August 28, 1972

MATRIMONIAL PROPERTY

The resolution of the Legislature of March 8, 1971, directed the Institute "to study the feasibility of legislation which would provide that, upon dissolution of the 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."

Implicit in this resolution is the recognition of the fact that the present matrimonial property system, whereby each spouse keeps his own and neither has a legally vested right to share in the property of the other, apart from judicially conferred "small mercies", works in practice to the detriment of the married woman, especially the one who is more or less completely dependent on her husband. That system was ushered in a century ago as a reflection of the intense individualism of the common law, as opposed to the prevailing community property systems (which still flourish among the vast majority of married couples in large areas of the globe, either as statutory regimes or de facto), the essence of which was the communal cooperation of the family.

Although during the past generation the legal pendulum seems to have started a swing back to somewhat a middle position, either as a result of judicial ingenuity or by statutory innovation, such piecemeal reform has not brought about any significant improvement in the position of married women, especially the predominant group which, by choice or necessity, is confined to the traditional role of housewife and mother in the family. Perhaps it is

not possible to bridge the gap between these two polar entities and build a lasting structure on existing foundations. Perhaps the only solution lies in a fundamentally different regime, which would not only conform to the wishes of the great majority of modern women, whether they earn through employment, business or professional work or whether their contribution to the matrimonial partnership lies entirely in their domestic activities and the care of the children, but would command their willing acceptance, being a true and tangible embodiment of the sacred marital vows whereby the man promises to endow his bride "with all his wordly goods" and she in turn promises to stand by his side "in sickness and in health, for richer, for poorer. . . ."

Besides commending to the good sense of the people, the proposed system must be workable, and for this reason must satisfy the criteria of certainty, simplicity and convenience, ensure the maximum cooperation between the spouses in vitally important areas touching the sensitive fabric of marriage, and at the same time leave unimpaired the existing balance between the interests of the spouses on the one hand and the legitimate interests of all those groups of individuals in social, economic and legal interaction with them, be they the issue or more remote relatives, or the creditors and other third parties, on the other.

The Institute has therefore thoroughly examined the various feasible alternatives to the present system by the above noted criteria of excellence, while at the same time diagnozing the ills of the latter to see whether the cure would be worthwhile, and at any rate with a view to finding

out whether there are some aspects of that system which could usefully be preserved and which would not only blend easily with the proposed alternative, but would also enhance its virtue.

Before delving into the communal property systems it may well be important to inquire why the century old separate property system is in seeming disfavour. Why should we discard a system that has all the badges of simplicity and convenience and is technically perfect and which seemed to ensure the maximum independence of the spouses in their economic dealings? To these questions the ready answers of the sponsor of the English Matrimonial Property Bill which intended to introduce a limited system of community of property into English law were:-

(a) that the present law ignores the solemn undertaking given by the married man on marriage,

(b) that it fails to take account of the contribution which a wife directly or indirectly makes to the acquisition of matrimonial property, and

(c) even more important, the law's attitude in looking on the wife's rights as being limited to maintenance is humiliating and degrading especially where an innocent wife is legally cast aside under permissive divorce legislation, "the woman is entitled only to bed and board, women are regarded

> as chattels in the home and economically and legally as second-rate citizens."[1]

However, the question still remains whether it is possible to find a compromise between the principles of separation and community of property, while at the same time preserving the equality of the spouses in matters of property and contract, and, one may add, in procedure.[2]

It should be recognized that if an alternative is in fact found, it should, like the laws of intestacy, be a statutory regime available in all cases where the parties either at the time of their marriage or subsequently do not or are unable to provide for an alternate system to govern their union. The law would operate on the thesis that it would not regulate the conjugal partnership unless the husband and wife failed to do so. Some legal systems also provide for other regimes which the spouses may expressly conclude at the time of or subsequent to their marriage.[3]

The Community Property Regime

Community of property between a husband and wife is that system whereby the property which they have is common, that is, it belongs to them equally as joint tenants

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[1] Mr. E. S. Bishop, Hansard (Commons) Vol. 776, col. 804.

[2] As posed by Professor Otto Kahn-Freund in 22 Modern Law Review (1959) at page 242.

[3] E.G., France provides for full community, separation of property and partnership of acquests in addition to the new legal regime (community of acquests) and so also does Quebec.

and not as tenants in common; or as tenancy by the entireties. Equality is the cardinal precept of every community system; and the basic requirements for its establishment are a valid marriage[4] and cohabitation as husband and wife.[5]

There are varying forms of this marital community, ranging from the universal community to the community of acquests and gains during the marriage; and there are also hybrid systems such as the community of surplus and the partnership of acquests and gains with co-ownership of certain important family assets.[6]

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[4]A common law marriage does not establish legal community; but a putative marriage, in the civil law, i.e., a marriage which is forbidden but which has been contracted in good faith and in ignorance of the impediment on the part of at least one of the contracting parties, has been recognized by a few U.S. states as establishing a community but others have refused to do so. Interesting problems arise or may arise where putative marriages are recognized, as to what would happen where there is a lawful wife as well as a putative wife (de Funiak at p. 97 in "Principles of Community Property" (1971) hereinafter cited de Funiak).

[5]Cohabitation is thought essential because it is considered that the mutual loyalty, the mutual sharing of burdens of marriage, the joint industry and labour of the spouses to further and advance the success or welfare of the marriage and of the family entitled them to share in the profits (de Funiak at pp. 108-109).

[6]The following quotation from Prof. Margaret H. Amsler's Foreward to de Funiak's 1971 Edition of "Principles of Community Property" seems to strike a very appropriate note:

> In 1940 Professor Funiak first called for recognition of the fact that the twentieth century American wife is not a toy of the idle rich nor is she simply unpaid domestic

1. The first of these is the UNIVERSAL COMMUNITY. All the property of the spouses, movable and immovable, whenever and however acquired, falls into the community, and on the dissolution of their union, is divided equally after deducting all the liabilities in respect thereof. A necessary corollary of this system has been that the community property must be administered by someone, usually the husband, and for that reason is not commendable to modern society even though the law might restrict his absolute powers. As Professor Kahn-Freund puts it, such a system is "incompatible with equality of sexes. . . ." and to this extent it entails a "subjection of women--her powers of disposition and management are of necessity suspended."[7]

If that was the only defect of the universal community, perhaps the alternative of either independent or joint administration may be a proper remedy. Independent right of administration would probably lead to serious difficulties and undermine not only the solvency

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(Footnote #6 continued)

> help; she is a person co-equal with her husband in contribution to the marriage.
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> Today, there is agitation in some common law states for the enactment of legislation which would compel a husband to pay a part of his income to his wife as a salary for the housekeeping, cooking, nursing, chauffeuring and the like which she does for her family. It is submitted that this proposal stigmatizes the marital relation as that of employer-employee. It is suggested that the appropriate solution is the enactment of legislation to adopt the community property system.

[7] 22 Modern Law Review at p. 242.

of the community but break up the marriage itself. It would be an altogether intolerable situation in many cases. Joint administration may not be as bad, but one can envisage situations where courts may have to intervene to settle differences of opinion and as Professor Kahn-Freund states ". . . a healthy marriage may be undermined not so much by the difference of opinion as by the need for, and the possibility of resorting to, court procedures for its settlement."

Another serious defect of the universal community is that it may lead to gross injustice, especially where the marriage lasts for a short time and one spouse has nothing or very little to contribute. "One may accept the result in the case of dissolution of the marriage by death, but it is highly inequitable in the case of divorce."[8]

To prevent such injustice, powers may be conferred in the courts equitably to decide as to the entitlement of each spouse for the labour and investment that had been expended, but such a solution would produce considerable uncertainty and in the final analysis may not represent any appreciable advance over the present separate property regime mellowed as the latter is with ample discretionary powers in the courts.

For these reasons, a universal community appears to be unacceptable as a statutory regime and in its undiluted form does not exist anywhere; "Civilian systems which have kept alive the community idea have, in their turn, compelled

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[8]Massfeller at p. 379, in Friedmann "Principles of Community Property - A comparative Analysis" (hereinafter cited Massfeller).

to revise the older forms of matrimonial community so as to recognize the growing social and economic independence of the married women."[9]

2. The second type, the COMMUNITY OF MOVABLES AND ACQUESTS which formerly prevailed as a legal regime in France "in the pays du droit coutumièr", in Quebec and in parts of Germany,[10] and is still recognized in these countries but as a conventional system, was perhaps a compromise between the rigour of the full community and the desire to assure to the wife that her property will not all be dissipated by a squandering husband. This system is however open to the same objections as the full community, although with lesser force, since there is some scope for private ownership of premarital real property. Furthermore, it is unlikely that modern women will have immovables prior to their marriage, at least if it is their first one, but are more likely to have other types of property, and hence practically such a system would be indistinguishable from the full community for a vast majority of spouses.

3. COMMUNITY OF ACQUESTS[11] in which the spouses own equal, undivided shares in all after-acquired property with

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[9] Friedmann, p. 442, in "Principles of Community Property - A Comparative Analysis" (hereinafter cited Friedmann).

[10] Other parts of France recognized the community of acquests and separation of property. So also Germany.

[11] This system prevails in Spain and in several American states which were heirs to the Spanish tradition (Arizona, California, Idaho, Nevada, New Mexico, Texas and Washington) in Louisiana (French tradition), Puerto Rico, Virgin Islands (Danish tradition), and a few other countries such as Philippines, and is also the new legal regime in France.

few exclusions,[12] and where each retains all other property exclusively,[13] appears to incorporate a simple, natural and appealing thought and, perhaps, overcomes at least one basic defect of the UNIVERSAL COMMUNITY, viz., the element of injustice when a marriage breaks up within a short period of time, but it brings considerable complexity to the whole regime of property law with implications to other areas of law, such as intestacy and family provisions, creditors' rights, etc. Unless this system confers tangible rights on the weaker and blameless spouse which could not in any meaningful way be achieved under a simpler system, the complexity would undermine its utility as a statutory regime for the universal mass of spouses who do not make alternate arrangements to regulate their rights.

The inquiry therefore would focus on the principal areas of difficulty that critics of the regime have brought to the fore in voicing their objections to it, to see whether the problems are so formidable that our legal system cannot be adapted without constant recourse to legislation to aid it at every nook and corner.

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[12] See Appendix A as to the definition of community and separate property and the provision of the Quebec Code.

[13] This right of the wife can be described as an equal present, and existing ownership right, which is unaffected by the fact that the administration of the common property is placed in the husband. It is conferred by law on the theory that "two individuals are equally devoting their lives and energies to furthering the material as well the spiritual success of the marriage" (De Funiak, at p. 237).

The first of the three major problems is one of administration. It is perhaps inevitable in any community system that in the ultimate analysis the authority to make final decisions must rest in one of the spouses, and in the nature of things that person would normally be the husband.[14] It would appear that this problem is over emphasized and it is certainly possible to provide that with respect to certain major transactions the concurrence of both the spouses would be essential to their validity or, where the spouses cannot agree, the appropriate court would settle the matter. In regard to matrimonial homes this is the approach taken by the homestead legislation of Alberta and other western Canadian provinces. Disagreement between the spouses on such major issues is really symptomatic of a deeper conflict and would perhaps hasten the dissolution not only of the regime but of the marriage itself. In this respect, the Swedish compromise seems to provide a solution. The Swedes have imported the concept of trust administration in imposing limitations on the husband's right to administer. Not only concurrence of the wife is needed for alienation of any interest in the family home and contents, but in respect of other transactions a fiduciary duty and a duty of care and skill are imposed upon the manager, rendering him liable in damages if he has abused his right to administer or

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[14] "The wife usually remains the homemaker, the husband the breadwinner, and because his share thus has to do with the earnings and property acquisition, their manangement remains in his hands" (de Funiak, p. 237) and "not because he has any higher or superior right therein." (de Funiak, p. 276).

committed waste or has otherwise been negligent in the management.[15] Furthermore the fact that he has seriously abused his powers and caused loss, or risk of loss, is in itself a ground available to the other spouse to bring about a dissolution of the community.[16]

The next major problem is the complexity of accounting or inventory that is required to be kept of the pre-marital assets and post-marital acquisitions by way of gifts, rewards or inheritances from third

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[15] "Even when the husband was managing wisely, it must not be thought that the wife was wholly without voice. She might object to a proposed plan of action by the husband (e.g., to his buying a new house or automobile) and agree that she was to have no part therein, either as to sharing the profits or bearing the burdens" (See de Funiak, p. 277). From a practical standpoint, even in a situation where she has legally no voice in the management, she may exercise a great deal of influence; "the wise husband who wants a happy marriage will always remember to consult his wife" (ibid at p. 282).

[16] In community property states, considerable leeway is allowed a husband where he makes modest gifts such as dowry to a child or sustenance to a daughter, or moderate presents to kindred, friends and servants, or other similar things, wherein fraud and squandering could not be supposed. Some states are more liberal than others, e.g., in Washington a wife could set aside gifts except veriest trifles, even to a relative without regard to the neediness of the recipient (Occidental Life Insurance Co. v. Power). The problem has always been to draw the line in such a way as to preserve the rights of the wife and family without unduly fettering the powers of the husband; "to protect the wife and yet not give her and her property so ample a protection that third parties will be Prejudiced. It is not surprising that to a problem so delicate, so many-sided, and complicated by so many varying ideas, new and old, as to the nature of the family and the conception of marriage, there should have been so many answers" (Holdsworth iii, 405).

parties which are generally excluded from 'acquests'. As Friedmann observes,[17]

> . . . this difficulty, while considerable, is probably the least insuperable. It is true that a legally correct settlement would not be possible by any method other than that of ascertaining the revenues and expenditures of the separate properties as well as the commonly acquired property during the entire marriage. Presumably a theoretically completely correct liquidation can hardly be imagined but only one in which there is a general ascertainment of the premarital assets of the husband and wife, a bringing into account only of major expenditures incurred in the community for the benefit of the separate estate, or vice versa, and a comparison of the initial and final assets.

It is unlikely that any serious disputes on this account will come up before the courts for resolution; and if the parties have not maintained an inventory at the time of marriage or there is no positive evidence of pre-marital assets or post-marital exempt acquisitions, courts may usefully employ the presumption that there was no initial estate.[18]

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[17] Friedmann, p. 448.

[18] The basis of this presumption is the probability that the major part of the property of the husband and wife belongs to the community and from the further fact that the real ownership is a matter peculiarly within the knowledge of the husband and wife. This is a convenient rule and would ensure that third parties, such as creditors and purchasers, who deal with the husband and whose means of knowledge are less ample, are not prejudiced. In contrast, the common law presumption of advancement is alien to the community system. The fact that the husband or the wife acquired the title in his or her own name would not alter

With regard to alienation of property by the husband, as in the case of property subject to a wife's dower rights, a bona fide purchaser who has provided adequate consideration, and who has no knowledge that the property he buys is community property, takes the property free of any claim by the wife. Her claim in such a situation is only a personal claim against the husband. The same is true if the community property is in the name of the wife alone and she seeks to dispose of it without the concurrence of her husband. In respect of property which a husband can dispose of in the course of his management without his wife's concurrence, the bona fide purchaser for value is protected unless he has actual notice that the vendor intended to defraud his wife. A wife can always attack transfers by her husband for inadequate consideration, or by way of gift which is excessive in proportion to the total estate, or which is a gift made for no good reason; similarly she can refuse to be bound by any purported liability incurred by the husband on the security of the community property, that is clearly in fraud of her rights (such as going security for another; or pledging property for immoral or tainted purposes).

The third major difficulty is in the area of creditors' rights and the problem revolves around the need to create an equilibrium between the interests of a bona fide creditor and those of the non-contracting spouse who

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[Footnote #18 continued]

the presumption that property acquired during the marriage was community property. The presumption may be rebutted by adequate proof or "clear and convincing" evidence.

may not have been aware of the transaction giving rise to the liability and if aware would probably have objected to it. In other words, should the community property be liable for all debts incurred by the manager-spouse (if he is the sole authority) whether or not they were for the benefit of the community (or of the family), or should there be a limitation of that liability to the extent of the separate property of the contracting spouse and his one-half undivided share of the community property? In the case of the latter, should the creditor be postponed until after the dissolution of the regime has come about due to other causes, or should he be given the right to bring an action for partition of the community property? The problem is further aggravated where prior to the marriage each party had outstanding debts. Should those creditors be postponed indefinitely until the debtor spouse realizes his or her share of community property on its dissolution? What about the liability created by the delicts of either spouse after marriage, whether or not in the course of managing the community? It is certainly not easy to find a solution to these questions which would be equally fair to the creditor (or to the victim of tort) and to the spouse not personally concerned in the transaction. It is here that we may have to grope for common law doctrines to find a way out.

Friedmann[19] suggests that with regard to pre-marital debts, "it does not appear to be unfair, given the principle of community of acquests, that a pre-marital creditor should have recourse only against the separate estate of the spouse

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[19]Friedmann, pp. 448-449.

with whom he has contracted." Would this not be an easy way out for the heavily indebted bachelor man or woman, by the mere expedient of marriage? What would happen to contractual undertakings, assignments of wages (where permitted by law), "orderly payment" orders (under bankruptcy legislation), or even to outstanding judgments garnisheeable against periodic incomes?

With respect to post-marital debts, Friedmann[20] suggests that the "creditors should have recourse against the community even if the transaction was only negotiated by one of the spouses." According to him such liability can be attached on the principle of implied agency or partnership and it matters not whether it was incurred by the husband or the wife or both. If the disputed transaction falls within the broad category of "benefit of the estate" or "benefit of the family" there would be no difficulty; further where one spouse holds the other out as having authority (e.g., entrusting a credit card) legal decisions have held either or both liable; finally where there was no initial authority but the principal ratifies the transaction, the courts have held the principal liable. There are of course areas where the parties act outside all semblance of authority in which case there is no difficulty in holding that the creditor's only recourse should be against the contracting party's separate property only. This is well understood by the commercial world, and if the creditor wishes to have a remedy against the community property, he could always insist on the transaction

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[20]Friedmann, pp. 448-449.

being concluded by both, or guaranteed by the other spouse. Such a procedure is better than protecting creditors at the expense of a spouse who had gained no benefit from the other spouse's contract. Furthermore, the concept of "unjust enrichment" could be applied, where there is in fact a benefit to the community, in making it liable. This still leaves the question of liability for delicts and, it may be that the judgment creditor in such a situation should be able to attach the tortfeasor's share of the community property and thus bring about its virtual dissolution. In this situation, as well as where a contract creditor can only look to one party's share of the community property, the exemption laws may serve a beneficial purpose in retaining at least some form of community after attachment as in the case of the homestead tools of trade and necessaries of life. Since the community of acquests presupposes co-ownership, the spouse free from liability is entitled to keep one-half of the value of the homestead (as well as of every other asset acquired after marriage and impressed with community) without affecting the exemption limits of the other spouse, it would follow that the limits will in most cases be doubled to the benefit of the spouses and the family.[21]

Transactions between husband and wife

In a community regime there may be several reasons why one spouse would wish to make a gift or transfer property for consideration to the other, whether out of

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[21]See Appendix B for a summary of the law prevailing in U.S. community property states.

his separate property or out of his share of the community property. Such gifts or transfers while presenting little legal problem between the spouses, on the day of reckoning, may prejudice the interests of the creditors of donor spouse, where separate property, as a result of the transaction becomes community property, or of the existing community creditors in the converse situation. One of the oldest principles of community property has always been the presumption that property acquired during marriage belongs to the community, no matter by which spouse acquired or in the name of which spouse acquired. That is a very sound presumption since it is designed not only for the protection of the community creditors but also to safeguard the impecunious spouse from the overwhelming "affections" of the other.[22] To displace the presumption, the law should continue to insist on proper evidence, corroborated by written documents wherever necessary, in order that there may be no fraud, over-reaching, undue influence or the like accomplishing detriment to one spouse.

Where a gift is perfectly valid, hardship may sometimes be caused to the donee spouse by the rigid insistence of the law on physical or symbolic delivery, especially where for many years the donee had treated and enjoyed

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[22]The general rules controlling the actions of persons occupying confidential relation with each other will apply to such transactions. The husband will bear a heavier burden in that if he obtains any advantage from the transaction a constuctive fraud is presumed and he will have to prove that he made a full and fair disclosure or explanation to the wife and that she understood fully the effect upon her.

the gifted property as her own. Is the interest of justice better served by retaining such a principle, especially when the execution creditor's rights to the debtor's property is really a matter of chance? Perhaps a contemporaneous written declaration evidencing such a gift may be accepted as a satisfactory fulfilment of the requirement of delivery.

Actions between spouses

The right of one spouse to bring a suit against the other is thoroughly recognized in all U.S. community property states (and common law interspousal immunity has been gradually removed in common law states). Unquestionably, in relation to her rights in the community property her right to sue should be subject to the husband's right of management and control of the community property. In ordinary circumstances she cannot demand an accounting or a division of the community property during the marriage so long as he is conducting a careful and honest management. But when extraordinary circumstances warrant, she is entitled to proceed against him, as where he is denying her interest in the community property (by way of action for "declaratory relief" or "quieting of title" or other appropriate remedy), or where he is threatening to dispose of community property to her prejudice (in which case an injunction is the appropriate remedy) or if he is incompetent to manage the community property, or if he has abandoned her, leaving her without support.

Protection of community property and bringing actions on behalf of the community

If the husband who has the management of the community property fails to act because of disability, or even by

reason of bad faith, or the like, and the property is thereby endangered, the wife as owner is uniformly recognized in U.S. community property states as having a right to take appropriate legal steps for its protection.[23]

In respect of property that is purchased under mortgage, or which has subsequently been mortgaged the wife's right to pay the mortgage money and prevent foreclosure or other actions should be recognized by law.[24] Similarly where a house or other property has been rented on a long term lease, it is but right that the wife should be able to step in and prevent forfeiture for nonpayment of rent or take measures to rectify breaches of covenants assumed under the lease. Such substituted rights in the normal course would arise on her desertion by the husband or following upon dissolution of the marriage; the law should provide in such cases that the wife would by operation of law be entitled to assume the mortgage or take assignment of the lease, and thereafter to be substituted as the contracting party, even if the original contract provides otherwise,[25] irrespective of the status quo of the marital community.

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[23] de Funiak at p. 320.

[24] English Law Reform Commission's recommendation to this effect is at p. 92 of their Working Paper No. 42.

[25] This would perhaps mean that unlike the general law of liability after assignment of the lease, the original lessee (the husband) will not be liable for breaches by the wife of the covenants under the lease.

Dissolution of the Community

Apart from cases of involuntary dissolution at the behest of judgment creditors, or bankruptcy and marriage breakdown, should a right be accorded to one of the parties (generally the wife) to terminate the regime while the marriage is a going concern and the community is still living and vibrant? In ordinary circumstances, where the marital relationship is harmonious and no serious differences with respect to management have developed, perhaps such an eventuality is unthinkable; dissolution if at all, would then be by agreement. In the average case, even where the marriage has lasted for some time, the major assets of any significant concern are likely to be the matrimonial home and its contents (which at any rate would be jointly managed) and one could not by any stretch of imagination expect a dissolution even by agreement. Nevertheless there may be cases outside the average, normal sphere where the parties may wish to dissolve, and there is no reason why agreements to that effect if they otherwise conform to general legal principles, should not be validly concluded.

It thus appears that only in the case of marriage breakdown, whether it be accompanied by divorce suit or separation de facto or de jure, should the spouses be permitted unilaterally to dissolve the regime and revert to separation of property. To this, there may be one exception and this is in connection with the administration of the community by the managing spouse. Friedmann[26]

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[26]Friedmann pp. 449-450.

suggests that where the conduct of either spouse is prejudicial to the carrying on of the "business" of the community, and any "circumstances which, in the opinion of the court, render it just and equitable that the partnership be dissolved",[27] a remedy by way of dissolution might be provided for any spouse who can satisfy the court that his share in the community property is in jeopardy. Courts are familiar with these principles in commercial partnerships (and analogous incorporated companies) and there is no reason why similar ideas should not guide them in dissolving the economic arrangement between spouses (as the community in fact is). The Swedish community is subject to dissolution at the instance of the wife in such circumstances[28] and because the husband manages the community exclusively, only the wife is given that right.[29]

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[27]As for instance where the manager persistently refuses to disclose to his spouse the state of financial affairs of the community, or the state of investment of its funds (perhaps in large communities, financial statements may be demanded!)

[28]The wife's rights in such circumstances have priority over the husband's so that she could exhaust all the assets before he gets anything. She has two further rights at dissolution; (a) she may refuse the community, so that she is not at all liable for community debts (and this entitles her immediately to her own personal property), or (b) she may accept the community subject to limitation of her liabilities of the community to the extent of the assets she collects from it.

[29]Mismanagement of the husband in certain circumstances entitles the Louisiana wife to seek dissolution of the marital community and the separation of property. Somewhat similarly, in California, the wife upon the same grounds for which she may procure divorce, may without seeking divorce, obtain a division of the community property (de Funiak at p. 323, 366). [Footnote continued on next page.]

Should death of one spouse bring about an automatic dissolution of the community? Perhaps a solvent community may be continued by the surviving spouse if the only beneficiaries of the deceased spouse's share in it are herself and minor children. In Sweden, in such a case distribution of the estate need not take place unless she remarries or abuses her powers of management (the mandate having come to her). This may have tax and estate duty implications. In any case, distribution cannot be postponed beyond the death of the surviving spouse and then the rules of succession would apply.[30]

[Footnote #29 continued]

In most such cases, the action for dissolution would be too late.

Professor Kahn-Freund would perhaps include unreasonable and persistent refusal to inform the other spouse of the state of his property, and the amount of his income, and remarking that the latter would "perhaps be a way of inducing a man to tell his wife what he earns, a better way than the somewhat fantastic remedies suggested to and rejected by the Royal Commission (e.g., that she should have an actionable right of disclosure enforceable by a claim to see the employer's copy of the pay slip, or to interview the tax inspector). [22 Modern Law Review at pp. 256-257.]

Judge Pederson in 28 Modern Law Review at p. 141 points out that the Dutch Act entitles the wife to seek dissolution if the husband unreasonably refuses to give information about the community property and the way it has been administered.

[30]The Ontario Law Reform Commission suggested that insolvency and bankruptcy of one of the spouses should not be grounds *per se* for dissolution of the community, and that dissolution should only be by act of parties, not at the instance of third parties (Vol. III, p. 514). These suggestions however though perhaps sound in respect of the [Footnote continued on next page].

Rights on dissolution and implications to maintenance/family provision laws

Generally, on the dissolution of the community each spouse would take one-half of the net assets after the common creditors have been paid off. The spouses would have already sorted out property belonging to the community and to them individually and would have dealt with the liabilities for which the community would be responsible.[31] Unlike the full community there should be no problem of inequity resulting from short marriages, and one may venture the opinion that when there is a significant amount of financial community established, this regime is probably less likely to produce dissension and breakup than any other regime. In a full community,

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[Footnote #30 continued]

community of surplus regime proposed by them, appear to be inapplicable to a community of acquests and gains. A Danish spouse is entitled to ask for dissolution in the event of bankruptcy. Other grounds for such petition are (a) unlawfully ceasing to cohabit, (b) if the husband becomes parent of an illegitimate child entitled to inherit from him, or (c) if he, unknown to the other spouse,had such a child at the time of marriage.

[31]Should either spouse be permitted to renounce his or her share of community property on dissolution? If the husband renounces it may amount to a gift of his share to the other where the estate is solvent, and may prejudice his separate creditors. Article 1266(s) of the Quebec Code gives an option subject to the proviso (Article 1266(v)) that creditors are not thereby predjuced. See also page 40.

there is every incentive for the financially weak spouse to terminate it; in a separation of property regime, economic relationships are no hurdle at all, in a community of surplus the tendency may be to select that moment of time which would result in highest net gains. While in full community states there may be some justification in conferring powers in the courts to vary the principle of equality of shares,[32] there is no such apparent need in a community of acquests and gains even where only one party is wholly to blame for the breakdown of the marriage and consequent dissolution, since it would amount to a deprivation of her "earnings" for her "wrongdoing".

However, when the marriage has broken down for any number of innumerable reasons, and the share in the community is insufficient to maintain the financially weak spouse (i.e., the one who has very little separate property and no prospect of immediate employment or who is unable to find gainful occupation by reason of age, health, education or skill) the current laws with respect to maintenance have their proper place to grant relief. Such laws cannot be dispensed with just because of her entitlement to equal shares in all post-marital acquisitions;[33] in a majority of

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[32] In Sweden this power is rigidly circumscribed so that only in very short marriages the court could vary the shares; if marriage has lasted more than five years, courts ought to exercise their discretion only in exceptional cases.

[33] As the English Law Reform Commission rightly points out, "Neither the coownership of matrimonial home nor community property system could replace the need for family provision laws." (Working Paper No. 42 at p. 209.)

cases the wife who devoted herself to her husband and children at the expense (in some cases) of a worthwhile economic pursuit where, like the husband, she would have had an "investment in the job" (such as "job rights", superannuation, etc.), would be unable to find comparable employment, and there is every justification in equalizing the opportunities of the spouses. Remarriage of the wife would terminate her entitlement to maintenance or alimony payments and perhaps when the husband remarries, his burden may be lessened to some extent.[34]

Courts may be granted incidental powers to settle matters concerning the division of assets in specie so that needs have priority, without affecting monetary entitlement.

The interests of children would also have to be taken into account in any dissolution. As a general rule, both parents should contribute to their maintenance, irrespective of who has been granted custody, according to their means and to their entitlement in community property.[35] It may be necessary in appropriate cases to award lump sum provisions for children (in exceptional cases, even to the wife) and to charge them upon the share of community assets of the financially stronger spouse, or even upon his separate property.

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[34]It should be noted that as a matter of fact a majority of the U.S. community property states impose mutual obligations of support on both husband and wife (de Funiak at p. 330).

[35]The responsibility to assist in the maintenance of children may result in uneven division of the community property.

The succession laws are likely to be affected to a significant degree by the introduction of the community. The deceased spouse would have no right to dispose of the entire property but only his undivided half. As Professor Kahn-Freund observes,

> . . . in this respect, the community regime achieves what the English law does not--to ensure that the widow is not by her husband's will deprived of what many would regard as a legitimate share in the property accumulated through their joint efforts.[36]

However, he says this protection can be formulated in terms of successoral, not of matrimonial rights. Such a formulation does not preclude a husband from defeating his wife's rights by inter vivos disposition if there was no community unless restraints are placed on his powers.

Perhaps there is no place for a statutory portion to the surviving spouse, for in a large estate she may, by retention of that portion benefit at the expense of other claimants who may deserve better treatment. She may instead be made an equal heir with the children of the deceased spouse.

If the surviving spouse's share is not adequate for her maintenance (along with her own separate property), the provisions of family relief legislation[37] would have to be called in aid, perhaps to an increasing extent. Furthermore,

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[36] 22 Modern Law Rev. (1959) at p. 246.

[37] Dependants' Relief Act.

special provisions in respect of the matrimonial home and its contents may have to be made, so that the surviving spouse would take a life interest in the distributable one-half share of the deceased.

In the community of acquests regime of Louisiana, separate provisions have been made where a spouse dies intestate with respect to his share in the community property. This may be necessary, to recognise the legitimate interests of the deceased spouse's kindred, so that the community share would be dealt with in the same way as his or her separate property; but as stated previously this distribution will be subject to family relief provisions.

4. COMMUNITY OF SURPLUS or PARTNERSHIP OF ACQUESTS AND GAINS. This regime which is now statutory in West Germany and Quebec, and which has gained the approval of both the English and Ontario Law Reform Commissions, avoids the problems of joint administration as well as the dominance of a single administrator, and attempts to mitigate the full rigour of separation of property by giving to either spouse a pecuniary share in the financial gains and endeavors of marriage. Despite its name, however,

> . . . it is not a community at all as that term is normally understood, for it expressly lays down that on marriage each retains what he or she has, that property acquired after marriage does not become joint property either and--the great innovation--each administers his or her property independently. It is primarily a system of separation of

> property and the 'community' element appears not at the beginning of the marriage but at its end when any surplus gained during marriage is 'equalized' or 'balanced'-- the surplus which is equally divided is that which, in the course of the marriage, the spouses accumulated through work and thrift.[38]

Although upon marriage the spouses do not get a vested property right in their separate post-nuptial acquisitions, there is what is called an "inchoate right" or "expectancy" quantifiable at dissolution of the regime which is co-terminus with divorce or death. This inchoate right would extend only to the actual earnings and gains made by the spouses and not to acquisitions that resulted to them without the use of earnings, labor or industry during the marriage (e.g., gifts, inheritances, etc.). As a result of this, there is still a need to define what assets are shareable and what are not at dissolution.[39] However, to protect this "expectancy" German law places certain restraints upon the power of either spouse to dispose of his assets. It allows an action of "anticipated balancing of surplus" where either spouse seeks to reduce his surplus by giving away assets or, even without such intention, where he acts to the detriment of the other spouse through waste or in other ways. German law also introduces a considerable community element in the matrimonial life itself, as distinct from the financial aspects of liquidation, by requring the consent of the other spouse

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[38]Professor Kahn-Freund, 22 Modern Law Rev. at p. 254.

[39]See Appendix A for definition.

to any legal transaction by which an obligation is undertaken to alienate, or which has the effect of alienating, the estate as a whole.

The one formidable objection to this system is that the "community" confers no tangible right to any of the husband's gains, apart from the right to protect an 'expectancy' in rare situations outlined above; and even after the termination of the marriage her right is only a ius in personam, a claim for equalization of the gains made during marriage, but not a ius in rem--something much less than what she enjoys in the community of acquests. Thus, she is powerless against execution or other creditors of the husband who may take away his assets in satisfaction of his debts under onerous contracts, or for injuries in tort actions, except to the extent of whatever protection is afforded by exemption laws, nor can she intervene, short of legal recourse, to prohibit him from making gifts, small or large, to other objects of his affection.

Furthermore, although this regime permits virtual independence in administration[40] and avoids the grave inequities of the full community and some of the complexities of the community of acquests (which, as discussed earlier, are probably not insurmountable), it is almost indistinguishable from the separation of property regime in that the economic status of the wife is not improved in any way while the marriage is alive; nor would there be any meaningful or significant improvement when she comes before the law to

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[40]This independence does not mean that one spouse cannot bind the other in respect of contracts entered into. The current jurisprudence built around agency concepts, including agency of necessity, will still apply whatever the regime is.

determine her rights in conjunction with an application for separation or dissolution of the marriage; the dower rights during marriage and on desertion by her husband (limited though they may be against creditors), the ample discretionary power the courts have (or could have) in awarding reasonable maintenance to her which could be secured if the husband has property (and if he does not have, there is of course no possibility of even "participation"), and the emerging jurisprudence whereby enlightened judges have come to recognize the equity of a wife in property purchased by her husband but to the acquisition of which she contributed directly or indirectly, by granting her a share in such property, compensate her adequately even though in theory she does not have vested rights. In matters of succession on intestacy, the present laws are even superior in their effect to whatever the widow might get under this or any other regime, at least in the average case, and in case of testacy it will not be difficult for legislation to restrain the freedom of disposition even further than what it has done by way of family provision, to achieve the ends of justice.

This alternative regime, therefore, does not appear to be an adequate improvement over the present matrimonial system to warrant a change from the latter.

5. COMMUNITY OF SURPLUS WITH CO-OWNERSHIP OF FAMILY ASSETS: This system has been advocated by Professor Kahn-Freund and is perhaps the most interesting compromise between the principles of separation and community, while at the same time it affords the maximum independence to the spouses and reduces the complexity inherent in the community of acquests to a considerable extent. Moreover

by conferring ownership rights in the substantial assets an average family has, or hopes to have, such as the matrimonial home and all those modern furniture and appliances that make "good" life possible during the marriage itself, it considerably improves the position of a spouse as compared to a bare community of surplus. Perhaps such a system will cater to the needs of the vast majority of couples who belong to the working and lower middle class rungs of society and it also appears to meet the criteria of excellence referred to in the introductory part of this paper, viz., willing acceptance by a majority, simplicity and convenience. It also represents a natural evolution of the law which already has recognized the equitable interest of a wife who contributes financially or by time and labour to the acquisition or improvement of a house or major assets, which has conferred dower rights in respect of homestead on every wife, lazy and industrious, squandering and thrifty alike, and thus assured her claim to possession both when they live amicably together and when he deserts her, which has made adequate provisions for maintenance according to her needs in case of separation or death of the other spouse with little or no consideration for her in his will, and which has generously provided for her in the case of her husband's intestacy.

This system will have all the features of the community of surplus, including the most cherished independence and equality of the spouses in matters of ownership and management of their separate property, with the exception of the "family assets". The object of conferring ownership rights in the latter is not only to improve the status and reduce

dependence of the weaker spouse by making her a coowner with her husband, irrespective of whether or not she has contributed financially or otherwise in the acquisition or improvement of those assets, and whether she chooses between working in the house or outside in gainful occupation, so that unlike the dower system her rights are in rem and not merely in personam against her husband. This has a very considerable advantage in that her share would be placed beyond the reach of her husband's creditors in an execution; moreover, splitting of ownership in this manner, as stated previously, would automatically double the limit of exemption against execution. Although where the husband's equity in the house is over and above the limits a creditor would be able to apply for a court order to partition and sale of the property, the incidence of that eventuality will be less likely, and in any case her share would be assured to her. As Professor Kahn-Freund points out "joint administration of these assets, so far from being impractical, is here inevitable, in view of the very purpose of the assets involved. . . . Separate enjoyment or separate administration is incompatible with normal married life."[41] Even here it is inevitable that the husband will have the sole power to determine where the matrimonial home shall be; if the wife does not wish to give up the house and move with him, the matrimonial community, and probably the marriage itself, will come to an end.

It would be necessary as the Ontario Law Reform Commission points out,[42] to impose restraints on donations

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[41] 22 Modern Law Review at p. 258.

[42] Vol. III, p. 514.

of the "shareable" assets (other than those which can be disposed of only by joint action) in excess of normal and reasonable amounts, as otherwise one spouse could defeat the just expectancy of the other on a division. Apart from such restraints, there would normally be no need to fetter the husband's powers with respect to his own property except in rare circumstances where dissolution of the regime is justified.[43]

In one respect this system goes even further than the community of acquests. That would happen in a case where the husband at the time of marriage was already the owner of the house and possessed valuable household effects or after marriage inherited them. Under the strict application of the principle of acquests, especially where an inventory had been agreed upon, those assets would be regarded as separate property of the husband and wife's right in it would be by virtue of her duty to cohabit (as expressed by the idea of and fortified by the legislation on homesteads) and to continue to be provided with a roof over head after being deserted by him. As Professor Kahn-Freund points out, the "community of family assets" depends not on contribution towards acquisition or intention of joint use but on the fact that the asset is <u>actually</u> used jointly.

The system would introduce reciprocity should the husband be the financially weaker partner and the wife instead were owner of the homestead and family assets.

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[43]See <u>infra</u> pp. 38-42.

Apart from the very important ownership right vested in praesenti instead of in futuro as in a bare community of surplus, on the dissolution of the community which normally would come about upon separation or divorce or upon death, both parties will share equally in the net financial gains of their union, and at that stage there would be a final accounting. If it is proved that at the time of the marriage one of the spouses had not in fact owned the home or the family assets (nor contributed to their improvement in any manner), and it was their intention (as evidenced by an inventory or other positive proof) to treat them as the owner spouse's separate property, the court would treat them as non-shareable and the non-owner spouse's legally conferred joint interest would be displaced. However, in the exercise of its discretion there is no reason why the court cannot take needs of a spouse into consideration and award him or her the house or some or all of the other family assets in satisfaction of the claim arising under the liquidation of the community.

There appear to be two main disadvantages to this modified version of community of surplus, both of which are not insuperable. Professor Kahn-Freund suggests that "the very nature of items such as furniture, silver, linen, etc. indicate the likelihood of their dedication to family use" and "there is indeed a strong case for treating such assets as joint property erga omnes" even though for the purposes of laying down rules in relation to creditors different principles may be applied.[44] The English Law

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[44] 22 Modern Law Review at p. 270.

Reform Commission rejected this idea as impractical because "family assets" created a definitional problem,[45] and instead favoured coownership of home and its joint administration by the spouses,[46] and the protection of the use and enjoyment of household contents rather than changing ownership rules in respect of them.[47]

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[45]Working Paper No. 42 at p. 282. "In some cases they would be the only substantial asset, but often they would be supplemented by other property. For example, savings or investments which are intended to be used for repairs, redecoration, replacement of furniture, or even for the purchase of a future home, would appear to be as much a family asset as the present home and its contents. But it would seldom be possible to decide which part of the spouses' savings or investments had been intended for such a purpose. Taking the matter a step further, 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 expenses, could the investments or business be regarded as family assets? If so, then the term "family assets" seems capable of almost unlimited extension."

[46]Working Paper No. 42 at p. 27 . "Where the husband owned two more homes, coownership will apply only to the principal home; if that was not possible, the spouses should be entitled to share the wealth of the most valuable home owned by them during the marriage." (ibid., p. 95).

[47]Ibid at pp. 18/19. Their reason was that household contents were depreciable property and their replacement cost was much greater; hence the main concern should be their continued use. They therefore proposed that the spouse in occupation of the home must continue to have the right; and the court should be given discretion in this respect.

Israel Family Code defines "household assets" as "chattels that, in the light custom and surrounding circumstances serve the joint household of the spouses." (Article s. 52(i)) Appendix E.

Secondly, even if one could overcome the definitional problem (and it is submitted that it could be), the English Law Reform Commission pointed out that "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;"[48] that would be inequitable. The short answer to this problem, which is less serious in jurisdictions with homestead legislation, is that the legal rights of ownership in the family home and its contents are subject to ultimate accounting along with post-nuptial acquisitions at the time of dissolution of the community; thus the non-owning spouse would be granted only an inchoate right which, nevertheless, for all purposes except interspousal reckoning, would have all the incidents of ownership.

There is one further problem of a technical nature, but it would be overcome by suitable modification of conveyancing and other documents on lines similar to the present homestead declarations. While under pre-community era conveyancers were required to ascertain homestead rights (and bona fide purchasers were protected if they had no notice) it would now be necessary to substitute that clause and join both parties in transferring the property to purchasers despite the recorded title in the Land Registry, and in lieu of joint transfer to declare that no other person has any ownership rights by operation of law. It may be necessary for the non-owner spouse with a view to avoiding the possibility of fraudulent transfers

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[48] Working Paper No. 42 at p. 283.

by the owner spouse to bona fide purchasers for value, to file a certificate of marriage with the Land Titles Office and get it recorded.[49] The interest of the new spouse would of course be subject to all encumbrances appearing on the record prior to her marriage, but all subsequent creditors on record whenever and however their rights arose (except mortgages and unpaid vendors) will rank inferior to her interest whether or not it appears on the title.[50]

Transactions between husband and wife

Under the proposed legal regime, there is no particular need for providing additional safeguards where one spouse makes a gift or transfers property for consideration to the other. In the interspousal reckoning, such property will not be shared, whereas the interests of the creditors of each spouse will not be undermined. The same question as in a community regime however arises with respect to gifts, namely whether there is need for protecting the donee where the gift which is

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[49] Under the Dower Act, the Alberta wife is entitled to register a caveat against the property; perhaps a mere filing of marriage certificate would enable her to save the lawyer's fees.

[50] The Ontario Law Reform Commission was opposed to an absolute rule of joint ownership as it would be too rigid; instead it preferred the Victoria (Australia) system which introduced the presumption of co-ownership in all questions of title and possession (Vol. III, p. 104).

perfectly valid has been incomplete under the existing principles of law which insist upon delivery.

Dissolution of the regime

The right to dissolve the regime and revert to the separate property system they enjoyed prior to marriage (or prior to statutory introduction in case of couples already married) will seldom arise apart from a petition for separation or dissolution of the marriage itself, the reason being that generally this regime is not more likely to lead to dissolution than the regime it displaces. In the majority of cases, the husband would be the sole breadwinner and is more likely to have been the owner of the home at marriage or subsequently to it, so that disagreement in the way the family assets are managed (or the separately owned non-family assets to which there is an inchoate right of sharing at dissolution) is unlikely to lead him to move for a dissolution; on the other hand, unless the wife would substantially gain from liquidation (having already had the benefit of coownership rights in the family assets), she is unlikely to petition for dissolution on that account alone. It is more likely however that a petition for dissolution is symptomatic of a deeper conflict between the spouses and would occur in conjunction with separation or divorce. As Professor Kahn-Freund remarks, to divide the matrimonial home and its contents which are, "as it were the material substratum of the matrimonial consortium is to put an end to cohabitation itself."[51] However the remedy of dissolution, without

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[51] 22 Modern Law Review at p. 258.

embracing the family assets in its scope, could be useful in rare circumstances, where the spouses have substantial investments of other types and the separate administration jeopardises or is likely to cause irreparable damage to the inchoate rights of the other spouse to share at a later date. Such danger, or perception of it, may be due to causes unrelated to the state of health of the marital union itself. In such situations therefore a unilateral right could be given to the spouse to petition for a dissolution of the regime pro tanto.[52]

Rights on dissolution

On the day of reckoning the spouses will draw up a sort of "balance sheet" of assets and liabilities. Each would probably have had at the time of marriage an initial estate called "equity capital" from which will be deducted all liabilities to arrive at the net estate. If the spouses had not drawn up an inventory of assets, or if they had intended to pool all their net assets in the "community", or if there was no initial capital due to onerous liabilities, the "opening balance" would be treated as nil. This would ensure that the solvent spouse does not have to part with more than one-half of his net personal gains. This initial equity capital will be deducted from the "final net estate" (which would comprise all the assets of the spouse with certain traditional exclusions, such as gifts and rewards other than perhaps those made to the other spouse if not of substantial value, and inheritances, and include those which would have existed

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[52] See under dissolution of community of acquests at p.

but for the conduct of the spouse and giving rise to claim for dissolution) to arrive at the financial gains during marriage. The spouse with a greater net estate would then transfer part of it so that the gains are equalized but he would not part with more than one-half. This would ensure that the spouse with a negative estate does not deprive the other of more than one-half. Should there be a right to renounce? Perhaps this should be allowed if the transference of assets would not materially improve the "bankrupt" spouse's position, unless it would unjustifiably defeat the rights of creditors. If the creditors had no ground to expect an increase in the bankrupt's estate, there is no reason why the solvent spouse should make a scarifice of his/her estate only to be taken away by the creditors of the bankrupt.[53]

If the spouse with negative final estate does in fact have considerable non-shareable assets (the exclusions referred to above) which would offset the total liabilities leaving a positive balance, naturally the burden of liabilities would fall primarily on those assets, so that no hardship is caused to the other spouse. Apart from this situation, there may be other cases of hardship resulting from inter-spousal cooperation during marriage, e.g., where the husband uses his wife's earnings to pay off his debts, leaving very little or nothing for himself and her. Perhaps such instances would rarely occur, and it is certainly impracticable for any regime to regulate minutely the economic relationship of the spouses and take care of every conceivable hardship. Perhaps, the court may use its discretion in this area.

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[53] See Quebec Code provisions (Article 1266(s) and (v) supra footnote 31. Ontario recommendation.

The fact that one spouse has submitted himself to this community regime (or for that matter any regime) will not terminate all the obligations undertaken by him as a result of marriage. In particular, the claim for maintenance will still survive for that claim is based on needs of the spouses and transcends all other considerations. This would occur where one spouse is left with an inadequate share after taking stock at liquidation and is incapable of looking after herself, and the other has extensive non-shareable assets or a sizeable income.

The equalization claim on the death of a spouse will be similarly dealt with, except that if the survivor has a greater net estate he will not be accountable; perhaps if he is still in necessitous circumstances and the deceased spouse disposed of her estate by will, family provisions law will have to be resorted to to deprive the non-dependant beneficiaries, of part or all of their gifts. In the case of intestacy, the survivor would be one of the beneficiaries in the net estate of the deceased, after the estates have been equalized, and perhaps the laws of intestacy should be more closely analyzed for their effect on other heirs of the deceased if the surviving spouse were to be entitled to the statutory portion in addition. It may in many cases appear necessary to retain the statutory portion; otherwise where the wife dutifully stayed at home and looked after the house and the family and thus had no worthwhile savings or gains, but the husband's gains were predominantly nonshareable, the full rigour of the separation of property regime would be visited upon her, despite the attraction the partnership in acquests seems to have. Perhaps that is the way the cookie crumbles!

Both in inter vivos and post mortem dissolution of the community, the court would continue to have discretionary powers in regard to awarding assets in specie to either spouse although generally there would only be a monetary claim.

Rights of Creditors

Under this property regime the creditors will not be materially in a different position than under the separate property regime. Each spouse would be totally responsible for his own debts under ordinary principles of civil liability, except that post-nuptial creditors will not have one-half of the debtor spouse's family assets which would have been legally vested in the other spouse. This may cause hardship to those creditors who had assisted the husband (or the wife) for the benefit of their family or for the benefit of the estate. In such circumstances, the strict rule may have to be set aside in favour of the creditors, under the doctrine of unjust enrichment or similar legal principle, despite the fact that only one of the spouses may have contracted the debt. In the case of family assets other than the matrimonial home, difficult questions may arise whether certain property is or is not held in joint ownership. A careful definition of family assets either in terms of items comprised in that category (stating the quantities if possible) or in terms of items and value may considerably minimize the problem, and in any case creditors and the courts are familiar with the operation of various laws granting exemption from seizure, or restricting the remedies available in respect of certain chattels. Perhaps the

benefit of any doubt in such cases should be exercised in favour of the creditor. On a liquidation of the community, a factually insolvent spouse's creditors would benefit by an enlargement of his estate due to transference of assets from the solvent spouse, unless the former is permitted to renounce his share.

Contracting out of the Statutory Regime and Retroactivity

In all matrimonial property regimes, the spouses may by agreement, whether at the time of their marriage or subsequently, opt out of the legal regime and make a different arrangement. One important question occurs in the granting of option. Is it compatible with public policy to opt out of the legal regime and make any sort of agreement or none at all? Professor Kahn-Freund suggests that opting out should not be permitted with reference to the matrimonial home and family assets[54] (which in effect means no opting out at all) and that any option should be available only at a certain property level (presumably where both have other properties or one owns the home and family assets and the other owns some other types of property of substantial value). Another approach would be to allow a period of, say, three years from the time of their marriage to exercise their option, so that they

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[54]See Minutes Mat/M/11, Mar. 28/72. In the USSR any agreement designed to disparage the rights under the statutory regime of either spouse is declared void.

Quebec Code?

are under no pressure, and if they do not, then the legal regime will apply.[55]

It appears that if the parties do in fact make other satisfactory settlement, the right to opt out is justified, and in any case, courts should retain the power to vary the terms of alternative arrangements made by them in the event of a breakdown or termination of the marriage. Furthermore, the right to contract out of the legal regime may be desirable, where one or both of the spouses had previously married, in the interests of dependants of the prior marriage.

The same is true with respect to variation of the regime by agreement during the subsistence of the marriage,

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[55] In a highly mobile society as ours is, the concept of domicile at marriage may be very important in determining the matrimonial community to which a couple would find themselves unknowingly subject to. The idea of postponing the operation of the legal regime for a year to three years may be an interesting solution. In this connection one may usefully consider the following dictum of Sir Barnes Peacock in McMullen v. Wadsworth (1889) 14 App. Cas. 631 when giving the judgment of the Privy Council in an appeal from the Supreme Court of Canada

> . . . it would be monstrous to suppose that an Englishman, Frenchman or American travelling in Lower Canada and retaining his domicile in his own country, could not be married in Quebec after a temporary residence there for six months, without abandoning his international domicile in his own country, and altering his status and civil rights.

especially when the legal regime had heretofore applied. Such variation will have to be jealously scrutinized by courts in the interests of the weaker spouse.[56] The Ontario Law Reform Commission[57] has recommended that the sanction of the court should be required as in Quebec and France, and this is perhaps desirable.[58]

The second problem that arises is with respect to retroactivity. Should the legal regime apply in all cases where parties have not agreed otherwise, whenever the marriage was contracted (i.e., whether before or after the regime is brought into force)? The English Law Reform Commission recommended retroactive operation[59] whereas Ontario[60] would have the regime apply only to new marriages.

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[56]There may be a problem where one spouse changes his domicile to a jurisdiction where a different legal regime applies. This question could perhaps be settled by means of an agreement respecting uniformity among various provinces.

[57]Vol. III, p. 547.

[58]It should be borne in mind that the raison d'être of any community property regime is that at its inception and continuation it is supported by valid, functional factors, a belief in the equality of spouses because of the actual contribution of each to the success of the marriage. If these factors no longer concur, there is no justification for insisting that the spouses continue under that system.

[59]Working Paper No. 42 at p. 92.

[60]Vol. III at p. 529.

This raises a fundamental problem in a pluralistic society characterized by high mobility; and the problem is further confounded by the fact that we have in Canada, unlike England, laws of ten different provinces to reckon with and as Canada still depends on a large influx of immigrants from all parts of the globe, one would be put to an impossible task to determine what laws would be applicable in a particular case. The Ontario proposal appears to be an attractive solution because of the apparent simplicity in its application.[61] Furthermore, it may not be justifiable to impose a matrimonial regime on spouses who have lived under an existing system.

However, assuming that there is wide acceptance of the proposed regime, there is no reason to deny its privileges to the present generation. On the other hand, the problem of couples objecting to such a radical change (which in their individual situation may work unfairly) could be met by providing for a transition period (of say one to three years) within which they may unilaterally declare (whether by means of a testamentary instrument or otherwise) that the legal regime shall not apply to them, and where one spouse died intestate it could be presumed that it was his intention to be governed by the new regime.

6. OTHER ALTERNATIVES

(1) In our search of a system to replace the existing separation of property regime, other pertinent

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[61] See Appendix C for a note on the conflict of laws. The presumption in such a case should enure only to the benefit of the survivor.

schemes were also examined. One of these was a scheme in which courts would be empowered to exercise complete discretion in settling disputes between married couples in the event of breakdown of their marriage, or between the surviving spouse and the heirs under a will in which she was not (or not adequately) provided for or under intestacy. This alternative had been very carefullly considered by the English Law Reform Commission and although they felt that such a scheme would introduce greater fairness, it would be at the expense of certainty. To this one might add that uncertainty breeds litigation, and that it is unwise for Parliament to entrust such powers to courts without laying down broad general guidelines concerning fundamental changes to which court discretion could be oriented. Furthermore, no early or lasting improvement in the law of matrimonial property is likely to result, given the nature of the legal process and conservatism of the bench and the bar.

(2) The second of the schemes considered was a modified separation of property system. This system would retain all the features of the existing regime but would introduce changes in those areas of the law that appear to have worked unfairly against one of the spouses, especially the wife, who in the majority of cases is confined to the role of housekeeper and mother and has had no property to "invest" in the marital partnership. The law as it stands only assures her bed and board subject to good behavior after termination of marriage for whatever cause, and refuses to confer any proprietary rights even over savings she might have put by by thrifty management of the household expenses. Although courts in many individual

cases have out of sympathy bent over backwards to mete out substantial "justice" to deserving wives, the pattern has not been uniform and in many instances the iron hand of law has been restored on appeal; unless there is a fundamental reconsideration of the property entitlement of the wife, it is obvious that courts are powerless to upset vested legal rights even in the face of a determination that there was indirect financial contribution to the acquisition or improvement of matrimonial property. As the Ontario Law Reform Commission has observed, "the real answer does not lie in levelling out existing inequalities to produce reciprocity but in constructing a new general scheme of greater balance and justice."[62]

However, certain changes in the existing system are warranted if the married couple were permitted (as they should be) to contract out of the legal regime proposed previously and thus modified that system could continue as an option open to married couples.[63] If, despite these changes, they still wish the old system to govern their partnership, or revert to it after dissolution during marriage they will expressly have to eliminate the changes from their marriage agreement which will be subject to the usual restrictions imposed by the general law of contracts;

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[62]Vol. III, p. 103.

[63]This is the scheme of the Quebec Civil Code. It lays down in detail the optional regime and the provisions for which the spouses may make their own arrangements. Similarly, although the USSR Code does not lay down alternate (conventional) regimes in detail, there is a general clause of prohibiting provisions that tend to disparage the rights of either spouse.

and the courts will also have the power to vary it on grounds of public policy. The changes referred to are as follows:

> (a) Savings from "housekeeping money" entrusted by one spouse to the other, in the absence of an agreement to the contrary, should be deemed to belong to both spouses in equal shares.[64]

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[64]As the law in Canada presently stands, such savings belong to the husband exclusively. The most recent Canadian decision on this is Calder v. Cleland (1971) 16 D.L.R.(3d) 369 (Ont. C.A.) following the leading English decision in Blackwell v. Blackwell (1943) 2 All E.R. 579 (C.A.). Following the vigorous dissent of Denning L.J. in Hoddinott v. Hoddinott (1949) 2 K.B. 406 (C.A.) England passed the Married Women's Property Act, 1964. See Mrs. Worton's paper, Ch. III at pp. 95-101, and especially the criticism of Professor Kahn-Freund in 22 Modern Law Review at 250 where he says that it was an excellent idea as far as it goes but it did not go far enough. He would like the provision to extend to savings "earmarked" for household expenses whether present or future, conceding that even this is unrealistic. He points out that the Royal Commission has made an unanswerable case for a new policy to give effect to the "partnership" of the spouses in terms of property law, but the proposal on household savings is an insufficient means towards that end. As soon, however, as one attempts to formulate a more adequate method, one is driven to proposals which may be self-defeating owing to difficulties of legal formulation and--more important even--difficulties of evidence. As Professor Kahn-Freund says,

> The Royal Commission also saw that injustice may be on either side where the wife grudgingly 'doles out' from the pay packet dutifully surrendered to her some beer and tobacco money but keeps to herself what she may be able to earn outside the house." (ibid, at p. 249).

(b) Earnings from the business of keeping boarders, in the absence of an agreement to the contrary, should be deemed to belong to both spouses in equal shares.[65]

(c) Subject to an express contrary intention on the part of the donor, all wedding gifts, except those by their nature clearly intended to be used only by the husband or the wife, should be the joint property of the spouses.[66]

(d) Where a spouse contributes financially to the acquisition of property purchased in the name of the other, or to its material improvement, or the spouses enter into an arrangement whereby even though one of them does not directly or indirectly contribute to the acquisition of such property or to its improvement, it can fairly be said, having regard to all the circumstances, that it was intended to be held by both of them beneficially, the non-owner spouse shall be deemed to have had an interest in such property in proportion to his/her contribution, and in the absence

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[65]See Mrs. Worton's paper, Ch. III at pp. 101-102.

[66]See Mrs. Worton's paper Ch. III at pp. 105-108 and p. 161.

of an agreement to the contrary, such proportion shall be deemed to be equal.[67]

(e) Where the savings or earnings referred to in (a) and (b) above have been deposited in a bank whether in joint or individual names, or otherwise invested, such moneys, investments or other property purchased therewith

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[67] This provision would introduce a measure of "fairness" in the separate property system to a spouse who has contributed something material to the acquisition of property; it does not help the majority of women dutifully taking care of the home and the family, and has no time to do anything in the nature of "improvement" for the home. Housekeeping and taking care of children is a full time occupation. In the nature of things, any improvement is likely to be by the husband in his spare time (often a lucrative hobby as it turns out to be) unmindful of the chores and cares and worries of family upbringing. Nevertheless even in the very limited area of its operation, it is a fair reform. There may be marginal cases where after contracting a mortgage-to-own, both spouses work and one spouse after initial down payment contributes very little but instead proceeds to build up his/her own private fortune. It is inequitable in such situations, whatever may be the initial contribution, to share the home in equal proportions.

For an excellent research on the law denying a spouse a share in such assets, see Mrs. Worton's paper Ch. IV.

This provision would bring the law in line with s. 37 of the English Matrimonial Proceedings and Property Act, 1970, which was Parliament's answer to Pettit v. Pettit [1969] 2 W.L.R. 966 (House of Lords). In Alberta we seem to have achieved this result through the Trueman decision [1971] 2 W.W.R. 688 (App. Div.) but an express statutory provision will ensure that a later Supreme Court of Canada decision will not overturn Trueman.

shall be deemed to belong to the spouses jointly and not as tenants-in-common.[68]

(f) Where one spouse buys property or makes any type of investment in the name of the other, or in joint names of himself/herself and the other without there being any financial or other contribution of the nature referred to in (a), (b) and (e) above, in the absence of any evidence to show that he or she intended the other to have the full benefit thereof, the property or other investment shall be deemed to belong to spouse so buying or investing and there shall be no presumption of advancement.[69]

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[68]This should also include savings "earmarked" for household expenses, as discussed by Professor Kahn-Freund; see footnote 64 (supra)

[69]The presumption of advancement under the existing legal principles enure to the benefit of a wife but not to a husband. Thus if a property is purchased in the wife's name, the husband contributing all the money (and assuming there is not even indirect contribution by the wife), the property belongs to her exclusively both in law and equity; on the other hand if the wife buys property in her husband's name, the title is not worth the paper it is written on; he is a bare trustee for the wife. The presumption of advancement is no doubt rebuttable by the husband. See Mrs. Worton's paper, Ch. IV, at pp. 163-167, 180-183, and Ch. III at pp. 120-126, 137-147.

Summary Procedure to Resolve Conflicts

In a comprehensive system of matrimonial property the need for a simple inexpensive and speedy procedure to resolve conflicts, and in some cases to enable the parties to arrive at a settlement or to vary or terminate one, is readily apparent. In Alberta we have nothing resembling the summary procedure laid down for English courts under the well-known section 17 of the Married Women's Property Act of 1882 (Eng.), supplemented by later enactments,[70] and the jurisprudence built around it.[71] That section enables judges on the application of either spouse to determine summarily their property and possessory rights inter se and to exercise discretion in such matters.[72] The scope of the procedural provisions will have to be widened beyond the mere determination of the above referred rights so as to include every aspect of the new regime, such as management, variation of regime, dissolution, both during the subsistence of the marriage and on its

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[70] vis., s. 7 Matrimonial Causes (Property and Maintenance) Act 1958 and s. 39 Matrimonial Procedure (Property) Act, 1970, the text of which is reproduced in Appendix D.

[71] This procedural measure will not vary established rights, the doctrine in Hine v. Hine (advocated by Lord Denning) having been repudiated by the House of Lords in National Provincial Bank v. Ainsworth [1965] A.C. 1175 and Pettit v. Pettit [1969] 2 W.L.R. 966.

[72] s. 17 procedure is purely procedural; it does not enable courts to vary established rights. This was finally settled by the House of Lords in Ainsworth rejecting the progressive Denning ideas in Hine v. Hine. See Mrs. Worton's paper, Ch. I at pp. 21-22.

breakdown or termination; and the court authorized to grant injunctions, money judgments and equitable remedies.[73]

The summary procedure referred to above relates to the general matrimonial property regime above and not to civil wrongs (torts) generally. In England it was found necessary to enact the Law Reform (Husband and Wife) Act in 1964 to remove the interspousal tort immunity and make available an unrestricted right of action between spouses. Since in Alberta such immunity still survives, an immunity which may, inter alia, frustrate the full aims and objectives of the matrimonial property regime, it would be necessary to enact legislation of a similar kind.[74]

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[74] The Ontario Law Reform Commission (Vol. VI, pp. 157-158) make similar recommendation. The text of the English Act is reproduced in Appendix D.

APPENDIX A

Definition of Community and Separate Property

The community property system comprises all the acquests and gains which the husband or wife or both may acquire during the marriage while they are living as husband and wife, otherwise than those specifically excepted, and the presumption in doubtful cases is strongly in favour of treating that which either spouse may own as community property.

(1) American Jurisprudence

(a) Real Property. Thus, in the case of property acquired during marriage and standing in the name of one of the spouses, in the absence of language in the deed tending to show that the purchase was with the wife's separate funds and that the property was conveyed to her as her separate property, the property is presumed to be community property; no such presumption of advancement as exists at common law, is recognized in community property law. Even recitals, as described above, are at the most only prima facie evidence and not conclusive.

Certain statutory qualifications have been added with a view to protecting bona fide purchasers, encumbrancees or those dealing with one of the spouses in good faith and for valuable consideration. For instance, (i) property acquired by a husband and wife by an instrument describing them as husband and wife is presumed to be community property, unless a different intention is expressed in the instrument; (ii) property acquired by a married woman

by an instrument in writing is presumed to be her separate property; (iii) property acquired by a married woman and any other person by instrument in writing is presumed to be acquired by her as tenant-in-common, unless a contrary intention is expressed.

(b) Personal Property. As to personal property, a joint tenancy thereof may be created only by a written transfer, instrument or agreement; and it must be expressly declared that it is a joint tenancy.

A written transfer of property by the husband to the wife, or the written transfer by a third person to the wife, and arranged by the husband, comes within the statutory presumption that the property is the separate property of the wife.

(c) Bank Accounts. Some states have statutes to the effect that bank deposits or accounts in the name of one spouse are presumed to be the separate property of that spouse, but this is primarily for the protection of the bank and does not supplant the presumption in favour of community property.

(d) Income of Separate Property. In most states the income from separate property has to be credited to the community, on the basis of the community effort or labour which contributed to producing it. In others, express statutory instruments provide that it should be separate property.

(e) Earnings of Wife. Although statutes may give the wife an independent right to manage and control

her own earnings and wages, they are deemed to be community property; a system that treats them as separate property but which makes the husband's earnings community property, cannot be called a community of acquests and gains.

In New Mexico the wife's earnings which are community property are by statute not liable for the debts of the husband.

(f) Pension Fund Entitlement. Benefits shared in proportion to the single and married life.

(g) Pure Gift Inheritance not being Reward for Services. Treated as separate property, but gifts or inheritances promised in return for services treated as community property.

(h) Gifts (including Wedding Gifts). Expressly given to both or intended for the use of both, regarded as community property.

(i) Trust Property. The corpus is not community property but Louisiana treats the income from it as community property--not the other community states.

(j) Improvements and Increases in Value. Purely intrinsic increases in value, deemed to be separate property; but if labour and industry is spent, the increase is community property.

(k) Unlawful Earnings or Gains. Statutory presumption that earnings and gains were justly made, but if the contrary is clearly proved, no community.

(l) Insurance Policies. If a husband makes a third party beneficiary, some courts regard the policy as separate property, even if he was paying premiums out of community funds; but there are opposite decisions in other courts. If he makes his wife a beneficiary, it is deemed to be a gift to the wife of his share, and hence her separate property. Conversely if he insures his wife and makes himself the beneficiary, it is deemed to be his separate property even though community funds are used to pay premiums.

(m) Rights of Action and Damages for Compensation for Injuries. Generally treated as separate property excepting that part which was obtained as loss of earnings, or services during marriage. Some states regard the whole as community property on the ground that any act by which the other spouse is deprived of the capacity to render services diminishes the capacity to accumulate community property, or on the ground that the definition of community property which excludes only certain specific property warrants such inclusion.

The logical conclusion, according to de Funiak, is that a personal injury to a spouse, or for that matter an injury to reputation or the like, may give rise to a cause of action in the injured spouse, and also in the marital community. This should be so without statutory intervention.

There is no place in the community law for action for loss of consortium.

Contributory negligence of the other spouse--bars recovery by community only, and the injured spouse is entitled to go on her own against the tortfeasor (e.g., if in a car accident, a third party is 25% to blame and husband 75% to blame, wife would be entitled to recover 25% from the third party and husband would not be able to recover).

B. Statutes facilitate the registration of inventory by either husband or wife, or at least the making of an official inventory while mandatory, the failure to file does not forfeit a spouse's right or ability to establish that the property is his/her separate property, although the failure may be considered with other evidence in making a prima facie case that the property is not his/her separate property.

If the manager (husband) intermingles separate property with community property, the whole may be considered community property, if wife's property is thus intermingled by him, he has to assume the consequences, including liability to her.

(2) Quebec Code

Article 1266(d): 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;[75]

(3) property acquired by him in replacement of private property;

(4) his clothing, personal linen, as well as decorations, diplomas and correspondence;

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[75] As Mrs. Worton points out, this affirmative provision reduces the category of separate property. Should this be adopted in lieu of a negative provision? The English Law Reform Commission would exclude from coownership a home acquired during marriage by gift or inheritance unless donor expressly gives to both. On the other hand, from the definition of "family assets" Professor Kahn-Freund would include even such a home.

(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.

Article 1266(n): 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.

NOTE: In U.S.S.R. very valuable (luxury) items are presumed to remain the common property even though worn by only one spouse, unless a written agreement to the contrary is executed. Thus the wife in effect becomes a display piece of the family fortune.

APPENDIX B

Debts, Obligations and Liabilities of the Spouses

(a) Ante-nuptial debts and obligations

The basic principle in community property regimes is that ante-nuptial liabilities are chargeable only against the property of that spouse and not against the property of the other spouse. This principle has analogy in partnership law: a partner is only liable for debts when such debts were contracted during the partnership; he is not liable for debts contracted before the formation of the partnership.

As a matter of fact, not even the share of the community property of the spouse who contracted the debt, could be reached during the marriage, for the community property during the marriage represents a fund available only for the payment of community debts and obligations; and it is only after the dissolution of the marriage and partition of the community property that the definitely ascertained share of the community property of the one who contracted the debt would become subject to liability for such debt.

In other words, it was well established that the community property was liable only for debts contracted during the marriage, which concerned the actual marriage and the conjugal partnership, and which accrued and were contracted on its account.

The husband may often, though not entitled to do so, discharge his ante-nuptial debts from the community property. If he does so, he had to make good and pay to

the wife (or her heirs) upon partition of the community assets, one-half of the amount so paid out, even to the extent of doing so from his separate property. However, the wife did not have to put up with this; if his action was in detriment or to the prejudice of her interest in the community property, she could take appropriate action to prevent his wrongful use of the community property.

This strict principle obtains in Arizona law, but statutes in other states have modified it to the extent of making community property liable for the ante-nuptial debts of the husband alone.

The harshness of the principle to the separate creditors can be mitigated by the right to petition for the bankruptcy of the debtor. (See infra).

(b) Debts and Obligations During Marriage

(1) Community debts: Debts contracted during marriage by the spouses, or either of them, for the common benefit were payable primarily from the common property, and wife's share was liable as well as the husband's even though only one of them contracted. If the common property was insufficient to pay those debts, they were then payable from the separate property of the contracting spouse, i.e., usually the husband. If he had no property and had contracted the debt in order to support and care for the wife, then her separate property was liable for the payment thereof.

(2) Separate debts: Neither the wife nor her share of the common property was bound in any way for the

debts or undertakings of the husband, where he was not acting for the benefit of the marital community. Arizona and Washington courts have adhered to these strict principles, and even refused to allow community property to be touched by creditors at least during the subsistence of the marriage. Two reasons have been advanced: one, that the half share of the community property belonging to the spouse contracting the separate debt, was not definitely ascertainable until the payment of community debts and the partition of the residue of the community property after such payment, upon dissolution of the conjugal partnership; secondly, that in the interest of family welfare, community property should be left intact for the support and maintenance of the family and that it should not be subject during the marriage, to inroads for obligations not incurred for the benefit of the family. This seems to go too far. On the other hand, an opposite view is taken by the other community states which subject the entire community property to liability for the husband's own debts contracted in his separate interest (as well as, of course, for those contracted for the benefit of the marital community). Again this is wrong for it is an absolute denial of the basic principles of community property, and it is equivalent to the assertion that the property is not community property but is entirely the property of the husband. However, liability may be imposed on husband's half share, and at any division or partition of the community, the amount paid on his debts should be debited against his share of the community. This has been provided in Louisiana law. Furthermore, the "separate creditor" should be permitted to petition for the bankruptcy of the community if he can hope to realize any part of the debt.

(3) Obligations imposed by law: (such as maintenance of aged and infirm parents, illegitimate children, etc.). It has been held by Washington and California courts that where there was a statutory obligation imposed on the wife to support her mother, she must fulfil it out of her separate property, and not out of her half-share in the community property. In Grace v. Carpenter the court's reasoning was that the husband had no statutory duty to maintain his wife's mother. De Funiak criticizes this decision, saying that the court seems to say that all the community property in his hands was his property.

(4) Liability because of tort of spouses: The same rules as under contracted liability for separate debts would apply.

(5) Priorities of Creditors: In insolvency or bankruptcy, there are normally two types of creditors (community and separate) and two types of property (community and separate).

If community property is insufficient to meet community debts, the separate property of both spouses should be brought into the hotchpot to satisfy such debts, on the general principle that the community presupposes gains and losses of the marriage are part of the story of the marriage. Consequently, if losses and expenses exceed the profts and gains, the wife must bear these equally with the husband, and unless there is some statutory exemptions in her favour (as in California law before 1937 which exempted wife's separate earnings, but since that

year liable in respect of necessaries supplied ot her or to both of them living together), she cannot claim any or all of the common property as against creditors of the community.

In insolvency, the community creditors first take away the community property and then rank pari passu with the separate creditors in respect of the common property. Discharge of husband in bankruptcy from the obligation of a community debt, of necessity also discharges the wife, even though she was not a party to the hankruptcy proceedings--but this has not been a uniform view.

The usual rules as to priority of secured creditors over unsecured creditors whether community or separate, apply.

One spouse may rank as creditor of the other, in genuine transactions, without priority, but in respect of property which belonged to her in her own right but which is in her husband's name and under his management, she is preferred over other creditors.

APPENDIX C

Conflict of Laws

The question of proper law of community property becomes important when the spouses or either of them change their matrimonial domicile. The spouses themselves may have provided for the proper law by ante- or post-nuptial agreement (or they may perhaps agree at the time of litigation). In the absence of such agreement, one of the following choices may be available:

(a) Law of the place where marriage was contracted,

(b) Law of the place of the husband's domicile,

(c) Law of the place of intended domicile, i.e., where immediately upon marriage they intended to make their matrimonial home,

(d) Law of the place where the property is situate.

American Views

(1) If there is an express agreement as to the proper law, that will govern; however in some cases it has been held that unless the agreement was made with the change in domicile in view, a change in domicile will affect all property acquired after the change. with the result that the spouses' rights and interests in that property will be governed by the law of the new domicile despite the terms of the contract.

(2) In the absence of an express contract:

(a) the law of the place where the spouses intended to set up their domicile immediately after marriage should govern,

(b) where the spouses change their domicile later, having lived for some time in the matrimonial domicile, the leading American case of Saul v. His Creditors holds that the law of the new State, in the absence of any express and effective agreement between the spouses, will apply in respect of the property acquired in the new domicile.

It is well settled that a change of domicile does not affect the nature of property which had already been acquired by the spouses at the time of the change of domicile.

Statutes in force in Louisiana, Texas and Arizona provide that upon the spouses moving to their states, their marital property rights are to be governed by the local law of acquests and gains.

English and Canadian Cases

The leading English cases are De Nicols v. Curlier [1900] A.C. 21 and in Re De Nicols [1900] 2 Ch. 410. In the first of these cases a Frenchman and Frenchwoman married in France, so that according to French law their rights inter se as to property were subject to the law of community

of goods. They came to England and were permanently domiciled there. The husband became a naturalized British subject, amassed a large fortune and died in England, leaving his wife surviving and having made an English will by which he disposed of all his property. The issue was whether the spouses continued subject to the system of community of goods after they became domiciled in England. Reversing the Court of Appeal and restoring Kekewich J's judgment, the House of Lords unanimously held that as to movable goods the rights of the wife under the French marriage law as to community of goods were not affected by change of domicile, and that the widow was entitled to the share of the husband's estate to which she would have been entitled if they had remained domiciled in France. In the contention that the French Code did not consider the effect of a change of domicile or nationality upon the community system, Lord Macnaghten's reply[75] was:

> That may be so. But if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicile. Why should the obligations of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country where the marriage was celebrated to an express contract, lose their force and effect when the parties become domiciled in another country?

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[75] at p. 33.

Should the House of Lord's decision also apply to real and leasehold property in England? Kekewich J. in Re De Nichols [1900] 2 Ch. 410 answered the question in the affirmative, holding that the widow was entitled on the same footing to a share in the real and leasehold property.

Ontario Cases

There appears to be two reported decisions in Canada on this point. Re Parsons [1926] 1 D.L.R. 1160 (Ont.) and Beaudoin v. Trudel [1937] 1 D.L.R. 216 (Ontario C.A.). In the latter case, the Trudels were married in Quebec and were domiciled there. They moved later into Ontario and were long domiciled there when Mrs. Trudel died intestate without issue. The plaintiffs who were sisters and brothers of the deceased wife of the defendant, claimed that the law of Quebec applied and that under that law they were entitled to the whole of the estate left undisposed of by Mrs. Trudel. It was held that the principles of the English decision applied but that case deals with rights of spouses inter se and the widow there was entitled to one half of the community property, the other half having been effectively disposed of by will by the deceased husband.

The law of the Province of Quebec applied as to the marital community, but with respect to the undisposed share of the deceased spouse in that community, the law of Ontario governed; so that the surviving husband was entitled in addition to his one-half share in the community property, to one-half of the deceased spouse's share.

APPENDIX D

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—

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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.

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 $\frac{2}{3}$-$\frac{1}{3}$, or $\frac{1}{4}$-$\frac{3}{4}$, 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

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 acqui the same power. Should either spouse be entitled to dispo unilaterally of his or her interest under co-ownership during joint lives? It would, in our view, be inconsister 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 right as a spouse to occupy the home. Even when the marriage ha broken down, it is our provisional view that neither sever ance nor sale of the interests should be permissible unles 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 hi or her interest by will, subject only to the survivor's right to apply for maintenance from the estate? An unseve able 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 th home had been originally the sole property of the deceased (e.g. where it had been owned before marriage). The origi owner would have no power to dispose of any interest in th 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-ownersh 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 spouse 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 eac 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 altogeth it might not be necessary to impose such stringent requirements as to form. We leave this question open to discussio

(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 or in respect of freeholds subject to a mortgage but in respec 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 t 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 wh is not the legal owner ought not to be personally liable t the mortgagee, lessor, or any other person whose claim is against the legal owner, even though his or her interest m be affected by enforcement of the claim.[154] This is, of

154. The position of a beneficiary spouse when a mortgage 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 [1963] 1 W.L.R. 601,609 (C.A.) per Russell L.J.; Falconer v. Falconer [1970] 1 W.L.R. 1333 (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.

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158. Para 1.85 above.

159. Finance Act 1968, s.56. 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 o a divorce.

(d) Business premises

1.102 The matrimonial home may form part of premises used for business purposes, for example, a shop with livir 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 practic difficulties in assessing separately the value of the livi accommodation could be overcome. It might, however, be impractical to apply all the proposals which we make rela- ting to the matrimonial home trust, for example, those under which a spouse would be entitled to apply to have tl legal title vested in joint names.[165] On breakdown of marriage or on divorce, the court in determining occupati rights, and in considering whether to order sale, should give special weight to the needs of the spouse running th business, and to the fact that it might not be practicabl to dispose of the business without the living accommodati

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-ownersl 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 protecti 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 shou be different proceedings and that different principles should be applied, to determine the spouses' rights accor ing to whether one spouse is legal owner or both spouses are joint legal owners. All these matters should be hear 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 princi ple 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, 48-4

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 bankrup 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, need 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.