The original owner would have no power to dispose of any interest in the home if the parties had not agreed upon severance during joint lives unless the law were changed to allow severance by will. This would probably be essential under co-ownership, otherwise it would be impossible for the spouses to take advantage of estate duty concessions which apply on the passing of a survivor's life interest. But if severance by

will were allowed the survivor would not necessarily succeed to any interest in the deceased's share.

1.85 One way of providing for the survivor would be to give him or her a life interest in the deceased's share. This rule could apply both to a tenancy in common and to a joint tenancy severed by will. In either case any disposition by the first spouse to die of his or her interest in the home would be subject to the survivor's life interest. Such a rule would ensure that the survivor could remain in the home for the rest of his or her life, and would also have estate duty advantages where there was a substantial estate. On the other hand it could be argued that the objective of co-ownership would be achieved by ensuring that the spouses shared the home equally, and that the question of succession rights in the home should be considered within the wider framework of inheritance rights. If the deceased has failed to meet his obligations to the survivor there is already a right to apply for family provision from the estate. In Part 3 of the Paper we propose that the court's powers to order family provision be extended to enable it not only to deal with the occupation of the matrimonial home, but also to transfer and settle property forming part of the estate on the death of a spouse. Taking these factors into account, therefore, our view is that it is not essential for co-ownership to include survivorship rights.[153]

(c) Contracting out

1.86 If a principle of co-ownership were introduced, the spouses should, in our view, remain free to contract out and make other arrangements as to the beneficial interests in the home. Their agreement should, subject to certain safeguards, be conclusive and binding upon them, except that it should be capable of variation by a subsequent agreement in the same form. The agreement should remain subject to the power of the court to vary the property rights of the

153. See also paras. 1.123-1.124 below.

parties in matrimonial proceedings. We consider that such an agreement should be in writing and signed by both spouses. In order to protect the weaker spouse, consideration should be given to requiring the signatures to be witnessed by a solicitor, or even by independent solicitors acting for each spouse. An agreement could affect not only a spouse, but, through that spouse, also the children. It is, however, arguable that where the spouses' agreement was limited to varying their beneficial interests in the home in minor respects and did not exclude the home from sharing altogether it might not be necessary to impose such stringent requirements as to form. We leave this question open to discussion.

(d) Sharing of obligations

1.87 As we have said, the co-ownership principle ought not to give one spouse any greater interest than the other. And, if there were a mortgage, the co-ownership principle should operate subject to it. But should the spouse who is not the owner of the legal estate be liable in respect of the outgoings either to the landlord or mortgagee or to the other spouse? This is a question of some importance not only in respect of freeholds subject to a mortgage but in respect of all leaseholds and especially those at a rack rent.

1.88 As regards liability to third parties, we have no doubt that either spouse should be entitled to discharge the obligations, whether the spouses live together or apart. This result has been achieved by the Matrimonial Homes Act 1967, section 1(5). But we take the view that a spouse who is not the legal owner ought not to be personally liable to the mortgagee, lessor, or any other person whose claim is against the legal owner, even though his or her interest may be affected by enforcement of the claim.[154] This is, of

154. The position of a beneficiary spouse when a mortgagee or landlord claims possession was considered in relation to occupation rights: see paras. 1.10-1.14 above.

course, the usual position of a beneficiary.

1.89 As between the spouses, while they are living together there should be no problem. Payments made by one spouse should be considered as payments by and on behalf of both, and co-ownership interests should not be affected by the fact that one paid rather than the other. Once cohabitation has ended, however, the situation is different. Suppose, for example, that the wife leaves the husband with a large mortgage commitment, or in a flat held at a rack rent. Do his payments continue to be made on behalf of both, or must she contribute or give credit? In principle it seems attractive to suggest that if the spouses are to share the benefit of the home, they should also share the burdens. If the wife has assets there seems to be no reason why she should be able to escape contributing to the outgoings. Even if she has no assets, it seems to us that since the co-ownership principle gives her a beneficial interest in the home, she should be liable, at least to the extent of the interest to contribute to the outgoings.

1.90 For these reasons, it is our view that as between the spouses they should in principle be liable to account to each other in respect of outgoings incurred after cohabitation has ceased.[156] The payer should be given credit, but there might also be a set-off, for example, where one spouse has had the benefit of occupation while the other has not. We recognise that as a practical matter the principle of sharing obligations could be effective only where the spouse concerned had assets, or where the outgoings could be set against the value of his or her interest in the matrimonial home.

156. See Wilson v. Wilson [1965] 1 W.L.R. 601,609 (C.A.) per Russell L.J.; Falconer v. Falconer [1970] 1 W.L.R. 1337 (C.A.) per Lord Denning M.R.; Davis v. Vale [1971] 1 W.L.R. 1022 (C.A.) per Lord Denning M.R.; Cracknell v. Cracknell, The Times, 25 June 1971, p.7 (C.A.).

(e) Two or more homes

1.91 If the spouses own more than one matrimonial home at a time, there are several ways of applying co-ownership:

(a) Co-ownership could attach only to the principal home (which would have to be defined).

(b) The spouse claiming an interest in a home could be made to elect.

(c) The co-ownership principle could apply to each home.

There are, of course, arguments in favour of limiting co-ownership to one home. If a suitable definition of the principal home could be found, solution (a) would be workable, especially where the homes were owned by one spouse. It might appear less satisfactory where each spouse owned a home. In either case we do not think it should be left to either spouse to choose which home should be shared (though they could, of course, agree the matter) and therefore do not favour solution (b). We leave this question open to discussion.

(f) Successively owned homes

1.92 Under present rules, where the legal estate is vested in one spouse and the beneficial interest is shared, on the sale of the home the beneficial interest of each spouse attaches to the proceeds of sale. The court can trace that beneficial interest through a series of later transactions and determine the interest of each spouse in a later home or in other funds or property.[157] However, the co-ownership principle would not depend on financial

157. Matrimonial Causes (Property and Maintenance) Act 1958, s.7; see e.g. Nixon v. Nixon [1969] 1 W.L.R. 1676 (C.A.), where the spouses had owned five homes.

contribution, but would attach to the matrimonial home automatically. It might be unfair if the result of this was to give a spouse an interest both in the proceeds of sale of one home and in a new home. Whether or not the new home was acquired before or after the first one was disposed of, in our view it should be presumed that the proceeds of sale of the first home were used to purchase the later home.

1.93 The effect of this rule would vary according to whether the later home cost more or less than the proceeds of sale. For example, if a home were sold for £5,000 and a new home purchased for £6,000 then it would be presumed that the later purchase price of £6,000 included the whole proceeds of sale of the first home. On the other hand, if the second home was purchased for only £4,000, there would be a "surplus" of £1,000. In this case the ordinary rules should apply. The spouses' beneficial interest would prima facie attach to the surplus. Where one home was sold and no further matrimonial home was acquired, either because the spouses had separated, or for any other reason, the beneficial interest under co-ownership would prima facie attach to the whole proceeds of sale, and the normal tracing rules would apply.

1.94 The effect of the presumption rule is that the spouses would share the worth of the most valuable home owned by them during the marriage. There would be several factors to take into account, for example, the extent of the beneficial interest if any particular house were subject to a mortgage. At this stage, however, we confine ourselves to the general principle; the details of its application should be further considered if it were decided to implement co-ownership.

(g) Estate duty and bankruptcy

1.95 As we have seen,[158] estate duty considerations may affect the choice between a beneficial joint tenancy and a tenancy in common as a means of implementing co-ownership. One estate duty problem is that if the interest held by a surviving spouse under the co-ownership principle were regarded as having been acquired by an inter vivos gift, it would attract duty if it had been acquired within seven years of the death of the other spouse. This is because estate duty law makes a clear distinction between interests acquired by way of gift and those acquired for valuable consideration. Estate duty law does, however, regard a marriage itself as a consideration and allows an exemption in respect of certain gifts in consideration of marriage.[159] Co-ownership makes no distinction on the ground of financial contribution; it recognises the partnership element in marriage and applies it to the home. In a sense, marriage itself is the consideration for co-ownership though co-ownership does not operate until there is a matrimonial home. Our view is that an interest created for a spouse under co-ownership ought not to be considered as a dutiable gift.[160] There is an analogy with capital gains tax, under which a disposition between spouses does not normally attract tax. The unity of the spouses is thus recognised.

158. Para 1.85 above.

159. Finance Act 1968, s.36. Gifts up to £5,000 to either spouse from the other spouse or from a parent or grandparent are exempt.

160. To prevent abuse, it might be necessary to fix an upper limit on the amount. Any agreement between the spouses to vary the terms of co-ownership, e.g. the surrender of one spouse's interest to the other, ought not to be exempted under these rules. For an estimate of the cost of exempting the surviving spouse's interest in the home from estate duty, see n.158 above.

1.96 A similar problem arises in connection with bankruptcy. Should the acquisition of an interest by a spouse under the co-ownership principle be regarded as a voluntary settlement, or as a disposition for value? The present policy is that a spouse's interest created by a voluntary disposition should not take precedence over creditors.[161] If it were thought necessary to preserve this policy, one would have to fall back on the principle of financial contribution to determine whether a particular transfer was voluntary. This, however, would add an unfortunate complication. In our view it would not unduly derogate from creditors' rights if they were able to look only to the bankrupt's half share,[162] so long, at any rate, as this was restricted to one matrimonial home.

5 EXCLUSION OF CO-OWNERSHIP

1.97 We have already indicated that in our view the spouses should be free to agree to exclude or to vary co-ownership. There are certain cases where it could be argued that co-ownership should be excluded automatically, without the need for an agreement.

161. Bankruptcy Act 1914, s.42; Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25, para. 78; s.42 applies to dispositions made within two years of the bankruptcy or within 10 years unless it can be proved that all debts of the bankrupt could be met without recourse to the property.

162. In practice, the trustee in bankruptcy is reluctant to sell the matrimonial home and evict the spouses from it; frequently it is sold to the non-bankrupt spouse for an almost nominal consideration.

(a) Home owned before marriage

1.98 Should a home owned by one spouse before marriage be excluded from co-ownership? There are two preliminary matters to consider. The first is that quite often one spouse buys a house before marriage with the help of a large mortgage which is paid off during the marriage. If there were to be an exception, it might be thought fair to limit it to a home owned absolutely before the marriage. The second is that it might appear arbitrary if co-ownership did not affect a home owned before marriage, yet applied to a home acquired after marriage with assets owned before marriage. Nevertheless it would introduce great complexity and uncertainty if it became necessary to trace the sources of funds; the fact that a spouse chose to use his assets to purchase a home during the marriage might appear to justify the application of co-ownership in these cases.

1.99 Returning to the question whether co-ownership should apply to a home owned absolutely before marriage, the arguments against applying co-ownership are first, that the home did not derive from the actual or notional efforts of the spouses during marriage; secondly, a spouse who owned a family home which passed from generation to generation and who wished to continue this tradition might be forced to seek legal advice; thirdly, there might be hardship to a person who entered into a second marriage, e.g. a widow with young children who owned her home absolutely would have to surrender a half interest in it on re-marriage. On the other hand there are strong arguments in favour of applying co-ownership universally. First, the matrimonial home is, in terms of value and use, the principal family asset, and it should be irrelevant who paid for it or when it was acquired. Secondly, co-ownership, if introduced, should apply as widely as possible. Thirdly, it would be unfair to leave it to the non-owner spouse to attempt to reach an agreement with the owner spouse. Where

a home has been in a family for generations it is likely that legal advice would be taken in any event. On balance, our view is that co-ownership should apply to homes owned before marriage, though we recognise that this is a matter on which views will differ.

(b) Home acquired during marriage by gift or inheritance

1.100 As regards a home acquired by one spouse during marriage by way of gift or inheritance from a third party, arguments similar to those outlined above can be applied. There are, however, additional factors to take into account. If co-ownership were to apply automatically, the donor could not make an absolute gift to one spouse without asking the other spouse to agree to exclude co-ownership. It seems undesirable that a donor should have to ask for such an agreement. The result would probably be that the donor would either refrain from making the gift or resort to some other device (such as granting a life interest)[163] to achieve his purpose. One solution might be to allow the donor to exclude co-ownership by express declaration, but this could appear invidious, and may be even more undesirable than an agreement to exclude. It seems preferable to recognise that a donor who wished to exclude co-ownership will find some means of doing so. Our provisional view is, therefore, that a home acquired by one spouse by gift or inheritance should not be subject to co-ownership,[164] unless the donor made an express gift to both spouses, or unless the donee agreed to share with the other spouse.

163. See below, para. 1.101.

164. This exclusion should apply to a home acquired by gift or inheritance from a third party during, or in contemplation of marriage.

(c) Life interest

1.101 Is it practicable to apply co-ownership where the interest of one spouse in the home is a life interest? In our view granting a spouse an interest in property during the life of the other spouse would lead to unnecessary complications without conferring any substantial benefit. If the life interest were part of an ante- or post-nuptial settlement, it could be varied by the court in the event of a divorce.

(d) Business premises

1.102 The matrimonial home may form part of premises used for business purposes, for example, a shop with living accommodation attached, or a farm. In principle, it would appear fair to apply the co-ownership principle to the residential part of the premises provided that the practical difficulties in assessing separately the value of the living accommodation could be overcome. It might, however, be impractical to apply all the proposals which we make relating to the matrimonial home trust, for example, those under which a spouse would be entitled to apply to have the legal title vested in joint names.[165] On breakdown of marriage or on divorce, the court in determining occupation rights, and in considering whether to order sale, should give special weight to the needs of the spouse running the business, and to the fact that it might not be practicable to dispose of the business without the living accommodation.

165. For proposals concerning the matrimonial homes trust, see para. 1.115 ff. below.

6 PROTECTION OF CO-OWNERSHIP

1.103 The co-ownership principle would operate automatically on the spouses' beneficial interest in the matrimonial home, but would not, of itself, have any immediate effect on the legal estate. As we have seen, it is often the case that the legal estate is in the name of one spouse. How are the interests of the other spouse under co-ownership to be protected against adverse dealings which may result in a third party acquiring an interest in the home?

(a) Registration of beneficial interest

1.104 In an earlier section the point was made that whereas the non-owner spouse may, by registration, protect rights of occupation from third party dealings, there is no means of registering a beneficial interest in the home.[166] Registration is not necessarily an effective means of protection; it may not be thought of until too late, and it may be regarded as a hostile act for a spouse to register an interest against the other spouse. Under the present law there would be practical difficulties in permitting registration of a beneficial interest. The existence of the beneficial interest might be a matter of doubt which would have to be resolved by litigation. Under co-ownership, which would be of almost universal application, this difficulty would be minimised.

1.105 It could be argued that in view of a spouse's power to register occupation rights under the 1967 Act it is not necessary to have the additional right to register a beneficial interest. However, there are certain points of difference. Under the 1967 Act a registered charge must

166. An interest in the proceeds of sale is not an interest in land and does not give rise to a registrable interest: Taylor v. Taylor [1968] 1 W.L.R. 378 (C.A.); Irani Finance Ltd. v. Singh [1971] Ch. 59 (C.A.).

be cancelled when either spouse dies or if the marriage is otherwise terminated, unless the court has extended the rights of occupation. Further, the court may terminate the rights of occupation of a spouse even though that spouse remains a beneficial owner. Since the beneficial interest under co-ownership can exist quite independently of rights of occupation, in our view a spouse ought to have an independent right to protect it by registration. In practice registration of both interests could probably be effected at the same time.

1.106 If registration were permitted, a spouse's beneficial interest in the matrimonial home under the co-ownership principle would be different from an interest in property under a trust for sale, which does not give rights of registration. A spouse would have an interest comparable with a direct equitable interest in land. It would, in our view, be appropriate to refer to the trusts under which the spouses' interests arise by a special term, such as "the matrimonial home trust". Other aspects of this new form of trust are considered below.[167]

(b) Vesting order

1.107 The most effective method of protecting a spouse's beneficial interest in the home would be to ensure that the legal estate became vested in joint names. Since both spouses would then have to be parties to any later transactions, this would protect rights of beneficial ownership, as well as rights of occupation. The spouse in whose name the legal estate is vested would, of course, have power to vest the property in joint names. The other spouse should also be entitled to apply to the court for an order vesting

167. Para. 1.115 ff.

the property in joint names.[168] But an application of this kind might be considered as a hostile act or might be left until too late.

(c) Declaration by purchaser spouse

1.108 Another method of vesting the home in joint names which we have considered would be to require every purchaser of land to make a declaration in the conveyance in the following form:

> "The premises hereby transferred will be occupied within [6] calendar months from the date hereof as a matrimonial home by [names of H & W] and will be subject to a matrimonial home trust."

OR

> "The premises hereby transferred will not be occupied within [6] calendar months from the date hereof as a matrimonial home and will not be subject to a matrimonial home trust."

The effect of a positive declaration would be to create an immediate trust in favour of husband and wife;[169] any transfer that did not vest the legal title in the husband and wife would be void, except that it would take effect

168. cf. Trustee Act 1925, s.58(1), s.40. In the case of registered land, the legal estate will not pass until appropriate action is taken by the Registrar: Land Registration Act 1925, s.47. The application for a vesting order should be registrable.

169. Even if the marriage had not yet taken place.

as a contract to convey to the spouses.[170] If the declaration were negative, a subsequent purchaser would take a good title free of any interest of the other spouse.

1.109 An initial declaration of this sort would minimise the possibility of fraud and evasion; the fact that the declaration had to be made at the time of purchase might lessen the chances that a spouse would attempt to defeat the interest of the other spouse; on the other hand it would hardly be practicable to limit the need for a declaration to premises already adapted for residential use, and it seems singularly artificial to require a declaration in respect of non-residential property.

1.110 On consideration, our view is that this system is open to the fatal objection that it asks a purchaser to declare as a fact (and as a matter of law) something which is no more than an intention and an opinion as to its effect. The longer the period stated in the declaration the more speculative it becomes. Suppose, for example, spouses buy a property intending to renovate it before occupation, or suppose they purchase land intending to build. It might be impossible to decide which declaration to make. If a marriage had not taken place at the time of conveyance, and never did take place, there would be many problems if a positive declaration had been made. More seriously, the proposed procedure would not affect existing matrimonial homes, nor would it affect a home owned by a party before marriage, which had not been acquired in contemplation of marriage within the stipulated period. In these cases, if the co-ownership principle applied, the beneficiary spouse's protection would depend on his or her right to apply for a vesting order, or to register his or her interest.

170. cf. Settled Land Act 1925, s.13, Law of Property Act 1925, s.27.

(d) Declaration by vendor spouse

1.111 Another way of protecting the interests of a spouse who has no legal title, would be to require every vendor, lessor or mortgagor of property which included a dwelling house to make a declaration to the effect that:

> "no person other than a party to [the conveyance][171] has any interest arising under a matrimonial home trust in the property [conveyed]."[171]

A conveyance without the declaration would be void, and a false declaration could give rise to penal sanctions. The declaration would be conclusive; the purchaser would not be affected by actual or constructive notice of a spouse's interest.[172] If the vendor were unable to make the declaration either he could convey the property into joint names,[173] or the other spouse could join in the conveyance. This might encourage spouses to put the home in joint names at the time of the original purchase.

1.112 An advantage of this method is that it could be applied to all existing matrimonial homes, even those which had not originally been acquired as such. The declaration would relate to an actual, rather than to a prospective situation and would be needed only where the property at the time of sale was or included a dwelling house. On the other hand a spouse who was determined to defeat the other's interest might not be deterred from making a false declaration.

171. In the case of a lease or mortgage different wording would be used, as appropriate.

172. He would, of course, be affected by any registered interests.

173. Since no beneficial interest would be transferred, no stamp duty would be payable.

1.113 To summarise, we envisage that a spouse with a beneficial interest in the matrimonial home under co-ownership would have available any of the following methods of protecting that interest:

(a) The right to protect the beneficial interest in the home by registration (para. 1.105).

(b) The right to apply to the court for an order vesting the legal estate in the home in joint names (para. 1.107).

(c) The requirement that the vendor of a home should declare whether any person has a beneficial interest in that home under the matrimonial home trust (para. 1.111).

These are intended as cumulative rights rather than as alternatives.

(e) Safeguarding third parties

1.114 It would be premature at this stage to decide which, if any, of the possible schemes discussed above for protecting the beneficial interest of a spouse would be most effective. There are many technical conveyancing problems which need to be considered in detail. Whichever scheme were chosen, however, we would stress that third party interests must be adequately protected and conveyancing must not be made unduly complicated. A third party purchaser ought to be able to discover without difficulty the interests involved and to take a good title free of any beneficial interest of which he has not had proper notice. How should it be determined whether the third party has had notice? Obviously, the question is only of importance where a beneficiary spouse

was not a party to the conveyance. If the scheme requiring the vendor to make a declaration were implemented,[174] a spouse with a beneficial interest would be a party to the conveyance except in the case of fraud. In the absence of such a scheme, the only practical solution, in our view, would be to provide that the purchaser for value should not be affected by the beneficial interest of a spouse unless that interest had been protected by registration.[175] In all other cases the purchaser should take a clear title, free of the beneficiary spouse's interest, which would attach to the proceeds of sale.

7 THE MATRIMONIAL HOME TRUST

(a) During marriage

1.115 Where a matrimonial home is beneficially owned by both spouses under the co-ownership principle we have suggested that it should be subject to a new form of trust, called a "matrimonial home trust", which would regulate the rights and obligations of the spouses and third parties.[176] In our view this is a far more appropriate term than "trust for sale" which to the layman seems to imply that the property must be sold. We have already indicated two major rules which should in our view be part of the matrimonial home trust system; first, that the beneficiary spouse should be entitled to protect his or her interest by registration; and, secondly, that the vendor of property including a dwelling house should be required to declare whether the property is subject to a matrimonial home trust.

174. Paras. 1.111-1.112.

175. Paras. 1.104-1.106.

176. Para. 1.106.

1.116 Another rule, which in our view should be part of the matrimonial home trust, is that the beneficial interests of the spouses should become direct equitable interests in land, rather than, as now, interests in the proceeds of sale, under a trust for sale. It should also be a term of the matrimonial home trust that during the marriage the home should be retained for the joint enjoyment of the spouses, and that it should be disposed of or otherwise dealt with only with the consent of both spouses.[177] Failure by the legal owner to obtain consent would be a breach of trust. Where a spouse refused to concur in a transaction, the other spouse should be entitled to apply to the court for an order.[178] The court should decide questions concerning occupation and sale in accordance with the principles outlined below. Although these proposals concerning the matrimonial home trust are made in conjunction with co-ownership, if co-ownership were not implemented we think that the proposals could be considered at a later stage to see if they could be applied wherever the beneficial interest in the matrimonial home was shared by the spouses.

(b) Breakdown of marriage

1.117 If the marriage broke down, and the spouses separated, the chief purpose of the matrimonial home trust, to provide a joint home, would come to an end. If neither spouse wished to occupy the home there would seldom be any problem. It could be sold and the proceeds divided. More commonly, there would be a dispute either as to which spouse could continue in occupation, or between the spouse who wished to remain in occupation and the other spouse who wished to recover his or her interest in the home

177. cf. Jones v. Challenger [1961] 1 Q.B. 176 (C.A.); Law of Property Act 1925, s.28(1). If a declaration were required from a vendor (paras.1.111-1.112) consent would be required automatically.

178. cf. Law of Property Act 1925, s.30; Re Beale's Settlement Trusts [1932] 2 Ch. 15.

through a sale. Under present law these questions can be determined in two different types of proceeding.

1.118 Where the legal estate is vested in one spouse, then, whether or not the other spouse has any beneficial interest in the home, rights of occupation can be determined under section 1 of the Matrimonial Homes Act 1967. Proceedings are heard in the county court or in the Family Division of the High Court.[179] As we have seen, the court must decide what is just and reasonable having regard to the conduct of the spouses, their means and needs, the needs of any children, and all the circumstances of the case.[180] Although the court is concerned with rights of occupation, its decision indirectly affects property rights. If a spouse's rights of occupation are protected by registration the legal owner cannot sell or otherwise dispose of the home except subject to the other spouse's rights of occupation under the court's order. In practice, this means he cannot sell at all.

1.119 Where, however, the legal estate is vested in the spouses jointly, the Matrimonial Homes Act 1967 does not apply. Disputes between the spouses concerning the home are heard in Chancery on the application of one spouse that the other be ordered to concur in a sale.[181] The dispute is determined in accordance with general property law principles. These generally require that once the purpose of providing a matrimonial home for the spouses has come to an end the trust for sale should be implemented, i.e. the property should be "converted" and each spouse should take

179. From 1 October 1971 the Family Division has taken over this jurisdiction from the Probate Division: Administration of Justice Act 1970, S.I. 1971 No.1244 (c.32).

180. Matrimonial Homes Act 1967, s.1(3), para. 1.8 above.

181. Law of Property Act 1925, s.30.

his or her share.[182] One exception is that a husband cannot enforce sale where a wife can establish that because of her right to be maintained by her husband, she is entitled to remain in occupation.[183] On the other hand, if she has lost the right to be maintained, or if allowing her to remain in occupation would exceed her maintenance rights, sale will be enforced on the husband's application.[184] He has no corresponding right to be maintained.[185]

1.120 In our view it is unsatisfactory that there should be different proceedings and that different principles should be applied, to determine the spouses' rights according to whether one spouse is legal owner or both spouses are joint legal owners. All these matters should be heard by the Family Division. Principles similar to those set out in section 1(3) of the Matrimonial Homes Act 1967[186] should apply to disputes between spouses as joint legal owners, whether under present law or under any new principle of co-ownership. That section makes no distinction between husband and wife, and the right to occupy does not necessarily depend on the right to be maintained. The court should consider what is just and reasonable in the

182. Jones v. Challenger [1961] 1 Q.B. 176 (C.A.); M.J. Prichard "Trusts for Sale - The Nature of the Beneficiary's Interest" (1971) 29 Cam. L.J. 44, 48-49.

183. Gurasz v. Gurasz [1970] P.11 (C.A.); Re Hardy's Trust (1970) 114 Sol.J. 864 (applying dictum of Lord Hodson in National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175, 1220 (H.L.)).

184. Jackson v. Jackson [1971] 1 W.L.R. 59. The wife's rights do not prevail against the trustee in bankruptcy: Re Solomon [1967] Ch. 573.

185. Jones v. Challenger [1961] 1 Q.B. 176 (C.A.); Rawlings v. Rawlings [1964] P.398 (C.A.), 415 per Harman L.J.; Re John's Assignment Trusts [1970] 1 W.L.R. 955. cf. Bedson v. Bedson [1965] 2 Q.B. 666 (C.A.).

186. Para. 1.8 above.

circumstances, balancing the hardship caused to a spouse who is turned out of the home against that caused to a spouse who cannot immediately realise his or her investment by enforcing sale.

1.121 Prior to a divorce, the court should, in our view, be reluctant to order sale against a spouse in occupation unless there are compelling reasons for enabling the other spouse to receive his share and no other practicable means of achieving this. The reason for this is that once a decree has been granted, the court will be able to exercise its powers under section 4 of the Matrimonial Proceedings and Property Act 1970, to vary the spouses' interests or to transfer one spouse's interest to the other.[187] If matrimonial proceedings are pending the position should be preserved until financial provision is considered by the court. The principle that all property questions should be dealt with together was recognised in a recent Practice Note in which it was stated that it would be convenient if applications under section 17 of the Married Women's Property Act 1882, applications for financial provision and applications under the Matrimonial Homes Act 1967 could be heard by the same tribunal.[188] 5

187. See, e.g. Radziej v. Radziej [1967] 1 W.L.R. 659; Smith v. Smith [1970] 1 W.L.R. 155 (C.A.).

188. Practice Note 29 Jan. 1971, [1971] 1 W.L.R. 260.

(c) Divorce, judicial separation and nullity

1.122 On granting a decree of divorce, judicial separation or nullity, the court has wide powers to make financial provision for either spouse.[189] These powers include:

(a) the award of a lump sum or periodical payments;

(b) the transfer or settlement of the property of either spouse for the benefit of the other spouse or the children of the family;

(c) the variation of any ante- or post-nuptial settlement (for example, where the home is in joint names).

The court, in exercising these powers, must take into consideration certain factors,[190] including the means, needs and conduct of the spouses, the length of the marriage, the age of the spouses, the standard of living of the family and "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family". These powers allow the court to deal with the matrimonial home on whatever basis is considered appropriate. It has been held that where both spouses have an interest in the home and there is an application to vary these interests (as a post-nuptial settlement), the court has a complete discretion.[191] The interests of a spouse wishing to remain in occupation must be balanced against those of a spouse wishing to sell. These powers would, in effect, become

189. Matrimonial Proceedings and Property Act 1970, ss. 2 and 4.

190. Matrimonial Proceedings and Property Act 1970, s.5.

191. Smith v. Smith [1970]1 W.L.R. 155 (C.A.); Spizewski v. Spizewski [1970] 1 W.L.R. 522, 524 (C.A.) per Lord Denning.

powers to vary the matrimonial home trust but should continue to be exercisable where the interests arose under the present law.

(d) Succession rights

1.123 The present rules governing a spouse's succession rights in respect of the matrimonial home were described above.[192] The main purpose of the proposals concerning co-ownership is to secure equal interests in the home. The survivor would always retain at least his or her share, but depending on how co-ownership were implemented, it might or might not lead to additional rights of survivorship.

1.124 In a later part of the Paper proposals are made to give the court power to allocate or transfer the matrimonial home under its family provision jurisdiction. We have already proposed that the court should have power to deal with the survivor's application in respect of occupation rights under that jurisdiction. For these reasons, we do not, in this part of the Paper, make any further proposals concerning succession rights in respect of the home. Nevertheless, when it has been decided what major changes are necessary in family property law, it might be appropriate to review this question, to ensure that the surviving spouse's interests have been adequately protected. This need no necessarily be part of co-ownership.

192. Paras 1.46-1.47.

APPENDIX D

An Act to amend the Law relating to Partition.

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short Title.

1. This Act may be cited as The Partition Act, 1868.

As to the Term "the Court."

2. In this Act the Term "the Court" means the Court of Chancery in *England*, the Court of Chancery in *Ireland*, the Landed Estates Court in *Ireland*, and the Court of Chancery of the County Palatine of *Lancaster*, within their respective Jurisdictions.

Power to Court to order Sale instead of Division.

3. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if it appears to the Court that, by reason of the Nature of the Property to which the Suit relates, or of the Number of the Parties interested or presumptively interested therein, or of the Absence or Disability of some of those Parties, or of any other Circumstance, a Sale of the Property and a Distribution of the Proceeds would be more beneficial for the Parties interested than a Division of the Property between or among them, the Court may, if it thinks fit, on the Request of any of the Parties interested, and notwithstanding the Dissent or Disability of any others of them, direct a Sale of the Property accordingly, and may give all necessary or proper consequential Directions.

Sale on Application of certain Proportion of Parties interested.

4. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if the Party or Parties interested, individually or collectively, to the Extent of One Moiety or upwards in the Property to which the Suit relates, request the Court to direct a Sale of the Property and a Distribution of the Proceeds instead of a Division of the Property between or among the Parties interested, the Court shall, unless it sees good Reason to the contrary, direct a Sale of the Property accordingly, and give all necessary or proper consequential Directions.

As to Purchase of Share of Party desiring Sale.

5. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if any Party interested in the Property to which the Suit relates requests the Court to direct a Sale of the Property and a Distribution of the Proceeds instead of a Division of the Property between or among the Parties interested, the Court may, if it thinks fit, unless the other Parties interested in the Property, or some of them, undertake to purchase the Share of the Party requesting a Sale, direct a Sale of the Property, and give all necessary or proper consequential Directions, and in case of such Undertaking being given the Court may order a Valuation of the Share of the Party requesting a Sale in such Manner as the Court thinks fit, and may give all necessary or proper consequential Directions.

Authority for Parties interested to bid.

6. On any Sale under this Act the Court may, if it thinks fit, allow any of the Parties interested in the Property to bid at the Sale, on such Terms as to Nonpayment of Deposit, or as to setting off or accounting for the Purchase Money or any Part thereof instead of paying the same, or as to any other Matters, as to the Court seem reasonable.

Application of Trustee Act. (13 & 14 Vict. c. 60.)

7. Section Thirty of The Trustee Act, 1850, shall extend and apply to Cases where, in Suits for Partition, the Court directs a Sale instead of a Division of the Property.

Application of Proceeds of Sale. (19 & 20 Vict. c. 120.)

8. Sections Twenty-three to Twenty-five (both inclusive) of the Act of the Session of the Nineteenth and Twentieth Years of Her Majesty's Reign (Chapter One hundred and twenty), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to Money to be received on any Sale effected under the Authority of this Act.

Parties to Partition Suits.

9. Any Person who, if this Act had not been passed, might have maintained a Suit for Partition may maintain such Suit against any One or more of the Parties interested, without serving the other or others (if any) of those Parties; and it shall not be competent to any Defendant in the Suit to object for Want of Parties; and at the Hearing of the Cause the Court may direct such Inquiries as to the Nature of the Property, and the Persons interested therein, and other Matters, as it thinks necessary or proper with a view to an Order for Partition or Sale being made on further Consideration; but all Persons who, if this Act had not been passed, would have been necessary Parties to the Suit, shall be served with Notice of the Decree or Order on the Hearing, and after such Notice shall be bound by the Proceedings as if they had been originally Parties to the Suit, and shall be deemed Parties to the Suit; and all such Persons may have Liberty to attend the Proceedings; and any such Person may, within a Time limited by General Orders, apply to the Court to add to the Decree or Order.

Costs in Partition Suits.

10. In a Suit for Partition the Court may make such Order as it thinks just respecting Costs up to the Time of the Hearing.

As to General Orders. (21 & 22 Vict. c. 27.)

11. Sections Nine, Ten, and Eleven of The Chancery Amendment Act, 1858, relative to the making of General Orders, shall have Effect as if they were repeated in this Act, and in Terms made applicable to the Purposes thereof.

Jurisdiction of County Courts in Partition. (28 & 29 Vict. c. 99.)

12. In *England* the County Courts shall have and exercise the like Power and Authority as the Court of Chancery in Suits for Partition (including the Power and Authority conferred by this Act) in any Case where the Property to which the Suit relates does not exceed in Value the Sum of Five hundred Pounds, and the same shall be had and exercised in like Manner and subject to the like Provisions as the Power and Authority conferred by Section One of The County Courts Act, 1865.

APPENDIX E

Matrimonial Property Act

Part I. The Matrimonial Home and Contents

Alternate Proposal #1. Co-ownership of the Matrimonial Home

1. The matrimonial home should be defined in the same way as the homestead is presently defined in the Dower Act.

2. In the absence of express agreement the spouses should share equally in the beneficial interest in the homestead.

3. An agreement contracting out of the co-ownership should meet certain requirements to be valid. These should include the requirement of legal advice.

4. Co-ownership should be protected by a requirement that all transfers contain either a declaration that the property is not the homestead of the vendor, or written consent of both parties to the sale.

5. As under the Dower Act the bonafide purchaser would be protected where the vendor made a fraudulent declaration that the home is not a homestead, as long as the transfer was registered. Provision should be made for a wide curative section to enable the court to declare a disposition valid even though the technical requirements of the Act were not followed.

6. Either spouse may have the certificate of title marked to indicate it is the matrimonial home by sending in a copy of the marriage certificate with an affidavit. This would prevent fraudulent declarations that the property was not the homestead.

7. In the absence of such precautions, the spouse who lost the occupation in the matrimonial home due to the other spouse's fraudulent declaration should have an action against that spouse, or, as under the present Dower Act, a right against the Assurance Fund.

8. Where matrimonial differences arise, either spouse may make a summary application to the court to determine which spouse should have possession of the house to the exclusion of the other. Wide judicial discretion should be given allowing the court to make such order as it thinks just. Consideration should be given to any factors the court deems appropriate, but the overriding consideration is to be the welfare of the family as a whole. Postponement of partition and sale applications would fall within this section.

9. The spouse making the application for exclusive possession of the matrimonial home may also ask the court to exercise its discretion to make such order as it thinks fit with regard to possession of the contents of the matrimonial home.

In the event the court makes an order for possession of personal property in favour of the non-owner spouse, and the owner spouse in contravention of the order disposes of such property to a third party who is a bona fide purchaser for value without notice of the court order, such a disposition will be valid. The spouse in contravention of the order will be subject to ordinary contempt proceedings as well as an action in personam by the other spouse.

10. Since the co-ownership involved in the Act only results in a tenancy in common, the Act should continue to grant a contingent life interest to the surviving spouse.

Alternate Proposal #2. Presumption of Co-ownership

1. A husband and wife shall, to the exclusion of any presumption of advancement or other presumption of law or equity, be presumed, in the absence of an express agreement or any special circumstances which appear to the Judge to render it unjust so to do, to hold or have held as joint tenants the homestead (as presently defined in the Dower Act).

NOTE: Alternate Proposal #2B follows and complements this legislation since the non-owner spouse would have no registerable interest in the property to protect his or her occupation rights. The presumption would be useful even if a partnership of acquests scheme is adopted.

Alternate Proposal #2A

It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which e either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings).

NOTE: This provision would apply under both the present separation of property regime and the partnership of acquests regime. However, if either Alternate Proposals #1 or #2 are enacted the provision is unnecessary.

NOTE: Alternate Proposal #2B would still be necessary to protect the occupation rights of the spouse who did not hold the legal title.

Alternate Proposal #2B. Protection of Occupational Rights in the Matrimonial Home

NOTE: This is an adaptation of the present Dower legislation to directly provide for protection of rights of occupation.

1. The definition of the homestead would continue to be the same.

2. The Act should confer a substantive right binding on both spouses to occupy the matrimonial home, irrespective of the manner in which the legal and beneficial interests are held, providing that no third party shares in the beneficial interest in the home. See section 26(1) of the present Dower Act.

3. The present consent and acknowledgment requirements in the Dower Act should be continued in this new Act. Before a homestead can be validly disposed of, there must be consent by both parties.

4. The new Act should contain a wide curative section giving the court the discretion to declare a transfer as registered notwithstanding any technical non-compliance with the Act.

5. Once a disposition has been registered, the matrimonial home will cease to be a homestead within the meaning of the Act. The remedy of the spouse who has lost his or her occupation rights would be limited to a suit against either the husband or the Assurance Fund as under the present system.

6. In order to protect the occupation rights, and not have to rely upon the right of suit against the spouse

or the Assurance Fund, provision should be made allowing the property to be registered as the matrimonial home by completion of an affidavit in standard form declaring the property to be a homestead together with the filing of a copy of the marriage certificate.

7. Where matrimonial differences arise, either spouse may make summary application to the court to determine which spouse should have possession of the house to the exclusion of the other. Wide judicial discretion should be given allowing the courts to make such order as it thinks just. Consideration should be given to any factors the court deems appropriate, but the overriding consideration is to be the welfare of the family as a whole.

8. The definition section in the Act should make clear that a disposition includes a partition and sale under the Partition Act 1868. Under the proposed provision for summary application to determine possession rights, the court should also have the discretion to postpone a partition application, using the same discretion as the court would use in deciding whether or not to grant an order dispensing with consent under the present Act. That is the court may consider any fact that it deems appropriate. Again the section might provide that the overriding consideration is to be the welfare of the family as a whole.

9. The spouse making the application for exclusive possession of the matrimonial home may also ask the court to exercise its discretion to make such order as it thinks fit with regard to the possession of the contents of the matrimonial home. In the event the court makes an order for possession of personal property in favour of the non-

owner spouse and the owner spouse in contravention of the order disposes of such property to a third party who is a *bona fide* purchaser for value without notice of the court order, such a disposition will be valid. The spouse in contravention of the order will be subject to ordinary contempt of proceedings as well as action *in personam* by the other spouse.

11. The present Dower right, that is the contingent life interest in the matrimonial home which is given to the surviving spouse, should be continued in the new Matrimonial Property Act.

Part 2: Tenancies

1. The court should have a discretion as to who should have possession of rental accommodation as between the spouse who has signed the tenancy agreement and the other spouse.

2. The court should have the right to make an order that the lease should be changed to the other spouse's name. Violation of the court order by the landowner would be contempt of court. The present right of the landlord to give a tenant notice, as specified in the lease, or in the absence of a written lease in the Landlord and Tenant Act would be continued.

3. A spouse who was applying for an order of possession in regard to rental accommodation, may also make application for possession of any furniture or other chattels necessary for the continuance of the matrimonial home.

Part 3: Ownership of Matrimonial Property

1. In any question between a husband and wife as to the title of property, either party may apply to a judge and the judge may make an order with respect to the property in dispute as he thinks fit. Following this general section the legislation would set out the principles of the partnership of acquests matrimonial regime. If it were decided not to implement such a partnership of acquests scheme those recommendations which would alleviate some of the hardship of the present separation of property regime should be implemented. For example, the provision whereby household savings are to be considered beneficially owned by both spouses.

Part 4: Variation of Property Rights

1. In this section the court should be given the power to make transfer of property between husband and wife as it thinks fit having regard to such criteria as inter alia, to the means (including property) and the needs of the party, length of the marriage, contributions made by each party to the welfare of the family, and the loss of any benefits such as a pension as a result of the divorce. The court must exercise its powers to place the parties as far as it is practicable and, having regard to their conduct, just to do so, in the financial position which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities to the other. (This section is based on the English Matrimonial Proceedings and Property Act of 1970.)

APPENDIX F

EXAMPLES
ONTARIO FAMILY LAW PROJECT
Pages 553-55 (rev.)

(1) Mr. and Mrs. Mouse had no property when they were married, and they have applied to the court jointly for a winding-up of the Legal Régime. Neither spouse claims any allowable deductions. Mrs. Mouse was employed from time to time during the marriage. The net estates are:

Mr. Mouse	$ 25,000
Mrs. Mouse	5,000

Since there are no deductions, these amounts are also the residuary estates. Mrs. Mouse is entitled to an in personam claim of debt against Mr. Mouse as the balancing claim. The amount of this claim is $10,000 and the calculation is as follows: 1/2 (25,000 + 5,000) - 5,000 = 10,000.

(2) Mr. and Mrs. Walrus each had property on marriage and an uncle of Mrs. Walrus left her a legacy during the marriage. In divorce proceedings between the spouses, allowable deductions are claimed and valued by the court (in its discretion) as at the date of marriage. The net values are:

Mr. Walrus	$ 10,000
Mrs. Walrus	20,000

The uncle's legacy is valued as at the date of acquisition and its value was $15,000.

The values of the net estates are:

Mr. Walrus	$ 120,000
Mrs. Walrus	25,000

Consequently, the residuary estates are:

Mr. Walrus	$ 110,000
Mrs. Walrus	Nil

The court therefore awards Mrs. Walrus a balancing claim against Mr. Walrus. The amount of this claim is $55,000, the calculation being: 1/2 x 110,000 = 55,000.

The final position is that Mrs. Walrus has been allowed to deduct $25,000 as capital, and is a creditor of Mr. Walrus for the balancing claim of $55,000.

(3) Mr. and Mrs. Cat had no property on marriage and there are no deductions. Mrs. Cat had been at home during the marriage and her net estate is nil. On an application to the court, Mr. Cat's net estate is determined to be $30,000.

Mrs. Cat is entitled to a balancing claim of $15,000 against Mr. Cat. This is an in personam claim of debt.