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LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORTS ON FAMILY LAW

PART I - THE SUPPORT OBLIGATION

PART II - PROPERTY DISPOSITION

Part I - Report #23
Part II - Report #24

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The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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FOREWORD

The subject of these Reports is an important portion of the general field of Family Law. In these Reports the Commission examines questions of family maintenance and the distribution of family property. The enormous social importance of these areas of law was pointedly emphasized by the decision of the Supreme Court of Canada in the much publicized case of *Murdoch v. Murdoch* [1975] S.C.R. 423, 41 D.L.R. (3d) 367; [1974] 1 W.W.R. 361 and the similarly publicized case of *Rathwell v. Rathwell* (1974), 14 R.F.L. 297.

The *Murdoch* case reveals a couple who were married in 1943, working together as hired ranchers in Alberta. By 1958, as a result of their work, it became possible to buy various tracts of land for their own ranching operations. In all of the purchases the property was held in the husband's name alone, and in none of the purchases did the wife make any significant direct financial contribution as the courts so held. However, during the period 1947 to the date of separation in 1968 the husband was away for 5 months of each year on stock association business and the wife contributed physical labour to the various ranching operations which was significant and which no doubt facilitated the acquisition of progressively larger properties. Her contributions involved doing the usual chores and included haying, raking, swathing, mowing, driving the trucks and tractors, dehorning, vaccinating and branding cattle. Upon the wife's application for a half interest in the property, cattle and other assets owned by the husband, and on final appeal to the Supreme Court of Canada it was held that since she made no direct financial contribution to the acquisition of the property (as the majority held) there was no basis for finding a resulting trust in her favour. Moreover, the majority of the Court held that the fact that the wife had performed various services in connection with the spouses' ranching activities did not accord her any beneficial interest in the husband's property. The first reported *Rathwell* case, above cited, involved a similar claim by the wife for a half interest in all of the real and personal property which was owned by or registered in the name of the husband. The court found that the wife did perform services and chores on the farm, but that they were the usual services ordinarily performed by farmers' wives for the benefit of the family even as the husbands work on the land. The court found no evidence of a common spousal intention that the wife had any interest in the property and, following the *Murdoch* decision, it dismissed her claim.

Both the *Murdoch* and *Rathwell* decisions followed an earlier Supreme Court judgment in *Thompson v. Thompson* [1961] S.C.R. 3, in which it is worth noting Mr. Justice Judson for the majority is reported as having said at p. 7.

> But no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation . . .
>
> . . .
>
> If a presumption of joint assets is to be built up in these matrimonial cases, it seems to me the better course would be to attain this object by legislation rather than by the exercise of an immeasurable judicial discretion . . . .

It is abundantly clear that court decisions of this *genre* expound the law in a way which runs directly contrary to the expectations and sense of justice of many people who consider that the law should require spouses to endow each other with all or at least half of their worldly goods. How to relate the endowment, or more to the point, the forced sharing of family property to the financial support of one separated spouse by the other is a major concern of the Commission.

The life-styles, maturity, economic circumstances and responsibilities of people in domestic conflict or breakdown vary enormously in a pluralistic society. To formulate a code of family law which is at once flexible enough to accommodate the human and economic variables justly, and precise enough so that every person may know or be accurately advised about his or her rights and responsibilities is no mean feat, if it be possible at all.

During the Commission's year-long and extensively publicised quest for public responses to our Working Paper published in January, 1975, it was suggested to us that our courts themselves could provide more sensitive and responsive redress to an economically deprived spouse through the traditional operations of equitable and common law principles than legislation ever could. After the *Murdoch* case, it was pointed out to us, came the Manitoba Court of Appeal decision in *Kowalchuk v. Kowalchuk* [1975] 2 W.W.R. 735 (Man.C.A.) which upheld the judgment of Chief Justice Dewar in the Queen's Bench, reported at [1974] 4 W.W.R. 287, [1974] C.C.L. 2469.

In the *Kowalchuk* case, the facts revealed that the spouses had married in 1938 and separated in 1967, but the marriage had not been dissolved. The wife sought a declaration of her entitlement to a half interest in the Manitoba farm lands, machinery and equipment which were acquired in the husband's name after the solemnization of the marriage, as well as an accounting of her claimed interest in their cattle herd. Although no written agreement existed, the husband had told the wife that the farm was for both of them. The facts disclosed that all her married life the wife had worked full time on the farm, milking the cows, working in the fields and garden, keeping the farm accounts and doing all the housekeeping. Early in the marriage

the wife's parents gave her four cows which became part of the farm stock. The Manitoba courts held that the farm was acquired, improved and operated, during cohabitation, by the parties' joint efforts. The gift of the four cows was a significant contribution as also was the wife's labour and account keeping. It was held that the husband's statement that the farm was for both of them was effective to disclose the parties' common intention, and the wife was entitled to the relief sought. No further appeal has been taken.

Unquestionably the *Kowalchuk* case is an example of judicial capacity to right wrongs under law as it stands. That example may well encourage others to seek their remedies through court action. It may also encourage some propertied spouses to behave in more equitable manner, without court action, than they might otherwise have done. Whether the *Kowalchuk* principles flower into general applicability or recede into obscurity depends on whether they are sought to be invoked or evaded on a case by case progression; the factual context of each case and, of course, the legal and social perceptions of the judges of Manitoba and of the Supreme Court of Canada, from time to time, from case to case.

Whether it is better to have the Legislature systematize the law through the enactment of guiding principles, or better to have the law evolve through the perceptions of the judiciary, is an important question in terms of family law. As will be noticed in this Report, various members of the Commission adhere to the one proposition or the other depending on the circumstances in which either one or the other could be applied.

Our recommendations in these Reports will reveal our shifting emphasis from one view to the other as the subject seems to require. In identifying a need for reform we have attempted always to keep the needs of contemporary society in mind. Where the law is, or can be, applied so as to give an undue and unearned advantage to one person as against another, or so as to deprive one person of advantage no matter how responsible the latter's conduct, there is a need for reform. What is due, earned, or responsible must be viewed in terms of perceived social values which are not always consistently expressed in the draconian expectations of this group, or the *laissez-faire* expectations of that group.

In Manitoba, we already have a regime of independent separation of family property which was established long ago and which finds current expression mainly in *"The Married Women's Property Act"*, Cap. M70 of the C.C.S.M. This separation of property regime, which reposes property rights and obligations on a married woman "in all respects as if she were unmarried", ended the long-standing legal dependence of married women on their husbands under the common law, and

was regarded as a reform in its day. Unfortunately, *legal* independence does not provide a share of actual property assets to the spouse who has not actually acquired any during the course of married life.

Because divorce had been generally regarded as a social, if not also a moral evil by most of our people, the law did nothing for the unpropertied divorced spouse in terms of division of assets. Reflecting societal attitudes, however, the law of Manitoba before that of other provinces has long provided a division of assets where the unpropertied spouse remained married until death parted them. Thus *"The Dower Act"*, Cap. D100 of the C.C.S.M., which embodies the present expression of these provisions accords, in brief, the following rights:

(a) a veto over any sale, lease, mortgage or other disposition of the marital home, called: the homestead;

(b) a life estate in the deceased spouse's homestead for the duration of the surviving spouse's life;

(c) if the deceased spouse has not provided adequately by will, the entitlement to receive from the deceased's estate such share of the deceased's net real and personal property as (with other factors) equals one-third of the deceased's net estate.

If the deceased spouse leaves no will, then the survivor is entitled not only to the homestead rights but also $10,000 plus all the rest, or half of the rest, or one-third of the rest, depending upon whether there be no offspring, one only, or more than one. These provisions are made in *"The Devolution of Estates Act"*, Cap. D70. These forced share provisions are additional to the regime of separation of property and refer only to spousal status. Thus, upon divorce, or legal dissolution of the marriage no legal spousal status remains as a basis for sharing assets, and these spousal rights and obligations are also dissolved by operation of law. On the other hand, in case of legal separation, the married state remains at least in name and a deceased spouse who leaves no will cannot bar the surviving spouse's share in the estate. But such deprivation of a separated spouse's share can be effected by will. This may well happen, because *"The Dower Act"* provides that where one spouse leaves the other spouse with the intention of living separate and apart, all rights given under that Act, both to a life estate in the homestead and to a share of the other spouse's estate, are forfeit. Except for the rights of veto over disposition of an existing homestead, for which there is a particular kind of release, the spouses may, either before or after their marriage, release or contract out of their rights under *"The Dower Act"*.

As distinct from property sharing, maintenance may be

awarded upon or after separation under *"The Wives' and Children's Maintenance Act"*, Cap. W170, and also upon or after legal dissolution of marriage under the *Divorce Act*, Chap. D-8, R.S.C. 1970. So it is that while property and estate sharing can rarely if ever be compelled upon or after separation or divorce, spousal maintenance can be and usually is. Although judges adjudicating cases under the *Divorce Act* sometimes come close to effecting a division of matrimonial assets through the provision for lump-sum maintenance, the constitutional power to enact property sharing laws, even under the guise of divorce legislation, does not repose in the federal Parliament. That power therefore cannot be exercised by Parliament or conferred on judges through any Act of Parliament even though Parliament has the constitutional authority to make laws in relation to marriage and divorce. Parliament does not have the principal jurisdiction over property and civil rights in the province.

It is true that there is a provision in *"The Married Women's Property Act"*, expressed in section 8, which authorizes the Court to dispose of "any question between husband and wife as to the title to, or possession of property . . . ; and the judge may make such order with respect to the property in dispute . . . as he thinks fit". But, as has been stated, since the above noted statute effects a regime of independent, separate property in the first place, the question, subject to *"The Dower Act"* (as mentioned in section 9) is really 'Whose property is it?' and not 'How should their property be shared?'. Resolution of the latter question would require specific statutory provisions, or at least, statutory guidelines directed to an acceptable social objective.

It is because of both the pressures for, and some resistance against, the formulation of statutory provisions in relation to property disposition that we think it advisable to consider the other existing economic consequences of marriage breakdown - spousal maintenance - in relation to property disposition. The question shorn of its manifest complexities boils down to this: *If the law is to require compulsory sharing of the spouses' property upon divorce or separation, to what extent and for how long should the maintenance of one spouse by the other be continued in law?* Would there then be a *quid pro quo*? Can the effecting of equality be accomplished by the forced transferring of assets and income at, or within a limited time after, divorce or separation; or should the "equalizing process" continue for an indeterminate time? Assuming that both of the divorced or separated parents must be, and remain, liable to maintain their dependent children in accordance with their respective means, how long and to what extent should the parent who is granted custody be entitled to be personally maintained by the other? Should entitlement to a share of the property be taken into account in the fixing of the maintenance obligation? And what if there be no dependent children in the equation?

In our Working Paper on this subject some facts about the incidence of gainful employment of Canadian women in general and wives in particular were produced. They were extracted from the publication *Women in the Labour Force - facts and figures (1973 edition)*,[1] which recorded data from 1972. There is now available, the 1975 edition[2] of that publication and the year recorded is 1974. In our Working Paper, it was noted that "it would seem that these percentages of married women in outside gainful employment are increasing as time passes". That observation is confirmed by the latest publication which shows a steady progression of larger and larger numbers of married women participating in the Canadian labour force. Here are the comparative figures:

	1972	1974
Total labour force of Canada	8,891,000	9,662,000
No. of women in the labour force	2,953,000	3,324,000
Percentage	33.2%	34.4%
No. of married women in female labour force	1,681,000	1,899,000
Percentage	56.9%	57.1%
Total no. of married women 14 years of age and over in Canada	4,955,000	5,177,000
No. of married women 14 years of age and over in the labour force	1,681,000	1,899,000
Percentage	33.9%	36.7%
Comparative Percentage (10 years previously)	21.6%	24.1%
Percentage of married women 20-24 years of age in labour force	47.4%	51.3%
Participation rates of women in labour force ranging from		
— high	40.3% Ont.	43.3% Alta.
— low	26.6% Nfld.	28.3% Nfld.
Percentage of women working part-time	24.9%	25.2%
Percentage of men working part-time	6.2%	6.2%

The significance of the labour findings is that, while women in the labour force constitute over one-third of the total Canadian labour force, of that one-third, more than half are married women; and these married women in the labour force number well over one-third of all married women in Canada. It should be noted however that as between parents, the mother is still the

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[1]Information Canada, 1974, Cat. No.: L38-3072.

[2]Information Canada, 1975, Cat. No.: L38-30/1975.

parent most likely to be at home, because of all men in the labour force, 93.8% are employed in full-time work - i.e. over 35 hours per week. The participation rate for Manitoba women in the labour force is neither the highest nor the lowest in Canada. It must also be noted that women are not yet engaged in proper numerical proportion in the more highly paid employment. A disproportionately high number of women are still employed in low paying jobs.

These labour force figures tell something of our society and its needs and expectations. We have kept them firmly in mind, along with other demonstrable social needs and expectations, in considering the social objectives of the family support obligation and disposition of family property. That the Commission remains of divergent opinion about the spousal maintenance obligation, tells something about the representativeness of the Commission's composition, as we believe, and accords with the divergence of public responses received by us. We should have preferred unanimity on all recommendations, but not at the expense of each Commissioner's conscientious discharge of the responsibility we bear.

One further observation should be made, before setting out our recommendations for reformed family law which are the main burden of these Reports. Marriage contracts as to the disposition of spousal property and income are rarely resorted to in our common law jurisdiction. We think that they could be more often employed by those who need and seek special arrangements. Whether the reformed law be rigid or flexible in its operation, we think that it should be possible legitimately to avoid some or all of its applications by contractual arrangements concerning matrimonial property and income (with effective safeguards against fraud or undue influence) on the part of those marriage partners who want a matrimonial regime differing from any standard regime established by law. The techniques to accomplish these ends are no strangers to our law. Thus, every adult person of sound disposing mind is free to make a Will, but if a person dies intestate then the law, notably *"The Devolution of Estates Act"*, provides a standard of disposition of property for that person who dies without a Will. The statutory provisions might not be to everyone's liking, but at least they operate as an effective charter for the disposition of intestate successions. We think that an analogy to the devolution of intestate estates could be pursued under new family property laws. That is, everyone would be legally free to make a marriage contract, but if none were made, then the prospective new law would operate as a standard matrimonial regime for those without a contract. These last mentioned people may well continue to be the majority.

In order to deal with the subjects of these Reports, the Commission not only invited written responses to the Working Paper which was published and offered free of charge to

interested persons, but we advertised the Paper and our invitation in display ads, and through numerous public appearances and speaking engagements by the Commissioners. These, in turn, generated news reports and interviews in the various media. A gratifyingly large number of written responses was received by us. Then, in order to accommodate Manitobans who might find it easier to express themselves orally than to compose a written response, and also in order to engage in public dialogue, we extensively advertised and held public hearings at which either the whole Commission, or the Chairman alone, attended. Those hearings, each one open to the public during both afternoon and evening, were as follows:

Brandon (The Commission)	-	August 7, 1975
Winnipeg (The Commission)	-	October 30, 1975
Thompson (The Chairman)	-	December 8, 1975
Flin Flon (The Chairman)	-	December 9, 1975
The Pas (The Chairman)	-	December 10, 1975

We certainly received a wide range of earnest views and opinions from individuals and various interest groups, each one calling for justice in family law, some diametrically opposed to others as to how justice might be realized. As will be seen in these Reports, complete unanimity on all matters has eluded the Commission, much like the Manitobans from whom we heard. Some separate opinions and dissents appear in these Reports although not every misgiving or doubt on the part of the various Commissioners is recorded in a written dissent. Our unanimous recommendations frequently represent a consensus reached only after intensive debate and discussion. It will be noticed that the various dissents and separate opinions are of various lengths. We unanimously agreed at one early point in our discussions, when we could not foretell which of divers viewpoints would emerge as a majority or a minority expression, that minority dissenters, alone or numerous, should be entitled to give full expression to the thoughts they brought before the plenary sessions for discussion. Except through consensus, we did not thereafter require abridgment of minority opinions.

We gratefully acknowledge the faithful assistance of the Commission's staff in producing these Reports. We also received unfailingly courteous help from Prof. S.S. Hu and the staff at the E.K. Williams Library, Robson Hall. We acknowledge special assistance from a former Manitoban, Daniel J. Krindle, who is now engaged in the practice of law in Los Angeles, California. We should also mention the help we received from the Librarian, Karen Phillips, of Loyola University, School of Law, Los Angeles, California. Really, there are simply too many others in the public service, in private agencies, within the province and abroad, to mention individually, and who helped us in our work. To all those who assisted us, the Commission is profoundly grateful.

PART I — THE SUPPORT OBLIGATION

In this Part on the support obligation, we are boldly considering maintenance after divorce, as well as upon legal separation. Judicial interpretation of *The B.N.A. Act* has accorded to Parliament the ancillary jurisdiction to enact spousal and children's maintenance provisions relative to dissolution of marriage under the *Divorce Act*. Because so many, if not most, divorce dispositions subsume the maintenance arrangements of a previous separation of the parties, we think that the maintenance provisions of both separation and divorce should be consistent with each other. Such consistency is all the more important in light of our recommendations about property disposition, which would be effected upon either legal separation or divorce. One can only hope that the Parliament of Canada would accept the principles which we recommend, or that the judiciary of Manitoba in adjudicating cases under the *Divorce Act* might adhere to these principles. Be that as it may, our recommendations will still have vitality within provincial jurisdiction, which is our proper sphere of consideration.

A. CHILDREN

We think that there should be no way in which parents ought to be permitted to evade their natural and legal obligation to support their children who are below the age of majority. We perceive this obligation to be a generally acceptable social norm. We also perceive a socially acceptable rule in requiring that where a parent with the custody of a child enters into a new liaison, whether by marriage or not, the newly acquired mate should also be fixed with a 'back-up' obligation to see that the child's needs are adequately provided for. That secondary obligation would, of course, become primary in the case of a so-called 'parent's-own' adoption of the child in conjunction with the new mate.

Sometimes however older children simply cannot be managed by the parents and the parent-child relationship becomes one of aggravated alienation. Here we refer to children over the age of 16 years. In some such instances, too, the child's repudiation of parental advice and guidance as to life-style, associations, ethics and citizenship amounts to open rebellion which destroys any semblance of home life or control of other siblings. Such behaviour is injurious to the child and others. Under a provision of *"The Child Welfare Act"* which is presently expressed in section 16, that child is described as "a child in need of protective guardianship". A further provision of the Act, section 29, permits a judge either to order the parents to contribute to the cost of the child's maintenance, or upon sufficient cause being shown, to discharge them completely or partially from such obligation. We think that these are desirable

provisions to be reflected in the principles of older child support even if the child be not made a temporary ward of the Director of Child Welfare or a Children's Aid Society. As we express them, they accommodate the policy of *"The Child Welfare Act"*. The drastic step of refusing to contribute further to the older child's support is, itself, a deed which, under section 16 and following provisions, could well result in a court hearing to determine the merits of the case and to pronounce an order under section 29 of the Act.

We think that sometimes the payment of child support is assessed and awarded at unrealistically low amounts. People, including a father who was paying court awarded child maintenance, complained to us that in some areas of the province child maintenance is being fixed by the court as low as $25.00 per month. Those people doubted that the amount is reasonable in almost any circumstances these days, and so do we. Therefore, we are recommending that the principal factors which comprise maintenance should actually be mentioned in the statute law which we propose on this subject so that, if the judge of first instance makes an unrealistic award, then in such hopefully rarer and rarer instances, an appellate court will have statutory criteria for reviewing the initial award.

The principles of child support as set out in our Working Paper were overwhelmingly upheld by those persons who responded to that paper. Indeed, no one has repudiated them, the only complaints being concerned with the clarity of expression of the "back-up" or secondary responsibility. We have attempted to meet those criticisms. Therefore, we now recommend that the principles of the obligations of parents to support their children should be expressed in the following or similar statutory language:

1. *CHILDREN HAVE THE RIGHT TO BE MAINTAINED BY BOTH PARENTS, WHO HAVE A CORRESPONDING OBLIGATION TO SUPPORT THEIR CHILDREN, JOINTLY OR ALONE.*

2. *THE OBLIGATION TO SUPPORT CHILDREN IS BORNE EQUALLY BY PARENTS, BUT WITH REGARD TO THE ACTUAL FINANCIAL CIRCUMSTANCES OF EACH.*

3. *NOTWITHSTANDING ANY LAW EXCEPT* "THE CHILD WELFARE ACT" *TO THE CONTRARY, EVERY PERSON IS LEGALLY LIABLE TO SUPPORT, MAINTAIN AND SEE TO THE EDUCATION OF,*

   (a) HIS/HER OWN NATURAL OR ADOPTED CHILDREN;

(b) *THE CHILDREN OF HIS/HER SPOUSE WHO ARE IN THE CUSTODY OF THAT PERSON OR THE SPOUSE WHENEVER, AND TO SUCH EXTENT AS, THE NATURAL OR ADOPTIVE PARENT OF SUCH CHILDREN DOES NOT CONTRIBUTE REASONABLY TO THEIR SUPPORT AND MAINTENANCE;*

UNTIL EACH CHILD ATTAINS THE AGE OF 18 YEARS.

4. *SUBJECT TO THE PROVISIONS OF* "THE CHILD WELFARE ACT" *A PARENT IS NOT RESPONSIBLE TO SUPPORT AND MAINTAIN A CHILD OVER THE AGE OF 16 YEARS WHO HAS WANTONLY DISCONTINUED APPROPRIATE FORMAL EDUCATION AND TRAINING AND WHO*

   (a) *THROUGH GAINFUL EMPLOYMENT IS ABLE TO BE SELF-SUPPORTING; or*

   (b) *IS BEYOND THE CONTROL OF HIS OR HER PARENTS OR OTHER PARENTALLY DESIGNATED PERSON IN WHOSE CHARGE HE OR SHE IS.*

5. *WHEN CHILDREN ARE BROUGHT BY ONE PARENT INTO A "COMMON LAW" LIAISON, THE OBLIGATION OF BOTH NATURAL PARENTS WILL ENDURE AND THE NEWLY-ACQUIRED "COMMON LAW" STEP-"PARENT" WILL ALSO BE FIXED WITH AN ALTERNATE (SECONDARY) OBLIGATION TO MAINTAIN THOSE CHILDREN.*

6. *WHERE IT IS PRACTICALLY IMPOSSIBLE FOR BOTH NATURAL PARENTS OR ONE OF THEM TO SUPPORT A CHILD THE OBLIGATION IS TO BE BORNE: FIRSTLY — BY A LAWFULLY WEDDED SPOUSE OR A "COMMON LAW" MATE WITH WHOM THE PARENT WITH CUSTODY OF THE CHILD IS LIVING; AND SECONDLY — BY THE PROVINCE. THE FACT OF A CHILD BEING IN THE CUSTODY OR CARE OF THE DIRECTOR OF CHILD WELFARE OR OF A CHILDREN'S AID SOCIETY DOES NOT, OF ITSELF, RELIEVE EITHER NATURAL PARENT OF THE OBLIGATION TO SUPPORT SUCH CHILD.*

7. *ANY ASSESSMENT OF THE AMOUNTS PAYABLE FOR MAINTENANCE OF CHILDREN SHALL TAKE ACCOUNT OF APPROPRIATE TOTAL COSTS OF CHILD MAINTENANCE, INCLUDING AMONG OTHER FACTORS THE*

COSTS OF RESIDENTIAL ACCOMMODATION, REASONABLE HOUSEHOLD ASSISTANCE, NOURISHMENT, CLOTHING, RECREATION AND SUPERVISION, AND HAVE REGARD TO THE CHILD'S OR CHILDREN'S NEED FOR A STABLE ENVIRONMENT.

8. *IN AWARDING CHILD MAINTENANCE, THE COURT MAY ORDER PERIODIC PAYMENTS OF UNIFORM OR VARIANT AMOUNTS, AND MAY DIRECT THAT ANY OR ALL SUCH MAINTENANCE BE PAID TO:*

   (a) *THE CUSTODIAL PARENT OR GUARDIAN;*

   (b) *THE COURT CLERK, ACCOUNTANT, ENFORCEMENT OFFICER OR OTHER OFFICIAL;*

   (c) *TRUSTEES; or*

   (d) *RECEIVERS*

   TO BE APPLIED AS, WHEN AND FOR SUCH PARTICULAR PURPOSES, ON SUCH TERMS AND CONDITIONS, IF ANY, AS THE COURT CONSIDERS APPROPRIATE.

9. *IN ADJUDICATING MATTERS OF CHILD MAINTENANCE THE COURT MAY ORDER THE PAYMENT OF A SPECIFIC SUM TO STAND ON DEPOSIT IN COURT OR ON DEPOSIT WITH AN APPROPRIATE INDEPENDENT PERSON, TRUSTEE, FIRM, BANK OR DEPOSITORY OTHER THAN THE CUSTODIAL PARENT OR GUARDIAN, AS SECURITY FOR FUTURE PERIODIC MAINTENANCE PAYMENTS IN THE EVENT OF DEFAULT OR LAWFUL INCREASE OF PERIODIC PAYMENTS, AND OTHERWISE TO BE RESTORED TO THE MAINTENANCE DEBTOR, WITH INTEREST, AND LESS ONLY NECESSARY ADMINISTRATION COSTS.*

10. *NOTHING IN THE ABOVE RECOMMENDATIONS SHOULD PRECLUDE THE COURT FROM ENTERTAINING AN APPLICATION TO VARY THE AMOUNT OF MAINTENANCE BECAUSE OF ALTERED CIRCUMSTANCES OF THE CHILD, OF THE CUSTODIAL PARENT OR GUARDIAN, OR OF THE MAINTENANCE DEBTOR.*

It will be noted that we propose basically that the parents' obligation toward their natural or adopted child endures until the child attains majority or is earlier adopted by someone else. Their obligation is limited only by their actual financial circumstances. Because, in considering the lives and resources of two parents and their child with the possible added

consideration of other adults coming in to stand in the place of the parent, the circumstances can vary so greatly it would be foolhardy to attempt to enact the desirable results in any particular case. This is much more complex by its very nature than, for example, a 50-50 partition of assets. This, then, is an area in which, with clear statutory policy guidelines, the result in every particular disputed case ought to be crafted by judicial disposition.

Finally, it will be noted that while we have hewed closely to the essentially private notion of family law in this discussion, we have also mentioned state obligations to support children for whom no other source of support is available. In our view it is not acceptable that a child, especially a child under the age of 16, should be faced with self-support or no support. *Someone* must be responsible at all times to provide necessaries for a child. This we regard as a constant essential even when, as in the case of a self-supporting 17 year old, no call is made upon that responsibility. It is for this reason that we have asserted that when parental or step-parental resources are not available, it is the state through guardians, foster homes or child care agencies, which unquestionably should shoulder that responsibility, as of course it does.

The foregoing section expresses the principles which we recommend as the legal basis of the support obligation for the benefit of children.

Memorandum of Dissent and Separate Opinion of Mr. Werier, Miss Shack and Dr. Hanly as to recommendation expressed in section 4 ante

We believe that parents have a *prima facie* obligation to support their offspring. Only extraordinary conditions should relieve parents of this obligation. Section 16 of *"The Child Welfare Act"* provides that a child who is beyond the control of his parents (16(d)) or whose behaviour, condition, environment or association is injurious to himself or others (16(e)) may be taken into protective guardianship. We believe that these conditions are sufficiently broad. We do not see the necessity or need for the state to further relieve parents of their obligations to children under the age of majority.

We therefore would favour the deletion of section 4 in the specific recommendations regarding the support obligation for children.

B. SPOUSES

Here, too, one can begin with relatively simple expressions of principle. If enacted into law, the principle serves as a general legal basis for arriving at an appropriate result in any particular case. Where the resolution of disputes is better left to the parties themselves with or without professional advisers, or ultimately to adjudication by a designated tribunal, the enacted principles define rights and serve as guidelines for judicial determination of matters in issue. Such, we think, is the matter of spousal maintenance. Because of the virtually infinite variety of individual circumstances, this is not an area in which it would ever be appropriate for the Legislature to try to legislate the actual results of every particular case.

Generally, therefore, we are attempting to enunciate here principles which we perceive to be acceptable social norms and with which we agree.

It is the unanimous view of the Commission that married persons should owe a duty to support each other while they continue to live together. This does not necessarily mean that each must undertake paid employment, or make any direct financial contribution to the marriage. Unpaid services rendered as a homemaker, or assistance in the operation of a family farm or other business undertaking could constitute an equally significant support contribution, for example. The duty does mean, however, that if one spouse is incapable of self-support for reasons beyond his or her control, the other spouse owes an obligation to provide adequate support.

Item 1 which follows simply attempts to express the principle of mutual support and interdependence which are appropriate in an ordinary 'legally uneventful' marriage. This obligation might be expressed as follows:

1. *EVERY MARRIED PERSON IS OBLIGED TO CONTRIBUTE TO THE SUPPORT AND MAINTENANCE OF HIS OR HER SPOUSE BY SUCH FINANCIAL MEANS AND/OR SERVICES AS SPOUSES MAY BY WRITTEN OR ORAL ARRANGEMENT OR BY CONDUCT AGREE.*

As will be seen the foregoing expressions of principle do not dispose of the varied multitude of questions which arise in this subject. More specific provisions must follow upon these.

Many of the persons and groups who responded to our Working Paper thought that, even with the principle stated immediately above, there would still be an imbalance in the traditional marriage which the law could and should redress. That imbalance occurs between the income earning spouse and the economically dependent spouse. They urged that whether the right would be exercised or not, the dependent spouse should have: the right to know the family's financial circumstances; the

right to participate in decisions about family expenditures; and the right to share the family income for individual personal needs and recreation. These, they asserted should be matters of *positive right*, and not just *discretionary accordance*. We think that there is much merit in such proposals, if they could be practically incorporated into law. There would be value to them, if only as declaratory principles, or statutory guidelines, to use a currently popular expression.

It is our intention in formulating these recommendations to persuade the people and the Legislature of Manitoba that during marriage spouses ought to enjoy equal legal and economic rights *vis-à-vis* each other. While it is neither practical nor desirable to attempt to interject formal arbitration procedures into the private and inter-personal operations of married life, yet some new approaches could aptly be the subject of legislation. For example, in Manitoba, the rights enunciated in *"The Dower Act"* have been engrafted onto the married state for many years now, without strangling the private, inter-personal aspects of marriage.

In our Working Paper we referred to a standard matrimonial property regime as "a new species of partnership". In those written submissions and public presentations we have been urged to recommend that some important aspects of the commercial or professional partnership be adapted to the new matrimonial partnership. We agree.

First, it will be necessary to state clearly the basic societal value which, we recommend, ought to be converted into the statutory expression of matrimonial partnership. We therefore recommend a provision of law which declares:

> 2. *WHERE, BY AGREEMENT, ONE SPOUSE IS ENGAGED IN TAKING CARE OF THE HOME AND/OR FAMILY AND HAS NO SIGNIFICANT INDEPENDENT INCOME, WHILE THE OTHER SPOUSE IS EMPLOYED OUTSIDE THE HOME, THE AT-HOME SPOUSE IS ENTITLED BY REASON OF HER OR HIS UNPAID WORK IN THE HOME, TO BE, AND TO BE CONSIDERED AS, A FULL AND EQUAL PARTNER IN THE ECONOMIC AND FINANCIAL ASPECTS OF THE MARRIAGE.*

The 'agreement' mentioned above could be in written form, or it could equally be oral and evidenced by the parties' habitual course of conduct. That provision would, of course, apply when both spouses are employed outside the home, as well.

Next, we recommend that this species of partnership should permit to each partner equal knowledge of the other's financial position, and accordingly, of the family finances. To carry the notion of equality further, then, we recommend a provision of law as follows:

3. *EVERY SPOUSE DURING COHABITATION IS ENTITLED:*

(1) *TO RECEIVE PERIODIC AND COMPLETE INFORMATION FROM THE OTHER SPOUSE CONCERNING FAMILY FINANCIAL CONDITIONS INCLUDING* INTER ALIA:

(a) *A COPY OF THE OTHER SPOUSE'S INCOME TAX RETURN LAST FILED TOGETHER WITH ASSESSMENT NOTICES AND REVISED RETURNS;*

(b) *A STATEMENT OF THE OTHER SPOUSE'S GROSS AND NET EARNINGS AND DEDUCTIONS WHICH, IF NOT VOLUNTARILY PROVIDED BY THE SPOUSE, SHALL, ON REQUEST, BE PROVIDED DIRECTLY BY THE SPOUSE'S EMPLOYER, PARTNER, PRINCIPAL OR THE ACCOUNTANT OR BOOKKEEPER OF ANY OF THEM;*

(c) *A STATEMENT OF THE OTHER SPOUSE'S DEBTS;*

PROVIDED, THAT IF THE OTHER SPOUSE BE A PRINCIPAL OR PARTNER IN ANY INDUSTRIAL, COMMERCIAL OR PROFESSIONAL FIRM OR UNDERTAKING, NOTHING HEREIN ENTITLES THE APPLICANT SPOUSE TO ANY INFORMATION OR KNOWLEDGE OF THE PERSONAL INCOME, DRAWINGS OR DEDUCTIONS OF THE OTHER PRINCIPALS OR PARTNERS IN THE FIRM OR UNDERTAKING.

(2) *TO PARTICIPATE IN DECISIONS CONCERNING EXPENDITURE OF ALL SPOUSAL INCOME;*

(3) *TO A REASONABLE STANDARD OF LIVING IN ACCORDANCE WITH THE FAMILY'S AVAILABLE MEANS, INCLUDING AS OF RIGHT:*

(a) *A PERIODIC CLOTHING ALLOWANCE, BY CASH OR UPON THE FAMILY INCOME EARNER'S CREDIT, TO BE DISPOSED ACCORDING TO THE SPOUSE'S SOLE DISCRETION; AND*

(b) *A WEEKLY OR MONTHLY SUM OF MONEY FOR THE SPOUSE'S OWN USE ABSOLUTELY, AS A PERSONAL*

ALLOWANCE; AND

THE ACTUAL AMOUNTS PAID UNDER THIS PROVISION SHALL BE REASONABLE, TAKING INTO ACCOUNT THE FINANCIAL CIRCUMSTANCES OF THE FAMILY AND THE ACTUAL AMOUNTS EXPENDED BY THE OTHER SPOUSE FOR SUCH PURPOSES.

(4) A SPOUSE WHO DURING COHABITATION IS UNABLE TO SECURE THE RIGHTS ABOVE DECLARED AND ACCORDED BY LAW, MAY APPLY TO THE COURT FOR A DECREE SPECIFICALLY DEFINING THAT SPOUSE'S RIGHTS, WHICH MAY BE ENFORCED BY ORDER, WARRANT, WRIT OR SUBPOENA, AS MAY BE APPROPRIATE TO EFFECT THE DECREED RIGHTS AS AGAINST THE OTHER SPOUSE AND ALL OTHERS DESIGNATED BY IMPLICATION IN PARAGRAPH ONE ABOVE.

(5) THE CROWN IS BOUND BY THE FOUR PROVISIONS ABOVE.

(6) AN APPLICATION UNDER PARAGRAPH FOUR, ABOVE, MAY BE MADE NOT MORE OFTEN THAN ONCE PER TWELVE MONTH PERIOD, EXCEPT THAT SUCH AN APPLICATION MAY BE MADE EARLIER THAN THE EXPIRY OF TWELVE MONTHS AFTER A PREVIOUS APPLICATION IF IT IS MADE IN CONNECTION WITH SEPARATION OR DIVORCE PROCEEDINGS.

The kind of rights above expressed would not seem unusual in any commercial or professional partnership; and we think that, for those who need them but yet do not desire a legal separation, they should be available and enforceable as a matter of basic justice.

All the foregoing principles still do not dispose of the multitude of questions which arise about the maintenance and support obligation upon and after separation or divorce. More specific provisions must still follow those above expressed.

We are also unanimous in believing that it is desirable in many situations that this duty of support should continue after the separation or divorce of the spouses for at least a limited period of time. One spouse might be without adequate job skills to become immediately self-supporting, for example, and might therefore require maintenance from the other spouse while undergoing vocational training. Or a spouse may have custody of children of the marriage who because of their tender years or other factors require the presence of a parent at home, thereby

preventing the spouse from supporting him or herself for some period of time. It may even be that a spouse who has contributed much to a marriage, and who is because of age or other factors unemployable at the time of separation or divorce, may in some circumstances deserve support on a permanent basis if the other spouse is capable of providing it. If the proposal advanced later in this Report concerning the distribution of matrimonial property after divorce or separation were adopted, the need for such continuing support would be eliminated or reduced in many cases, but there will always be some circumstances in which some transitional support is needed.

On the other hand, it is unquestionably desirable that separated or divorced spouses should become financially independent of each other as soon as reasonably possible. Continued economic dependence after the rupture of a marriage can be detrimental to the interests of all parties.

A division of opinion within the Commission arises exactly here and despite the many helpful submissions and briefs which we received, we have been unable to resolve our divergence of opinion.

INTER-SPOUSAL MAINTENANCE

What responsibility does a husband have for the support of his former wife after the break-up of the marriage through separation or divorce? Or a wife for the support and maintenance of her former husband, should the position be reversed?

The members of the Commission recognize that the responsibility is determined by a number of factors which vary in their relative importance from one situation to another.

To arrive at equitable settlements that will take all these factors into account, it is necessary to set some objectives for the ordering of maintenance payments, to lay down some guidelines for judges to follow in making their awards. As we tried to set these objectives and to lay down the guidelines, we discovered that, desirable as all of them seemed to us, there were occasions when they appeared to be in conflict. For example, one objective surely should be the provision of an economically and emotionally stable home for children of the marriage. Yet it seemed to a majority of us that this objective was only sometimes compatible with what the other Commissioners considered the equally desirable objective of prompt financial independence of the former spouses.

We are also uncomfortably conscious of the gap that exists between an ideal society, economically organized so that complete financial independence for both partners could be attained within a limited period of time, and the real society in which spouses, usually wives, suffer severe handicaps in trying to achieve that independence.

There is no doubt in the minds of the majority of the Commission that financial ties between the former spouses should be cut as soon as is feasible, but we consider such severance only one of several objectives, none of which should receive legislative priority over the others.

We listened with interest, sympathy and concern to the presentations of former husbands, who found themselves in severe straits because they were being forced to make maintenance payments to former wives. We agree that self-respect and economic independence are closely allied, and that support payments should never be exacted for purposes of revenge, or to afford luxuries to a former spouse who is entirely able to support herself or himself, and indeed may already be doing so. Nor would we be willing to give encouragement to the spouse who feels that a few years of marriage entitles him or her to support for life.

But we also listened with interest, sympathy and concern to the presentations of former wives who were faced with grinding poverty when their marriages terminated. Even when support for children seemed adequate they found that their own earning power was not sufficient to maintain a standard of living similar to that which had prevailed when the wage earner was the father of the family.

A fact of the real world is that women are usually left with the care of and major responsibility for the upbringing of children. Child support seldom includes provision for housekeeping and related costs, so that those expenses have to come from the women's usually limited earnings. Day care facilities are scarce, and even with government support, come nowhere near meeting the needs of working mothers who are also single parents. There is almost no structured care for children of school age during lunch hours, after school hours, or during school vacations. Many children, of course, are capable of caring for themselves when homemakers are not available but not all. Some children need the continued support of someone - parent or other homemaker - whose services must be paid for either out of mother's earnings or in terms of her earnings sacrificed.

For the majority of mothers who are heads of single parent households those earnings are meagre. In Canada in 1971 — with the growing incidence of divorce the situation is likely to be worse rather than better in 1976 — there were approximately 338,000 single parent families of which 85 per cent were headed by women. Of these 44 per cent were classified as "low income families". In fact, although families with female heads made up only 7 per cent of all families in Canada, they constituted 30 per cent of all low income families. Manitoba does not generally deviate radically from the Canadian norm, so we can assume that the situation in this province is similar to that of Canada as a whole.

We do not intend to dwell on the reasons for this situation, except to point out that these women suffer from an aggravation of a situation which is common to the majority of working women. A Women's Bureau report issued in 1975 points out that the average pay of men, even in jobs that fall into the general category of "women's work", is higher than the average pay of women doing similar work. For example, men in clerical work are on the average paid 56.7 per cent higher salaries than women clerks; the earnings of men in sales jobs, of which close to 40 per cent are filled by women, exceed the earnings of women by a startling 167.9 per cent. In spite of legislation and publicity aimed at reducing the differential it seems to be widening. Seventy per cent of office occupations surveyed by the Canada Department of Labour (address by Sylva Gelber, Toronto, 1974) showed that the differential in pay between men and women had increased in the three year interval from 1969 to 1972. It is also a fact of real life that most women are employed in low status, low paying jobs.

So even if women return to work and achieve so-called economic independence soon after the dissolution of their marriages, the standard of living they are able to provide for themselves and their children is likely on the average to drop substantially below that in existence before the marriages broke up. It seems not unreasonable that a former husband and father, when he is able to do so, should continue to help maintain the standard either through payment for housekeeping expenses or through direct support of the spouse who has responsibility for the day by day care of his children.

The spouse of long standing, especially if she has not worked outside the home during the years of her marriage, is at a double disadvantage. It seems obvious that the longer people are out of the labour force the more difficult it is to re-establish themselves as wage-earners. Not only are skills weakened over a period of time, and the effort of learning new skills greater, but there is a built-in discrimination against the older worker. It appears in hiring policies and in insurance and pension plans, and operates against promotion to better paying jobs. When a marriage has lasted for a period as long as 20 years it is often unrealistic to expect the formerly dependent partner to attain financial independence merely as a result of the will to do so and a period of re-training or upgrading. The length of the marriage, and the nature of the dependency within the partnership, should have some bearing on the settlement of maintenance payments.

Where a good deal of property has been accumulated during the course of the marriage or where the so-called dependent spouse had brought property into the marriage, the need for maintenance of that spouse is mitigated. The majority of the members of the Commission, however, are aware that in many a marriage the only property accumulated is the family home and

a small amount of insurance. As the present status of single parent families, especially those headed by women, indicates, in many marriages there is very little to divide, and the pittance that is available to the formerly dependent spouse has little influence on his/her power to be self-supporting. The financially dependent spouse, nevertheless, has often made a substantial contribution to the marriage and the operation of the marital home through careful management and good housekeeping. We believe that such contribution should have some bearing on the amount and the period of maintenance and support to be given on dissolution of the marriage.

We recognize the fact that "contribution to the marriage" like "fault in producing the break-up" is difficult to assess. We struggled with the problem of the degree to which the principle of fault should determine the right to maintenance and support. Again we listened to the presentations made to us in writing and in person, and found among them as much ambivalence of feeling and difference of opinion as there was among us, the members of the Commission. On the one hand, the break-up of a marriage involves such a mesh of reasons, alleged reasons, incompatibilities, recriminations, and petty irritations that prime fault is almost impossible to untangle. To try to assess the amount of support and maintenance on the basis of fault is likely to be unjust to either partner or to both partners. Nor, as sometimes happens, should the fault of a former spouse be used to exact revenge for a real or imagined injustice, as - if our informants are accurate in their statements - sometimes happens.

On the other hand, it seems equally unjust that a partner who failed to live up to the commitments expected of a marriage should escape scot free, should not be required to compensate in any way for the injuries inflicted during the years of marriage: frittering away of monies, physical abuse, infidelity, humiliation, failure to share familial responsibilities.

Caught in this dilemma we decided to recommend that in determining the amount and period of maintenance to be awarded fault should be only one of the factors to be considered, and compensation for the fault only one of several objectives to be attained with no greater emphasis to be placed on it than on the other objectives.

The recommendations of the Commission to the question of support after separation or divorce are therefore as follow:

> *WHERE, AFTER SEPARATION OR DIVORCE, AN APPLICATION IS MADE BY ONE SPOUSE OR FORMER SPOUSE FOR A MAINTENANCE ORDER AGAINST THE OTHER SPOUSE OR FORMER SPOUSE, THE JUDGE IN DETERMINING WHETHER AND IN WHAT AMOUNT TO ORDER MAINTENANCE*

SHALL CONSIDER ALL THE CIRCUMSTANCES OF THE CASE, INCLUDING:

(a) THE RESPECTIVE RESPONSIBILITIES OF THE SPOUSES FOR THE CUSTODY AND SUPPORT OF CHILDREN OF THE MARRIAGE;

(b) THE RESPECTIVE RESPONSIBILITY OF THE SPOUSES FOR THE SUPPORT OF OTHERS;

(c) THE LENGTH OF THE MARRIAGE AND THE EXTENT TO WHICH EACH SPOUSE HAS CONTRIBUTED TO IT;

(d) THE EXTENT TO WHICH THE APPLICANT SPOUSE IS DEPENDENT UPON THE EARNINGS OF THE OTHER SPOUSE, AND THE CAUSES AND REASONS FOR SUCH DEPENDENCY;

(e) THE PROBABLE AMOUNT OF PROCEEDS OF ANY POSSIBLE OR LIKELY PROPERTY SETTLEMENT BETWEEN THE SPOUSES, OR THE ACTUAL OR DETERMINED AMOUNT IF KNOWN;

(f) THE SPOUSES' STANDARD OF LIVING AND THEIR FINANCIAL SITUATION;

(g) THE RELATIVE MEANS AND ABILITY OF THE SPOUSES TO BE OR BECOME ECONOMICALLY INDEPENDENT; AND

(h) THE RELATIVE RESPONSIBILITY OF BOTH SPOUSES FOR THE SEPARATION OR MARITAL BREAKDOWN OR FOR THE REFUSAL OR NEGLECT TO PROVIDE SUPPORT;

AND IF IT BE JUST TO DO SO, THE JUDGE SHALL ORDER THE OTHER SPOUSE TO PAY TO THE APPLICANT SPOUSE PERSONALLY OR FOR HIS OR HER USE TO ANY THIRD PERSON ON HIS OR HER BEHALF, SUCH WEEKLY, OR OTHER PERIODICALLY PAYABLE SUM AS THE JUDGE CONSIDERS REASONABLE, AND UPON SUCH TERMS AND CONDITIONS AS THE JUDGE PRESCRIBES.

JUDGES TO WHOM APPLICATIONS ARE MADE FOR MAINTENANCE ORDERS SHOULD BE DIRECTED TO ITEMS (a) to (h) AS GUIDELINES TO BE FOLLOWED IN SEEKING A JUST SOLUTION FOR EACH INDIVIDUAL CASE, HAVING REGARD TO ALL THE CIRCUMSTANCES OF THE PARTICULAR CASE, AND THE NEEDS OF EVERYONE INVOLVED, BOTH SPOUSES AND CHILDREN, AND WITHOUT GIVING PRIORITY TO ANY OF THE ITEMS AS AN OVERALL PRINCIPLE.

Non-Marital Cohabitation

The majority of the Commission are of the opinion that even unmarried co-habitants should in certain circumstances owe a duty of financial support to each other. Casual encounters having no significant impact on the future lives of the parties ought not to give rise to any such obligation; but unions which produce children, or which are of lengthy duration and resemble marriage in all but legal form should, in the majority's view, create responsibilities similar to those undertaken by married persons.

The views above described might be expressed as follows:

IN THE CASE OF UNMARRIED CO-HABITATION, EITHER PARTY TO THE UNION MAY APPLY TO A JUDGE FOR MAINTENANCE ON THE SAME TERMS AS IF THE PARTIES TO THE UNION WERE MARRIED TO EACH OTHER IF:

(a) A CHILD OR CHILDREN HAS BEEN BORN OR IS LIKELY TO BE BORN AS A RESULT OF THE UNION, OR

(b) THE UNION HAS IMPAIRED THE ECONOMIC SELF-SUFFICIENCY OF THE APPLICANT SPOUSE, EITHER PERMANENTLY OR TEMPORARILY.

Here we propose that unmarried co-habitants may seek maintenance under the same conditions as if married, but subject to two further conditions which are above stated. This proposal imports the fault principle expressed in item (h) on page 22 above. Being so imported, it remains only one of a now longer list of ingredients, and not a major concern in awarding maintenance to an unmarried co-habitant.

The Commission makes these recommendations for a period in Manitoba's history which we hope is developmental and transitional. Our aim is to protect the interests of those men, women and children who are caught in a period of changing values and expectations. At the same time we look toward a future where such protection will not be necessary as social and economic opportunities become equally accessible to both sexes.

Memorandum of Dissent and Minority Position of Mrs. Bowman, Mr. Smethurst and Mr. Muldoon

The majority of the Commissioners think that the goal of individual self-sufficiency after separation or divorce, is an important factor among others, but should not be declared as a primary objective of the new family law. Self-sufficiency, and ending the traditional state of women's dependence in law has been much advocated by those persons and groups who submitted written briefs to the Commission and who made presentations at our public hearings throughout the province.

But many of those strong advocates of the principle would flinch at enacting the legislative expression of that principle in the reformed law. They indicated that now is not the time, because Manitoba society is not ready with adequate lunch-and-after-school programs, and suitable employment opportunities for the separated wife and the divorcee.

We of the minority believe that if now is not the time, then 'the time' might well be never. If the people and Legislature of Manitoba do accept the principle of achieving self-sufficiency as soon as possible after separation and divorce, and are prepared to pay more than just lip-service to it by emplacing it in the law of this province, then Manitoba society will perforce change to accommodate the new realities. Surely, in the social, political and economic functioning of our human species on this planet, most of the 'realities' of these activities are not immutable, but are human-made. (It is, no doubt, quite otherwise in regard to the actual nature and proclivities of our species.) Historically, almost every marked change in law causes some temporary social dislocation or even upheaval until society adjusts to the new norms. Reform is, after all, less violent and more civilized than revolution, and is the ultimate strength of a democratic society. So long as the principle is good and does not run counter to society's other good principles of morality and social values, its enactment can be legitimately described as a reform.

What is the social objective to be expressed in law?

To appreciate the question, one must first consider the subject of this Report, which is 'family law'. In adhering to this subject, as has been stated at our public hearings, we are concerned with the legal rights and obligations which operate between individuals in a family relationship. We have not been discussing the operation of social assistance or welfare entitlements as between classes of individuals and the state. We think that our role is properly restricted to the legal relationships between individuals in the family. Here the questions are how much maintenance can this dependent spouse and these dependent children expect to be levied against the income of the other spouse, and for how long? We are, of course, unanimous in regard to child support. The answers to the question of interspousal maintenance, and the social values in issue, will determine what one may call the 'maintenance profile' of our recommendations. This we believe is properly the first stage in the sequence of identifying and, where useful, legislating societal values. The next stage, which is of a much more partisan and political nature, is to determine how closely social assistance provisions will follow or accommodate the profile of family maintenance law. Will there be, should there be, gaps? In other words, at the point where family maintenance law relieves a private individual from further obligation to support his or her separated or divorced spouse, will there be a necessity

for that spouse to become self-supporting—which some will call a 'gap'—or will the state through its taxation-raised revenues take up the maintenance of that separated or divorced spouse? Graphically, when the time comes, if it ever does, when the law relieves Jones (John or Mary as one chooses) from further obligation to keep on supporting (Mrs. or Mr.)Jones, will the latter have to become self-supporting or shall we taxpayers take up the maintenance where Jones was permitted to leave off, at last? That is a decision probably better left to those who levy the taxes and whose authority to govern and legislate is in the sole discretion of the electorate. They will, of course, be most interested in the proposed 'maintenance profile' or base-line, from which they will or will not require the taxpayers to pick up the financial responsibility for Jones' separated or divorced spouse.

It seems quite cold-blooded to speak in terms of 'taxpayers' and 'financial responsibility', but of course our elected, responsible government which levies the taxes, controls the public purse and pays support to the needy, must also concern itself with human and social values in performing the feat of democratic government. If the Joneses be in their late 30s or early 40s (for example) and if 'sentenced' by law to pay life-long maintenance to the separated or divorced spouse, Jones:

— will or won't be able to afford it;

— will or won't try to evade it;

— will or won't (after divorce) be able to establish a new family with a new spouse.

Should Jones (still equally John or Mary, as we see it) be compelled to pay life-long maintenance? If not, will the maintenance obligation be translated then into an obligation for self-support, or taxpayer support? If the latter, should the taxpayers indiscriminately support even the separated or divorced spouse who can be shown to bear the paramount responsibility for the separation or divorce, or should that responsibility be shouldered by that individual? Whether one speaks of 'paramount responsibility' or 'gross non-contribution' as some of our correspondents did, it comes to much the same thing — a determination of fault and a shouldering of the responsibility, by someone, for the consequences. No matter how insistently one advocates the notion of 'no-fault' maintenance, someone must inevitably bear responsibility.

These questions of competing human and societal values may be of less concern to Parliament, even though it has legislative authority over marriage and divorce, than to the Legislature of Manitoba which has responsibility for social welfare assistance. It is, therefore, pertinent to examine the tentative proposals expressed by the Law Reform Commission of Canada in its Working Paper 12, "Maintenance on Divorce",

published in mid-1975. Although significantly modified in following propositions, that Commission's first proposal was:

> *Marriage per se does not create a right to maintenance or an obligation to maintain after divorce; a divorced person is responsible for his or her own maintenance.*

Without quoting extensive tracts of that Working Paper, it would be appropriate here to extract two companion proposals to the one set out above:

> *The purpose of maintenance on divorce is to provide the maintained spouse with financial support required to meet those reasonable needs recognized by law as giving rise to a right to maintenance during the transition period between the end of the marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance; maintenance on divorce is primarily rehabilitative in nature.*
>
> *A right to maintenance shall continue for so long as the reasonable needs exist, and no longer; maintenance may be temporary or permanent.*
>
> *A maintained spouse has an obligation to assume responsibility for his or her own maintenance within a reasonable period following divorce unless, considering the age of the spouses, the duration of the marriage, the nature of the needs of the maintained spouse and the origins of those needs, it would be unreasonable to require the maintained spouse ever to assume responsibility for his or her own maintenance, and it would not be unreasonable to require the other spouse to continue to bear this responsibility.*
>
> *The amount of maintenance should be determined by:*
>
> *(a) the reasonable needs of the spouse with a right to maintenance;*
>
> *(b) the reasonable needs of the spouse obliged to pay maintenance;*
>
> *(c) the property of each spouse after divorce;*
>
> *(d) the ability to pay of the spouse who is obliged to pay maintenance;*
>
> *(e) the ability of the spouse with the right to maintenance to contribute to his or her own maintenance; and*
>
> *(f) the obligations of each spouse towards the children of the marriage.*

The Law Reform Commission of Canada rejected the notion that either the amount or duration of maintenance should be predicated upon spousal behaviour. Its tentative proposals are

concerned with the corresponding individual rights and obligations of the ex-spouses as between themselves. This limited concern is probably based on the fact that Parliament either has not the constitutional authority or has not tried to exert any such authority, to provide social welfare assistance for a divorced spouse. Nevertheless, the eligibility for assistance and the needs of the divorced spouse are matters within the constitutional competence of the provincial Legislature. We too, confine ourselves to the limited concerns of the inter-personal legal relationships of 'family law'. Its profile once determined, one must next look to both government policy and public policy to provide alternative maintenance, if any.

The second preliminary consideration on the way to formulating a reformed maintenance law is the matter of the socio-legal impact of divorce. Divorce as we know it means the actual dissolution of the marriage in law. Thus, by operation of the invoked law, two spouses during their joint lifetimes may pass from the state of being married to each other to the state of not being married at all. In 1968 Parliament addressed itself to the subject of divorce and enacted the new *Divorce Act* whereby it became legally easier to obtain a decree of divorce than it had ever before been under the previous divorce law of 1857.

Since a decree absolute of divorce had always utterly dissolved the bonds of matrimony in the eyes of the law, it had always been recognized that the two spouses who were so put asunder, were legally free to contract new marriages with respective new spouses. The *Divorce Act* of 1968 did not change that feature of the law, but what it did change was public policy concerning the accessibility of divorce. The new public policy of 1968 asserted that the legal grounds for divorce be widened to render divorce legally easier to obtain and therefore much more accessible. Nowadays there is no life-time problem of one's spouse not 'giving' one a divorce. Even a deserting spouse is now entitled to have a divorce after five years of separation from the deserted spouse. One can no longer decline to marry a *de facto* mate on the conclusive assertion that one's lawful spouse will just never divorce one. Thus, that which was once an iron clad excuse is no longer valid. Now the ground for divorce was not widened merely from adultery to include only five year separation. The 1968 *Divorce Act* prescribed shorter periods of separation and many new behavioural grounds, most of which can be invoked as soon as proof can be marshalled.

As a direct result of the apparently popular reforms of 1968, the incidence of divorce in Canada, and accordingly in Manitoba, increased markedly. In its cited Working Paper 12, the Law Reform Commission of Canada also acknowledge "the accelerating divorce rate". It is often and rightly said that a clear legal right which is too expensive to articulate is simply illusory. And so it must seem with the clear legal right, after

divorce, to enter into a new marriage. More accessible divorce is presenting our society with the new and increasing phenomenon of multiple, serial marriages on the part of individuals. But although an individual may have engaged in multiple serial marriages, he or she is still an individual with one income. If that one income be called upon to support not only a present family, but also the children and ex-spouse of a previous marriage, the clear legal right to re-marry after divorce becomes too expensive, and hence, illusory. Indeed for the overwhelming majority of income earners, supporting just two families (representing only one divorce and only two serial marriages) would be too costly for one income.

These perceptions were illustrated and confirmed for us at the Commission's public hearing in the City of Brandon. A married couple attended, having given notice of their intention to make a presentation. For the husband, theirs was a second marriage, he having two children and an ex-spouse by a dissolved previous marriage. He asserted that he had tried to acquire legal custody of those children on at least two occasions, but had failed to persuade the court. He said that he was content to pay maintenance for the children, but wished that their maintenance had been realistically assessed. It was, he said, ludicrously low, whereas their mother had been awarded generous payments in relation to his income. The husband said that his ex-wife was always quick off the mark to apply for increased maintenance and had done so successfully each time his salary had been incrementally raised. He described his ex-wife's two disparate although both highly paid employment skills, but said she steadfastly declines to obtain employment outside the home. He asked if this maintenance of the ex-spouse should, in law, be a life sentence for him and his second wife. The second wife revealed to us that she and her husband have a young child and that she is employed outside the home. She said that she had attended some of the court hearings on maintenance in which her husband was a party and she noted that the judge seemed to think it important that the two children of her husband's previous marriage should have their mommy at home to look after them all day — a luxury, she noted, which is denied her child because she has to have a job to help to pay to keep the other mommy at home!

Now since Canadian society clearly wants the easier divorce with the concomitant right of multiple, serial re-marriage, its law should make that right real and substantial by abolishing the actual and potential 'life sentence' referred to by our relator. Obviously it does not make much difference whether that 'life sentence' be predicated on fault, gross non-contribution, or need. So long as it can be imposed, it nullifies the right which the Government of Canada proposed and Parliament provided in pursuit of an agreed social value. But since Parliament cannot

compel provincial welfare assistance for those who find themselves in the role of marital economic debris, the statutes of Parliament necessarily merchant in potential 'life sentences'.

It would be anomalous if under provincial law maintenance were to become temporary and transitional upon mere separation, while simultaneously maintenance were to remain potentially life-long under the *Divorce Act*. It is to be hoped that the judiciary in Manitoba would exercise their discretion in interpreting the federal law to conform to the provincial norms. In such event, the Legislature could discern one base-line maintenance profile for our maintenance creditors whether separated or divorced, from which to enact, or not, provincial welfare assistance programs. Our view is that maintenance ought not to be imposed as a potential life sentence on one spouse, nor to be a potential life-long meal ticket for the other. Whether that other spouse should be required to shoulder the responsibility for self-support or whether the province generally should shoulder that responsibility through social allowances is a matter to be resolved by the government and the Legislature.

Thirdly, in considering the social value to be expressed in law, one must consider whether spousal behaviour (ie. fault) should be determinative of the existence, amount or duration of maintenance payments.

Our alternative proposal, without enumerating a list of specific marital offences as is found today both in *"The Wives' and Children's Maintenance Act"* and in the federal *Divorce Act*, does nevertheless retain the fault principle in the expression of 'paramount responsibility'. The proponents of this alternate proposal urge that complete "no-fault" maintenance would be contrary to justice and to human dignity. Like potentially life-long maintenance, no-fault maintenance would encourage evasion by job-hopping, stubborn non-compliance or absconding from the province on the part of the spouse fixed with making the payments. These ramifications, clearly, often go counter to the social goals of maintenance. Transitional maintenance of limited but adjustable duration is thought to be an instrument of greater justice as well as an encouragement toward job-retraining and ultimate independence on the part of those whom society has hitherto generally regarded as the 'weaker' ones.

In dealing with the concept of fault, we are again referring to the notion of individual responsibility. Those who assert that courts cannot actually determine marital fault, surely overlook the fact that our courts, over the years, in exercising jurisdiction in matrimonial cases have long been making just that very kind of determination. Have they recently and suddenly lost that ability? Or is the alleged inability only wishful asserting on the part of recent writers? We think that the judicial process is as apt

for the determination of marital fault as it is for the determination of criminal, tortious or any other kind of fault.

We do agree that in many marriage breakdowns it is absurd to try to weigh marital fault too nicely on fine scales. In many instances the fault or responsibility for the breakdown is so nearly equal that it would be silly to weigh the last scintilla of fault on one side and make that determine the result. When we speak of 'the paramount responsibility for separation or marital breakdown' we are, in effect, discarding the fine scales.

So probably in a majority of cases, no finding of paramount responsibility will be able to be made. And that, we suggest, will be the equivalent of a determination that paramount responsibility does not reside in the conduct of the respondent spouse. (The respondent spouse is either (a) the one for whom maintenance is sought; or (b) the one from whom a reduction or elimination of maintenance is sought. The applicant is the one who initiates the proceedings.)

'Paramount responsibility' is, we think, a more felicitous expression than that which some of our correspondents referred to as 'gross non-contribution': both import the same notion of very great, demonstrable fault for the breakdown of the marriage.

Why retain the fault notion, at all? We think that it would be a positively anti-social law, as well as being a foul example to the children of a marriage for the law to say, in effect, to all spouses:

— you don't have to make any effort to live up to the commitment of loving, honouring, cherishing or being conjugally faithful to your spouse which you solemnly made upon marriage;

— you may positively harass, belittle, deride, assault and make life a Hell for your spouse;

— you may irresponsibly squander, and plunge the family into debt; and

don't worry, for unto you maintenance shall be (a) paid; (b) forgiven, notwithstanding your rotten behaviour.

Is the foregoing not exactly what those who advocate utterly no-fault maintenance want our law to decree? We think that there is no redeeming social value in such a state of affairs. We think that such a law would be degrading and so unjust as to invite understandable evasion.

In addition to the statement of principle expressed on page 14 *ante* the minority posits the following complementary principles:

> *1a. Upon separation, a spouse is obliged to do everything or anything which is lawful and within his or her ability to maintain himself or herself.*

(Note: We do not mention divorce. Judicial interpretation of The B.N.A. Act has accorded to Parliament the ancillary jurisdiction to enact maintenance provisions relative to divorce under the *Divorce Act*. One can only hope that the Parliament of Canada would adopt the above principle or that the judiciary of Manitoba in adjudicating cases under the *Divorce Act* might adhere to this principle.)

The statutory expression of the principles discussed and recommended in this memorandum should be crafted by a professional in legislative drafting, but might take form similar to the following:

Interspousal maintenance

1 *"Infant child of the marriage" means every natural or adopted child of the spouses and any child to whom either the husband or the wife stands* in loco parentis *and who is under the age of 7 years, or, if 7 years of age or over, is in need of special and continuing care and attention.*

2(1) *Where an application for a maintenance order is made on behalf of the spouse of a childless marriage, including one of which there are no infant children of the marriage, or on behalf of a spouse who has not been awarded the custody of any infant child of the marriage, the judge, in determining whether and in what amount maintenance should be awarded shall consider all the circumstances of the case, including* inter alia*:*

(a) the extent to which the applicant spouse is dependent upon the earnings of the other spouse, and the causes and reasons for such dependency;

(b) the probable amount of proceeds of any possible or likely property settlement between the spouses, or the actual or determined amount if known;

(c) the spouses' standard of living and their economic and financial situation;

(d) the relative means and ability of the spouses to be or become economically independent; and

(e) the respective responsibilities of the spouses for the support of others;

and if it be just to do so, the judge may order that the other spouse pay to the applicant spouse personally, or for his or her use to any third person on his or her behalf, such periodically payable sum as the judge considers reasonable, and upon such terms and conditions as the judge prescribes to the end that the

applicant spouse should, if possible, and within a reasonable time, become self-supporting.

(2) No maintenance order shall be made against the respondent spouse under the provisions of subsection (1) unless the paramount responsibility for the separation or marital breakdown or for the refusal or neglect to provide support, resides in the conduct of the respondent spouse.

3(1) Where an application for a maintenance order is made on behalf of a spouse to whom the custody of infant children of the marriage has been awarded, the judge, in determining whether and in what amount maintenance for the applicant spouse should be awarded, shall consider all the circumstances of the case including inter alia:

(a) the relative responsibility of both spouses for the separation or marital breakdown or for the refusal or neglect to provide support;

(b) the extent to which the applicant spouse is dependent upon the earnings of the other spouse, and the causes and reasons for such dependency;

(c) the probable amount of proceeds of any possible or likely property settlement between the spouses, or the actual or determined amount if known;

(d) the spouses' standard of living and their economic and financial situation;

(e) the relative means and ability of the spouses to be or become economically independent; and

(f) the respective responsibilities of the spouses for the support of others;

and if it be just to do so, the judge shall order the other spouse to pay to the applicant spouse personally or for his or her use to any third person on his or her behalf, such periodically payable sum as the judge considers reasonable, and upon such terms and conditions as the judge prescribes to the end that the applicant spouse should, if possible and within a reasonable time before the seventh birthday of any infant child of the marriage whose custody has been awarded to the applicant, become self-supporting.

(2) If, in considering the circumstances expressed in subsection (1)(a), the judge concludes that paramount responsibility for the separation or marital breakdown, or for the refusal or neglect to provide support does not reside in the conduct of the respondent spouse, the judge shall so

certify, and in that event liability under any maintenance order awarded shall endure only so long as the applicant spouse has lawful custody of any infant child of the marriage and not further. (No finding, or silence, on the matter of paramount responsibility shall be in all respects the equivalent of a finding that paramount responsibility does not reside in the conduct of the respondent.)

4 *If no appeal as to a finding or silence on the matter of paramount responsibility whether certified or not certified by the judge be taken in the time and manner provided by law such finding, whether certified or not, shall not afterwards be open to question and the parties shall be bound by the judge's disposition of the matter.*

5 *Notwithstanding the provisions of sections 2(2) and 3(2) regarding paramount responsibility, the following exceptions for rehabilitative maintenance shall be applied without regard to responsibility for the separation or marital breakdown:*

(1) Where by reason of (a) the employment of a spouse's time in and about the home, and/or (b) the spouse's lack or paucity of job skills, it is not reasonably possible for the spouse to become presently or ultimately self-sufficient or where by reason of (a) and/or (b) above a spouse's earning capacities have been significantly prejudiced, then in any such circumstances transitional maintenance, reviewable and renewable by the court, but of not more than 1 year's aggregate duration, may be awarded to such spouse to be paid by his or her marriage partner.

(2) Where the court is satisfied of the applicant's good faith and ability to complete a course of study or training exceeding one year in duration in order to augment the applicant's employment skills and financial self-sufficiency, and if it appears reasonable to do so, the court may extend the duration of maintenance for the purpose of enabling the applicant to pursue such a course for any reasonable period or periods not exceeding four years' aggregate duration beyond (a) the date of disposition of an application under section 2(1), or (b) the period provided in section 3(2).

Since the publication of the Commission's Working Paper, we have given further thought to the matter of rehabilitative maintenance. One year might not always be adequate for job-training in many instances, and so we recommend Section 5,

above. It should be noted, however, in keeping with our views, that under 5(1) those spouses least likely to make anything out of job-training, or most likely to attain their maximum achievement in less than a year, are to be identified early. They should not continue to draw spousal maintenance any longer than necessary if it will serve no useful rehabilitative purposes. Means of support other than those extracted from the respondent spouse will have to be found, and probably through social allowances, unless of course, the respondent spouse bears paramount responsibility for the applicant spouse's plight.

We turn now to the question of maintenance upon the breakdown of non-marital cohabitation or so-called 'common law marriages'.

Considering the much relaxed grounds for divorce enacted by Parliament eight years ago, the social and legal bases for non-marital cohabitation are now largely illusory. It takes only a little time and blood to get married in Manitoba. Therefore, nowadays, persons who enter into non-marital unions do so, in a psycho-social sense, much more 'voluntarily' than was the case prior to the enactment of the *Divorce Act*.

We must consider marriage in its secular sense, shorn of all the sacramental or other religious connotations which many of our people attribute to it. With no antipathy to those many, it is best to consider marriage in this sense, as an institution concerning which laws are enacted, so that we can discern its basic, common essentials. Marriage then is seen as a personal commitment of a woman and a man to each other for mutual kindliness, sexual and social fulfillment, support and fidelity. The Legislature enacts laws concerning its solemnization or formalities so that there shall be no doubt as to the fact of those mutual commitments, so that society and the law can recognize that this man and this woman have in fact committed themselves to each other in marriage, and to the children whom their union begets. Little wonder that marriage can be aptly described as a species of partnership, which in defined circumstances may be dissolved by divorce or suspended by separation.

Some, and evidently more and more, couples live together, but they steadfastly decline to make that mutual commitment which society and its law recognize as marriage. Of these, as it was told to us at the Commission's public hearings in Winnipeg, some feel so alienated from Manitoba society that they will not pander to it by 'playing society's game' through any formal solemnization of their union. Of the non-marital cohabitants, others with a less polemical and perhaps more realistic view of the institution of marriage, simply decline to be committed or bound to a lawful spouse, in order to preserve their freedom. Still others of course enter upon such unions because they are temporarily not free to marry until one or both obtain a decree absolute of divorce from someone to whom an earlier

outstanding commitment is in the process of dissolution. Notionally at least, all of the above mentioned people understand that they are not bound by any legally recognizable commitment to their cohabitants, even though they are responsible to support and maintain children born of their union.

Finally, as we were reminded at the Commission's public hearings, there are some people who just drift (or even rush) thoughtlessly into non-marital cohabitation with no heed at all about the ramifications. Unless it were to become awfully authoritarian or draconian, the law *per se* just cannot preserve such people from their own thoughtlessness.

The concept of individual liberation or liberty is good, but socially chaotic unless it imports individual responsibility.

The minority of the Commissioners recommend an innovation in regard to 'common law' unions which requires only a trace of forethought. Agreements to maintain a 'common law' marriage have traditionally been held to be unenforceable as going against public policy. We recommend that any such agreements between a man and woman who have no outstanding marriage commitments to anyone else and no outstanding support obligations to any spouse or ex-spouse should be enforceable. Such agreements would have to be objectively provable, because if an alleged agreement cannot be perceived by a court, then there is nothing to enforce.

If couples who 'live common law', however, will not make *any* objectively provable commitment to each other, even this highly adaptable, non-marital, informal kind which we recommend, then in our opinion the law should rightly regard them as absolutely uncommitted and under no mutual support obligation whatever. Having made no legally cognizable commitment to each other, the parties are legally free to walk away from each other at any time with no maintenance 'strings' attached. The minority contends that the recommended state of law imports socially desirable individual responsibility to the choice of whether to marry or not, whether to make a commitment or not.

If translated into law, the proposals in this Report would require some extensive recasting of present provisions of law set out in *"The Wives' and Children's Maintenance Act"*, among other statutes. In particular these minority recommendations about non-marital cohabitation would terminate the possibility of long term or lifelong maintenance being awarded under section 6 of that Act.

The majority of Commissioners do agree that maintenance should not be awarded after a "casual encounter". The problem is: how long is "casual" and is it the same length of time in all cases? Although the minority recommends that no maintenance at all should be awarded without prior commitment, we have not

receded from the position which we unanimously share with our colleagues that parents, married or uncommitted, must remain personally responsible to maintain the children whom they procreate.

We have one final observation to make in support of our minority dissent. One can have so-called 'common law marriage', but there can be no 'common law divorce', or separation, or reconciliation under any laws in Canada, at any rate, simply because there is no legal marriage to dissolve or to save as the case may be. The minority asserts that our courts with whatever counselling and conciliation services they offer are, and in truth should be, busy enough dealing with the agonies of real marriage breakdown. They should not have to undertake the burdens of adjudicating thoroughly in the private lives of the uncommitted non-married, as could be the case under the majority's proposal.

The minority recommendations could be expressed in the following or similar statutory language.

Non-marital cohabitation

1 *"Infant child of the union" in relation to non-marital cohabitants or domestic arrangements, including those referred to as "common law marriages", has the same meaning as "infant child of the marriage" as to marriages.*

2 *In regard to any union, cohabitation or domestic arrangement where the man and woman are not married to each other, including those unions referred to as "common law" marriages, if there be no infant children of the union in the lawful custody of either of the parties, neither party to the union, cohabitation or arrangement shall be obliged by law or be ordered to provide support or maintenance to the other party unless one or both of the parties gave some formal objectively provable and subsisting contractual undertaking to do so.*

3(1) *An application for a maintenance order may be made by or on behalf of a party to the union, cohabitation or arrangement to whom the custody of an infant child of the union has been awarded, and the judge, in determining whether and in what amount maintenance for the applicant party should be awarded, shall consider all the circumstances of the case including* inter alia:

(a) *the extent to which the applicant party is dependent upon the earnings of the other party, and the causes and reasons for such dependency;*

(b) *the relative means and ability of the parties to be*

or become economically independent; and

(c) the respective responsibilities of the parties for the support of others;

and if it be just to do so, the judge shall order the other party to pay to the applicant party personally or for his or her use to any third person on his or her behalf, such periodically payable sum as the judge considers reasonable, and upon such terms and conditions as the judge prescribes to the end that the applicant party should, if possible become self-supporting within a reasonable time before the seventh birthday of any infant child of the union whose custody has been awarded to the applicant.

(2) In any event, liability under any maintenance order awarded shall endure only so long as the applicant party has lawful custody of any infant child of the union, and not further, unless the respondent party gave some formal, objectively provable and subsisting contractual undertaking to provide maintenance of longer duration.

We should not wish to incur the risk that this minority dissent might be misconstrued because it relates the existence, age and custody of children to parental maintenance. It is to be remembered that these minority recommendations deal only with *spousal* and *unwed parents'* maintenance, and not with *child* maintenance, which the Commission has considered earlier in this Report in a firm and unanimous package of recommendations.

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The recommendations about the support obligation are a necessary companion to the recommendations in Part II for property sharing between spouses. The two go together.

PART II — PROPERTY DISPOSITION

GENERAL OBSERVATIONS

Many proposals concerning marital property — what it is, and how it should be shared or apportioned — have been expressed in Canada and elsewhere in recent years. A summary of all those which we have considered would be profitless in this Report, because most are too extensive. Most, if not all, are cited in the bibliography which is Appendix B to these Reports.

Marital property regimes come in several variants. The major types are:

— Separation of property
- with or without fetters on freedom of disposition by will
- with or without forced sharing provisions

(Manitoba has this regime with limitations on testamentary dispositions and with some forced sharing provisions.)

— Community of property
- instant or deferred
- joint management or management by the designated 'head' of the family (ie. husband)

(Deferred community comes into operation only upon some event such as, the death of a spouse, divorce, annulment of marriage or separation. As propounded by the Ontario Law Reform Commission property is separate until the occurrence of the specified event.)

— Joint ownership

It is trite, but we believe it is still true, to assert that the family is the basic and most important unit of our society. Even in modern times, some countries by radical social and legal means, have attempted to loosen the bonds of family cohesion and so, have become a kind of social laboratory which can be observed and from which much can be learned. The Soviet Union, in its early days, was one such state. The initial Soviet measures in regard to family law were aimed essentially at promoting the then new emphasis on 'community' as opposed to 'family'. Marriage itself became a mere matter of registration, and divorce simply a matter of demand with no reasons asked. This looseness in the formal requirements of matrimony was carried over into property arrangements where the reform, like *"The Married Women's Property Act"* of Manitoba, imported complete separation of property, despite the drastic consequences for the housewife who did not work for remuneration outside the home. "They hoped that the abolition of not only formal, but actual,

inequality in the earnings of men and women would proceed sufficiently swiftly to make the complete division of income between husband and wife a mere realization of individual freedom, and to render marriage 'a union of the bodies and souls, but not of the fortunes', as a competent foreign observer remarked".[1] This regime did not operate in practice according to its theory, and in the 1926 Code, joint ownership of all property acquired during the subsistence of the marriage was introduced. So it remains today.[2] It has taken us in Canada much longer than eight years to confront the fact that the semantic equality of separation of property is no comfort at all to the separated spouse who owns no property. Many Canadians claim that this is the bitter lesson of *Murdoch v. Murdoch*.

With us, the regime of separation of property was, when established, regarded as a reform! Although that questionable regime has been with us for many years, we have never departed, as a matter of social policy, from the notion that the institution of marriage is the basic cement of the family. Without delving into all the moral, social, legal, canonical and metaphysical attributes of the institution, one can perceive that marriage involves, at least, a formal, legally recognized commitment of a man and a woman to cohabit to the exclusion of others and to be responsible for the nurture, shelter and social formation of the children whom they procreate.

The commitment of the spouses to one another traditionally carried the notions of home and family, together with a sharing of worldly goods. It can be justifiably characterized as a species of partnership. This being so, it is more than merely legalistic, it is also socially rational to assert that the law should provide for some sharing of property between spouses regardless of who paid for it or in whose name legal title stands.

Most of the people who responded to our Working Paper favoured the concept of community of property. Although we proposed one kind of community property regime—deferred community — some of our correspondents strongly urged a different form of community of property. The kind they advocated has two significant characteristics which differ from deferred community of property.

The first characteristic is, quite simply, that the community would not be deferred; it would be instant. This kind of community is familiar to us as the traditional regime, until recent years, of the Province of Quebec. It is also characteristic of

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[1]Schlesinger, R. *Soviet Legal Theory,* London, 1951, pp. 59-60

[2]Sedugin, P., *New Soviet Legislation on Marriage and the Family,* Progress Publishers, Moscow, 1973, pp. 63 *et seq.*

other civil code jurisdictions outside Canada. In this regime the community attaches all the spouses' property instantly upon marriage, as if it were the corporate assets of the newly 'incorporated' spousal 'corporation'.

The second advocated characteristic of a community of property regime is that of the joint or simultaneous management of the community property by the spouses. This is a similar feature of the Washington, and now the California, community property regimes. The states of Arizona, Idaho, New Mexico and Texas, in addition, all have some variety of joint management or dual management as it might more accurately be called in Texas. To carry on the 'spousal corporation' analogy, the shareholdings are equal and both shareholders are the sole members of the board of directors.

We have earnestly pondered these proposals and researched the effects of their enactment in various states in which they have come into force. Our correspondents who urged instantaneous community of property with conjoint management did so, they said, in order to attain spousal equality and security for the non-earning, non-propertied spouse. If it appeared to us that such a matrimonial property regime were the only or the best way of effectively attaining those goals, we should have little hesitation in recommending such a regime. We conclude that we cannot conscientiously recommend for Manitoba a shift from separation of matrimonial property to instant community of property with joint or equal or dual management and control. We are recommending deferred community of property with equal sharing.

In our Working Paper we observed that some people say the deferred community of property regime of the kind there described would create a 'heyday' for lawyers and accountants because of its complexities of accounting and evaluating. Such complexities, we believe, would be eclipsed by those of the instant, jointly or equally or dually managed community of property regime urged by some of our correspondents.

Community of property is a concept. Within the bounds of reason, Legislatures or married couples themselves can construct a variety of regimes differing greatly in detail but all adhering broadly to that concept.

The principal objection to the instant community property regime is its complexity. In our opinion, it would import an unnecessary and undesirable degree of complexity not only into the marital relationship, but also into the relationships of the married couple and the rest of society. An immediate and actual economic partnership might indeed be for some spouses the ideal solution to the problem of spousal equality and security, but for many others it could be an augmenter of frustration and discord.

Any partnership works best when its principals are equal in

knowledge, ability and resolution. Weak or indifferent partners offer an invitation to exploitation which is often irresistible to their more aggressive or ruthless confreres. Internal politicking can frequently be contained within acceptable limits in a business or professional partnership where the partners are bound only by the economics of their particular enterprise. However, in a partnership which embraces the intimate physical and emotional union of marriage as well as the pooled property of the partners, the conflicts of managerial hegemony could be disastrous. A weaker partner could be subjected to virtually all kinds of undue influence and coercion in order to secure his or her consent to a particular disposition of community property; and between a couple of equally strong-willed partners, the most minor of management decisions could become a grinding duel in which the economic tug-of-war would inevitably degenerate into an emotional battle.

The foregoing may sound extreme, but our researches lead us to the opinion that to legislate equal, continuing powers of management and control into all marriages, regardless of the personal and economic bargaining powers of the spouses would be to introduce a fertile breeding ground for rancour and irritation which may well destroy many otherwise good marriages. A marriage union just cannot be wholly equated with the commercial or professional union of business partners. The latter is formed by similarly motivated individuals for the basic purpose of generating and maximizing income through selling the goods or services, which those individuals are skilled in providing. The personal commitments of those individuals are objective and quantifiable; they do not have to meet each other's fluctuating emotional, sexual or social needs and expectations; they do not have to look after one another personally during sickness or convalescence; they do not have to see to the social and moral formation of children and to rear them with mutual love and respect. Moreover, it is most common in commercial and professional partnerships to designate one partner as the managing partner, notwithstanding that all partners share according to their rank and commitment upon dissolution of the partnership. The purpose of the commercial, industrial or professional partnership is narrow and impersonal and if there be a fundamental disagreement, the partnership can be dissolved clinically, and with such despatch as the lawyers and accountants are capable of mustering.

California, which has long had a legal regime of husband-managed community of marital property, conferred equal management rights upon the spouses as of January 1st, 1975. The state legislature seems to have so enacted in order to accomplish two purposes: (1) to accord the wife a present and subsisting interest in the community property so that she could establish a credit rating base of her own; and (2) to meet the constitutional

hurdles to husband-only management. One comment on the new California law concludes:[3]

> The problem of mismanagement has long plagued the law of community property. To be sure, when the marital relationship is harmonious, there is little danger that either spouse will act in derogation of the other's property rights. But when dissolution is in view or when one spouse is incapable of carefully managing the community property, there is a distinct possibility that one spouse will abuse the power of management and interfere substantially with the other's interest in the community property. The legislature could have eliminated this problem by expressly defining the rights and duties of husband and wife as managers of the community estate. This was not done. Thus the judiciary must act if there is to be a remedy for the wrong of mismanagement.

Whether it be equal management or joint management, the literature on such community property regimes abounds with concern over the complexity of dual control. Clearly it is one degree of complexity to provide equal sharing upon termination of the regime, but quite another to provide on-going joint or equal management day to day for 'the duration'. In our opinion, Manitobans do not need these added complexities in their lives.

Coming closer to home, it would appear that the people of Quebec consider that they do not need the complexities of instant community property either. It will be remembered the special marital authority of the husband was a notion adopted by the Quebec Code of 1866. This authority of the husband—and the corollary incapacity of the wife—was imposed without distinction and regardless of the marital regime adopted by the consorts. In 1970 the law of Quebec established a form of deferred sharing called 'partnership of acquests' as the standard legal regime, thus displacing the traditional community of property as the standard regime. Under the Quebec law there is freedom to contract out of the standard legal regime by agreement of the parties. Such agreements are recorded in a central registry and the results of a recent analysis[4] make a telling commentary on the spontaneous popularity of community of property.

> (Translation)
> It should also be mentioned that community of property is not the regime chosen by agreement of the parties in

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[3]Belan K. Wagner, "New Community Property Law", (1974), 5 *Pacific Law Journal*, 723 at 737.

[4]From an article entitled "La popularité des différents régimes matrimoniaux depuis la réforme de 1970", by Michèle Rivet, advocate, Professor of Law, Laval University, published in (1974), 15 *Cahiers de Droit* 613 at pp. 627 *et seq.*

any of the dossiers studied. One cannot thereby conclude that nobody chooses community of property by formal agreement; but the number of those who do adopt it must be very meagre, no doubt less than 1%. This result appears to us to be wholly within the logic of things: community of property, since the 1960s begins more and more to lose adherence; once it is no longer the legal (ie. standard) regime, its popularity can only diminish further.

1.2.2. Results based on (sampling of) marriages

Let us first examine in table form the distribution of marriages according to matrimonial regimes chosen.

TABLE IV

RESULTS BASED ON (SAMPLING OF) MARRIAGES

Year		Marriages	Partnership of Acquests without marriage contract	Separate Property	Partnership of Acquests by notarial agreement or contract	Incomplete
1970	#	31,062	15,766	11,992	2,600	703
	%	100	50.7	38.6	8.4	2.3
1971	#	50,095	19,724	27,121	3,037	213
	%	100	39.4	54.1	6.1	0.4
1972	#	53,780	19,066	31,659	3,055	-
	%	100	35.4	58.9	5.7	-
1973	#	53,400	19,698	29,658	4,044	-
	%	100	36.9	55.5	7.6	-
TOTAL	#	189,000	74,900	100,750	12,551	799
	%	100	39.6	53.3	6.6	0.4

The impact of the partnership of acquests is measurably significant according to table IV: for the year 1973, 44.8% of Quebecois were married under the regime of partnership of acquests; since July 1st, 1970, it is 46.2% of marriages which have the partnership of acquests for their property regime. Because community of property is less than 1%, almost all the other marriages were under separation of property.

Is this relatively high number of partnerships of acquests surprising? If one looks at the figures reported by Me. Roger Comtois which refer, by decade, to the

years of 1932 to 1962 inclusively, in 1962 separation of property amounted to 73% of the number of marriages. According to our figures, in 1972 it was 58.9%. The partnership of acquests has therefore "rolled back" separation of property.

The partnership of acquests thus appears to us to be well established in Quebec.

We think that, during cohabitation, spouses should be as free as reasonably possible to work out together their own arrangements for handling family finance, without the kind of unnecessary legal red tape which invites entanglement and misunderstanding. There is a place for restraint in the case of a squandering spouse, as we shall recommend. However, in regard to the every-day business affairs of the spouses and the family, we think that Manitobans would not willingly accept the complexities of instant community of property.

One must also consider the dealings of the spouses with third parties, who deal commercially and financially with them. Under a system of joint management and control both spouses would have, not only to consent, but to give formal written proof of consent for all but the most minor of transactions involving whatever assets or acquisitions would be included in the definition of community property. Most third parties, for their own protection, would surely insist upon such a cumbersome formality which would slow down the flow of credit and services to the family unit. If, moreover, each spouse were accorded equal and co-extensive control of the community property, independent of the other, as is now the case in California there would be the additional problem of how to cope with simultaneous overlapping transactions involving the same property. The complexities which would be introduced into the commercial life and law of Manitoba by an instant community property system would be matched, if not eclipsed on an inter-provincial level where outsiders dealing with Manitobans would be faced with a property system alien to that generally prevailing in the other common law jurisdictions, and now more and more, even in Quebec.

Moreover, instant community of property generates complications when the regime is terminated either by death or divorce, complications which can be largely avoided we think, by resort to the kind of reforms which we are recommending in this Report. Deferred sharing certainly introduces complexities, too, but we think they would be fewer, and more manageably consonant with our overall legal system, including some progressive laws already in place here, than the community of property variants which have been urged upon us.

In light of the foregoing observations and the more detailed complications which we have studied, we do not think that the

advantages of an instant community of property regime are so great as to elevate it above such considerations. In our opinion, a standard, deferred, community sharing regime would provide advantages just as real and enforceable as those to be found under the community of property regimes in force elsewhere, and would do so with far less complication and disruption.

In our travels and public appearances both as a body and as individuals, we have heard it said that equal sharing is not fair. Are the contributions of the spouses to building up an estate often, if ever, equal? Why then, it is asked, should the spouse who earned the assets be compelled to accord half to the spouse who made no economic contribution whatever? These questions are perfectly reasonable only if one regards the other spouse as an utter stranger, or a servant, or a rented consort. The institution of marriage is, however, a social reality which defies the semantic simplicity of the questions. It is obvious that there are differing but valid ways of contributing to marriage on the part of the spouses. In the view of marriage which we have stated, the spouses perform their respective roles according to their particular talents and mutual arrangements, and for each other's benefit. If those arrangements break down, there may be cause for grievance and the establishing of new arrangements. Or, there may be cause for separation or divorce. If the new arrangements provide that both spouses will henceforth be employed for monetary gain, then any disparity in the purely economic aspects of their respective contributions will diminish in any event. If the breakdown results in separation or divorce, those events provide the ultimate occasion upon which sharing could be effected. All in all, we think it quite just that each spouse be entitled to an equal share of all the economic benefits which accrue during marriage.

Having concluded that equal sharing of the economic gains, if any, acquired during marriage is the proper objective, we are confronted by further questions. Should such sharing, in the absence of agreement, be left to judicial or arbitral discretion? Should it be detailed in legislation? What property, if not all, should be shareable? Again apart from mutual agreement, what are the occasions upon which sharing should be effected?

The sharing which we propose should not be thrust upon married couples in Manitoba, whether they wish so to order their affairs or not. We think that the freedom of spouses to agree upon dispositions which they regard as more suitable should be fostered. As will be seen, we regard the deferred equal sharing of acquired assets as a standard regime for those who accept it and for those who neglect to make other provisions. Even in regard to the marital home which we regard differently from other assets, contracting out of the standard recommended provisions should be the spouses' right.

We have recommended equal sharing of the spouses' estates,

and we now set out what property values and economic gains should be disposed by sharing and how that should be effected.

A. MARITAL HOME

Our first proposal in this regard has to do with the matrimonial home. We define 'marital home' (or, family home, if that be preferred) in the same terms as 'homestead' is defined in *"The Dower Act"*. We would, of course, employ the expression, 'the owner and his or her spouse', but essentially the 'marital home' would mean:

(e) "homestead" means

(i) a dwelling house in a city, town, or village, occupied by the owner thereof and his wife as their home, and the lands and premises appurtenant thereto, consisting of not more than six lots or one block (where the block is not subdivided into lots) as shown on a plan duly registered in the proper land titles office, or registry office, and not more than one acre where the land is described otherwise than by registered plan;

(ii) a dwelling house outside a city, town, or village, occupied by the owner thereof and his wife as their home, and the lands and premises appurtenant thereto, consisting of not more than three hundred and twenty acres; but where the lands and premises of the owner consist of three hundred and twenty acres not in a block, any part thereof in the same section or across a road or highway from that portion thereof on which the dwelling house is situated shall for the foregoing purposes be appurtenant to that portion; and if the lands and premises of the owner exceed three hundred and twenty acres in the same section the homestead shall be the one hundred and sixty acres on which the dwelling house is situated and such other one hundred and sixty acres, being a quarter-section, in that section as the owner designates;

The meaning of this detailed definition has been clarified over the years by judicial interpretation in cases where, for example, the dwelling is part of a store premises[5] is attached subsequently to commercial premises,[6] is a suite within an apartment block,[7] is a

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[5] *In re Ostapowicz Estate* [1938] 1 W.W.R. 609; 46 Man.R.65;[1938]2 D.L.R. 466.

[6] *In re Tarnopolsky Estate* [1944] 3 W.W.R. 203; 52 Man. R.258; [1944] 4 D.L.R. 139.

[7] *In re Ripstein Estate* [1929] 1 W.W.R. 788; 38 Man. R.184.
In re Barrie Estate [1945] 2 W.W.R. 384; 53 Man. R.80.

residential premises within which rooms are rented,[8] to mention but a few. It seems beyond doubt that a condominium unit in which the owner and spouse dwell is included within the definition. That, we propose, is as it should be.

We suggest that in the absence of any contrary agreement between the spouses, the marital home should be and become by standard operation of law the jointly owned property of both spouses. Needless to say, we should expect that no interspousal gift tax would be leviable when the law itself effects such a joint tenancy. Unlike a homestead, which endures only during marriage, the joint ownership of the marital home would not be dissolved by law upon divorce. It would endure just as any joint ownership of property endures, but, we think this joint tenancy should have an additional aspect of durability. It should not be severable by the unilateral conveyance of one spouse in favour of a third party.

Another characteristic of the homestead is that a married person cannot have more than one homestead at the same time.[9] In this regard, the marital home concept which we recommend would differ in that once the joint tenancy crystallizes, it will have no less durability than joint tenancy in which many married people voluntarily take title to their homes at present.

In regard to homesteads, as presently defined in *"The Dower Act"*, a combination of statutory provision and jurisprudence prevents a spouse in Manitoba from unilaterally severing title to co-owned residential property. In the Court of Appeal's decision in *Wimmer v. Wimmer* [1947] 2 W.W.R. 249, it was held that the fact that property occupied by husband and wife as their home is owned by them as joint tenants, or as tenants in common, does not prevent it being a 'homestead' within the meaning of *"The Dower Act"*. Such being the case, a further provision of that statute, section 3(1), is conclusive in preventing unilateral severance of ownership and sale of only one spouse's interest without the co-owner spouse being a party to the disposition. This relates only to homesteads as defined in the Act, and not to any other co-owned real property whether residential or otherwise. We suggest that this feature should be retained in the new concept of the marital home, not only for the duration of the marriage but also after legal dissolution of the marriage. Thus, the marital home could be disposed of only by consent or by court order — apart, of course, from judgments, liens, mortgage proceedings and tax sales.

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[8]*Randall v. National Trust & Guyot* (1954), 11 W.W.R. 385.
Packer v. Packer (1960), 31 W.W.R. 22; (1960), 24 D.L.R. 411.
[9]*Langan v. Ducharme* (1957), 22 W.W.R. 126; 65 Man. R.268.
Re Brown & Thorsteinson (1960), 31 W.W.R. 119.

Now there is no way that peoples' rights will jump right up automatically and assert themselves without human intervention. Just as the title to a homestead today does not necessarily bear any notation to that effect but may if the non-propertied spouse lodges a Dower Caveat, so title to a marital home will not necessarily, without some intervention, reveal itself to be the inseverable joint title of the spouses. The law should provide the non-title-holding spouse with the means to give notice of the character of that residence to the District Registrar and the world at large. As with all joint tenancies, title will pass to the survivor upon the death of one of them unless they have earlier made a joint disposition of their marital home.

Our original proposal in our Working Paper concerning joint ownership of the marital home attracted general approval on the part of those who wrote to us and appeared before us. Among those who appeared was Mr. Gerald O. Jewers, Q.C., Chairman of the Manitoba Branch of the Canadian Bar Association who presented a resolution passed by the Manitoba Bar at its 1975 annual meeting, which is:

> Resolved that the matrimonial home and household furnishings and equipment be deemed as a matter of law to be held in joint tenancy from the date of marriage unless the parties otherwise agree by written agreement executed on independent legal advice at any time.

We mention this resolution only because it concisely typifies the broadly based support which the proposal generated on the part of many diverse groups and individuals. The Bar resolution is actually wider in scope than our recommendation.

This recommendation for instant joint legal ownership of a marital home, at least, should please our correspondents who urged such characteristics for virtually all post-nuptial property of the spouses. After all, it seems clear that the home property which they acquire after marriage is the main material asset, if any, of most married couples. However, we received submissions expressing disagreement with one particular proposal about the marital home concept described in our Working Paper. That disagreement centred on a dwelling which is owned by one spouse prior to marriage, quite possibly as the economic gain from a previous marriage. We were urged to alter our proposal to exempt such pre-nuptial home from the joint ownership proviso. This argument was based not only on the notion of consistency with the treatment of all other property owned by spouses, but also on a compassionate view of widowhood. We have heeded that earnest advice. Although we think that the homestead fetter (ie. no disposition without consent of the non title-holding spouse) should remain as it is, we now conclude that only a dwelling acquired during the marriage should become jointly owned by standard operation of law. A home owned by one spouse prior to

marriage, in which both spouses dwell after the solemnization of their nuptials, should continue to be included within the homestead rules, but not become jointly owned other than by deliberate conveyance on the part of its sole owner, *unless* one of the affianced parties acquired it in contemplation of the marriage which actually later occurs. This proviso contemplates that a widow, for example, who with her late husband had acquired a marital home, would not be compelled by law, upon marrying again, to accord joint ownership of that home to her second husband.

The effect of this recommendation would require that a marital home acquired after the solemnization of marriage be inseverably jointly owned by the marriage partners and that a voluntary disposition of any interest in the home could be effected only by mutual agreement, or by the successful application of one of them to a court to preserve, secure or 'wind up' the property partnership. We think, however, that so long as the marital home be actually occupied as the couple's homestead, its joint ownership should be inseverable on the part of either of the marriage partners alone.

Needless to say, we should not want our recommendation about jointly owned marital homes, if enacted, to become a tax trap for married couples. Few would consider that to be a reform! Accordingly, it is our recommendation that the conferring of joint spousal ownership of a marital home and the paying of mortgage instalments should never be regarded as a taxable, or even reportable gift from the income-earning spouse to the home-making spouse whether that joint ownership be conferred by actual conveyance or by operation of law. It is no gift! It should rather be a matter of public policy buttressed by law.

There is one further proposal which attracted almost universal favour among our correspondents. It concerns a right of continued occupation of the family residence after separation or divorce. Our recommendation in this regard would complete the well-founded provisions of section 19.1 of *"The Wives' and Children's Maintenance Act"* which were enacted in 1970. That section conferred as full a jurisdiction as can be constitutionally wielded by a provincial family court judge in property matters. On the assumption that our property disposition recommendation would, if translated into legislation, be within the prescribed jurisdiction of the Queen's Bench or the County Courts, the plenitude of judicial jurisdiction could be invoked. Accordingly, we recommend that if a separated or divorced spouse who has legal custody of any child of the marriage can persuade the court that continued occupancy of the marital home would be for the benefit of the child or children, the court be accorded a specific discretion to refuse partition or sale of the property and to grant that spouse the right to continue to reside there. One might anticipate that in very many cases such an

order would be granted as a matter of course, on a relatively long term basis. Subsequent changed circumstances might well call for the termination of that occupancy in due time and upon appropriate conditions.

Still disclaiming expertise in legislative drafting, we suggest that the above expressed recommendations might find statutory form in the following or similar expression:

THE MARITAL HOME

1(1) "MARITAL HOME" MEANS A DWELLING HOUSE, OCCUPIED BY THE OWNER THEREOF AND HIS OR HER SPOUSE AS THEIR HOME, WHICH MARITAL HOME IS:

(a) A DWELLING HOUSE IN A CITY, TOWN OR VILLAGE, AND THE LANDS AND PREMISES APPURTENANT [continues as in homestead definition];

(b) A DWELLING HOUSE OUTSIDE A CITY, TOWN OR VILLAGE AND THE LANDS AND PREMISES APPURTENANT [continues as in homestead definition, mutatis mutandis].

(2) "MARITAL HOME" ALSO MEANS A UNIT AND COMMON INTERESTS, WITHIN THE MEANING OF "THE CONDOMINIUM ACT", OCCUPIED BY THE OWNER THEREOF AND HIS OR HER SPOUSE AS THEIR HOME.

2. EVERY LEGAL OR EQUITABLE RIGHT, TITLE AND INTEREST OF A SPOUSE IN A MARITAL HOME

(a) ACQUIRED BEFORE THE SOLEMNIZATION OF THE SPOUSES' MARRIAGE AND IN SPECIFIC CONTEMPLATION OF THE MARRIAGE; OR

(b) ACQUIRED AFTER THE SOLEMNIZATION AND DURING THE COURSE OF THE SPOUSES' MARRIAGE

IS, FOR ALL PURPOSES OF LAW, HELD JOINTLY WITH THE OTHER SPOUSE, WHETHER OR NOT IT IS SO RECORDED IN ANY DEED, GRANT, CERTIFICATE OR OTHER INSTRUMENT OR EVIDENCE OF TITLE, AND THE ACQUISITION OF INTEREST BY THE OTHER SPOUSE WHETHER FORMALLY OR BY OPERATION OF THIS SECTION SHALL NOT BE CONSIDERED, ACCOUNTED OR TAXED AS A GIFT UNDER ANY TAXATION MEASURE OF THE PROVINCE OF MANITOBA.

3. *WHERE THE OWNER OF A MARITAL HOME AND HIS OR HER SPOUSE PROVIDE BY FORMAL AGREEMENT WITH INDEPENDENT LEGAL ADVICE THAT THE DWELLING HOUSE OR CONDOMINIUM UNIT SHALL NOT BE JOINTLY OWNED, THE JOINT TENANCY PROVISION OF SECTION 2 SHALL NOT APPLY THERETO, BUT NOTHING IN THIS SECTION OVERRIDES THE HOMESTEAD PROVISIONS OF* "THE DOWER ACT".

4. *ANY SPOUSE WHO HAS NOT JOINED FORMALLY AS A PARTY TO THE ACQUISITION OF ANY LEGAL OR EQUITABLE RIGHT, TITLE OR INTEREST OF HIS OR HER SPOUSE IN A MARITAL HOME, MAY, UPON FILING OF AN APPROPRIATELY COMPLETED DEPOSITION WITH A MARRIAGE CERTIFICATE OF THE SPOUSES, IN THE APPROPRIATE REGISTRY OFFICE OR LAND TITLES OFFICE, CAUSE THE REGISTRAR TO ENTER INTO THE REGISTER AND UPON THE APPROPRIATE CERTIFICATE OF TITLE A MEMORIAL OF THE DEPONENT SPOUSE'S INTEREST ACCORDED UNDER SECTION 2, AND THE FILING AND ENTRY SHALL BE OF THE SAME EFFECT AS IF IT WERE FORMALLY RECORDED IN SUCH OFFICE THAT THE DEPONENT SPOUSE IS AND HAS BEEN THE JOINT OWNER FOR ALL PURPOSES WITH THE OTHER SPOUSE OF THE PROPERTY DESIGNATED AS THE MARITAL HOME.*

5. *WHERE ANY MARITAL HOME IS HELD BY SPOUSES IN JOINT TENANCY UNDER THIS ACT, EVERY DISPOSITION BY* INTER VIVOS *ACT OF ANY INTEREST IN THE MARITAL HOME BY A JOINT TENANT MADE AT ANY TIME AFTER THE COMING INTO FORCE OF THIS ACT, SHALL BE INVALID AND INEFFECTIVE, INSOFAR AS THAT PROPERTY IS CONCERNED, AND THE JOINT TENANCY SHALL NOT THEREBY BE SEVERED, UNLESS THE OTHER JOINT TENANT IS, FOR THE PURPOSE OF MAKING A DISPOSITION OF HIS OR HER INTEREST OR ESTATE, A PARTY TO THE DISPOSITION SO MADE AND EXECUTES IT FOR THAT PURPOSE.*

6. *WHERE THE MARRIAGE IS DISSOLVED, THE SPOUSE WHO IS BY SECTION 2 ACCORDED A JOINT INTEREST IN THE MARITAL HOME, LIKE ANY OTHER JOINT TENANT, SHALL BE ENTITLED TO PARTITION OR SALE OF THE MARITAL HOME, BUT EITHER SPOUSE HAVING LEGAL CUSTODY OF ANY CHILD OF THE MARRIAGE MAY BE PERMITTED TO OCCUPY THE HOME AND IF THE COURT*

CONSIDERS THAT SUCH OCCUPANCY WOULD BE IN THE SUBSTANTIAL BEST INTEREST OF THAT SPOUSE AND THE CHILD, SALE OR OTHER DISPOSITION OF THE HOME MAY BE POSTPONED UPON SUCH CONDITIONS AS THE COURT THINKS BEST.

7. *EVERY LEGAL OR EQUITABLE RIGHT, TITLE AND INTEREST OF A SPOUSE IN A HOME ACQUIRED BEFORE THE SOLEMNIZATION OF THE SPOUSES' MARRIAGE BUT NOT IN SPECIFIC CONTEMPLATION OF THAT MARRIAGE SHALL BE SEPARATE PROPERTY OF THAT SPOUSE, SUBJECT TO* "THE DOWER ACT".

B. EQUAL DISPOSITION OF POST-NUPTIAL ASSETS

General

We have recommended, to this point, the sharing by joint ownership of the marital home, when acquired by either of the spouses after the celebration of their nuptials. Their house is the major asset, if any, of many families. There are, however, many other couples, both rich and poor who do not own a home. Therefore, one must consider any and all other assets which a married person may own.

Joint ownership imports joint control and management unless these be ceded by one joint owner to the other. In this, joint ownership is a species of instant, jointly managed community of the designated property. We have already noted that we do not favour such a regime for all property of a married couple. Joint ownership seems to us appropriate for the usual major asset - a residence - for which there is a public register of title, and which is an immoveable not frequently bought or sold, and rarely if ever utterly worn out and scrapped.

The family home provides shelter, but not usually profits. It is usually not a commercial, industrial or professional enterprise, although in some instances rooms are rented to lodgers. The spouses' joint right to manage or participate in the operations of a commercial enterprise would be of questionable validity unless both had the business qualifications or other requisite skills. Business, it is said, is business.

Farming and Commercial Enterprises

There is an important question which arises in relation to business enterprises. Would deferred sharing be unduly burdensome to farmers, proprietors of small businesses and other people with substantial property but no ready means of raising the cash to pay the spousal share? The question, of course, presupposes that the spouses involved have not, by mutual agreement, made some other arrangement in the event of separation or divorce.

The land and equipment by which the farming operations are conducted may well be of substantial value, while at the same time the farmer is 'cash poor'. The business assets, too, may be of substantial value, but not readily translated into cash. If it be the only or major productive asset which the owner has it may make no sense to sell it, unless retirement be imminent. To sell off a part of a farm or business, even if possible, may well make less sense, if the remainder be not an economically useful or viable unit. If the spousal share had to be wrenched abruptly out of the farm or business, the above noted considerations would be virtually conclusive. But those considerations diminish significantly if provision be made to permit time in which a spousal share could be paid by instalments, and in some circumstances to account for payment in specie by outright transfer of other available assets, as the equivalent of a payment in money.

One of the briefs we received was submitted by the Manitoba Farm Bureau, "a general farm policy organization which, through its seventeen member organizations, represents the major portion of farm people in Manitoba". Of the Bureau's many cogent responses, three in particular should be noted in this context.

> That all property of either spouse acquired during the marriage should be divided upon separation with certain exemptions such as gifts, inheritances, awards of damages for tort, etc.
>
> That division of property be on a shared 50-50 basis but the Manitoba Farm Bureau supports the position taken by one member of the Commission as stated on p. 56 of the Paper, i.e., "that the court should have discretionary power to vary those provisions whenever it appears fair to do so in light of **extraordinary circumstances** prevailing in a particular case." One of the partners would be required to prove that a 50-50 share would be unfair.
>
> The Manitoba Farm Bureau is on record as supporting division of property on the basis of an "equitable share". We take that to mean a possible divergence from 50-50, according to the circumstances of a particular case.
>
> That "fault" should be only one of the factors considered by the court in deciding upon the division of assets.

We take this to mean general and positive support of the equal, deferred sharing regime suggested in our Working Paper, modified only by extraordinary circumstances in which marital fault would be only one of the factors. We regard these responses as positive because, by definition, the overwhelming majority of particular cases must evince only *ordinary* circumstances, with

the result that "division of property [should] be on a shared 50-50 basis". The amassing of farm land and equipment during marriage is most frequently the result of both spouses' efforts; and even if it were not, when "the farmer takes a wife" (or, depending on the farmer's gender, a husband) the marriage, with the new family it establishes, imports no less social value, is no less a marital partnership than the marriages of city folk. These, we think are decisive considerations. As with the acquisition of assets by urban dwellers, so with the development of a farm; the benefits should not go solely to the spouse who by design, or by tradition, or by indifference, happened to become the sole holder of legal title. Indeed, we observe that the tradition and the indifference are both being progressively overcome by farm spouses. Increasing numbers of farm couples are now taking title as joint owners.

No-fault Sharing

We think that the place for marital fault to be taken into account is in the matter of maintenance, but not in the sharing of property. Indeed, even at present, for the vast number of married couples whose major asset is their jointly owned home, marital misbehaviour is not even considered in the disposition of that asset. Having contracted to become owners "each of an undivided one half interest . . . as joint tenants and not as tenants in common", the spouses share in the partition or the sale proceeds of the property on that basis only. It is true that if the court has no confidence in the reliability of one of such spouses to meet a maintenance obligation that spouse's share of sale proceeds may be sequestered as security for future maintenance, but there is nothing unreasonable in that.

Except for a windfall like winning The Western lottery or a shrewd stock market transaction, it takes time for most people to acquire assets during marriage. Spouses discovering whether their married life together be tolerable or not is also usually a matter of time. The longer they consider it tolerable, if not downright pleasant, the more time there will be in which to acquire assets. If and when one of the spouses concludes that he or she has been treated by the other with "physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses" (to employ the expression of the *Divorce Act*) that could well be the logical and natural time at which to bring about a division of the property acquired to date. If the assets then be substantial, it can surely be said that the time was well spent in an economic sense, if no other. If not, it may well be that the unhappiness of the marriage has suppressed the acquisition skills and earning capacities which will be free to flower once the spouses have each embarked on "a new life" after separation or divorce. The foregoing are to us the compelling considerations on which we base our recommendation that the disposition of post-nuptial acquisitions should simply be equal,

without regard to fault.

Contracting Out of Standard Regime

The equal sharing disposition which we recommend should be the standard regime. It should govern all those who do not enter into a marriage contract, either pre- or post-nuptial. Spouses should be free to choose their own property regime by mutual agreement. To this, however, we propose one caveat: unless a marriage contract be so well drawn that it describes a comprehensive matrimonial regime of the parties' own making, it should be interpreted to be nothing more than a specific variation of the standard regime. This is a sort of legal 'safety-net', such that matters omitted from the marriage contract would be governed by the appropriate provisions of the standard regime.

This notion of opting out of standard statutory provisions is not alien to our law. For example, *"The Devolution of Estates Act"* provides for the disposition of the estate of everybody who does not leave a valid will. It is the 'standard regime', but people are free to make wills if they so choose. With some restrictions, notably those expressed in *"The Dower Act"* and *"The Testators' Family Maintenance Act"*, people are free to make any disposition of their estates which they choose to make by will.

Thus, our recommendation imports an option of a familiar kind. The marriage contract to avoid the provisions of *"The Dower Act"* had been held not to violate public policy,[10] even before the Legislature sanctioned such releasing or contracting out of dower rights "either before or after the marriage", in section 23 of the Act.

Contracting out of the standard property sharing regime should be done, if at all, only with the parties' 'eyes wide open' whether before or after the wedding. We consider it advisable to recommend, as we now do, that in order to be legally valid, an agreement to contract out of the standard regime should (a) be executed only after independent legal advice to each of the parties, the tendering of which advice should be certified in writing on the written agreement; and (b) a copy of the written agreement should be filed in a public registry, like that presently contemplated under section 6(1) of *"The Marriage Settlement Act"*, Cap. M60 of the C.C.S.M.

Although marriage settlements registered under the Act appear to be in the public domain, it may be that people who contract out of the standard regime would wish to keep the details of their arrangements private. On the other hand, the very purposes of such a registry would be (i) to protect the spouses

[10] *Stern v. Sheps et al* (1967), 58 W.W.R. 612 (Man. Court of Appeal); upheld [1968] S.C.R. 834; (1968), 64 W.W.R. 749; 69 D.L.R. 223.

themselves from inter-spousal negligence or fraud in the preservation of a record of their agreement by providing safe, impartial deposit of it; and (ii) to notify third parties whether the spouses' agreement accords more or less freedom to deal with property than is accorded by the standard regime. We think, therefore, that most if not all who conclude such contracting-out agreements would want their arrangements to be verifiable upon a search of the register. Two persons who appeared before us suggested that marriage contracts of this kind could well be included in the computerized register of personal property securities.

If public opinion should demand confidentiality of such agreements, we think that at the very least those marriage contracts which import utter separation of property with utterly no expectation of deferred sharing upon separation or divorce, should be so designated. That kind of designation would tell third parties that either spouse is free to squander or to make transfers of property for low, or no, consideration, without impinging on the right of the other spouse. The designation could be certified by the professional legal adviser. A registered marriage contract with no such certificate would have to be regarded with caution by anyone who sought to deal with one of the parties.

All in all, we think that it would be more practical if the terms of such spousal agreements were in the public domain, and we so recommend. Personal privacy should not be unduly abrogated by this arrangement. After all, marriage contracts will be providing how assets will be disposed and will not necessarily be listing what the assets are. There may even get to be a certain sameness to such agreements, as the years pass.

Memorandum of Dissent and Minority Position of Dale Gibson

I am concerned about the possibility that the new regime will be too easy to avoid by means of individual marriage contracts. It is important, of course, that parties should have the right to choose a different regime for themselves if they wish. What troubles me is that marriage contracts are likely to be signed at a time when the parties are emotionally very susceptible to influence from the other, and unwilling to contemplate the possibility of future discord. In such a state of mind they are poorly equipped to make wise decisions as to their future economic well-being.

It would be very easy at this starry-eyed stage of a relationship for the more aggressive partner to persuade the other to enter a marriage contract abandoning the rights provided by the Commission's proposal. It is highly probable that "standard form" marriage contracts containing terms closely resembling the present regime would come into common use. An unsophisticated bride-to-be might find it very difficult to resist the assurances of her apparently exemplary groom that

she can safely trust him to manage family finances in the interest of them both. When the honeymoon is over and she discovers that her husband is not so fair, responsible and selfless as he had seemed, it will be too late to withdraw her ill-considered signature to the marriage contract.

The law provides for "cooling-off" periods in certain types of consumer transaction in order to give the purchaser an opportunity to recover from the influence of salesmanship before being finally committed to a purchase. There would, I believe, be virtue in similar protection with respect to marriage contracts where, after all, the stakes are much higher. Acquiring a spouse is, admittedly, not quite the same thing as purchasing cookware. There would be disadvantages to allowing one party unilaterally to alter the legal basis of the relationship after the marriage. One of my colleagues described the prospect of "opting out" of a marriage contract after the nuptials as a "time bomb" threatening the future welfare of the marriage, and I acknowledge that such a possibility would be disruptive.

Perhaps, however, some protection from undue influence could be provided in a way that would not be so disruptive. Why could the law not provide that the standard marital regime proposed by the Commission would automatically apply during the first year of every marriage, but could be contractually altered thereafter? In that way the onus would be on the partner who wanted a special arrangement to persuade the other at a time when the other is better able to give the question sober and independent consideration. Such a restriction might be expressed as follows in the legislation:

> *No contract between spouses or prospective spouses with respect to matrimonial property shall be valid unless executed more than one year after the date of marriage.*

Another possible way to protect spouses from ill-considered marriage contracts would be to provide for a discretionary power by the courts to review and set aside contracts on application by the dissatisfied spouse. This possibility will be considered further in a later comment.

Scope of Standard Marital Regime

The Commission has concluded that, except for the marital home discussed earlier, during marriage spouses should be absolutely free to maintain as complete a separation of property as they wish. On the other hand, nothing, including taxation measures, should inhibit spouses from taking title or otherwise registering assets jointly or in common, if such be their wish. Obviously, where title can be formally registered or otherwise objectively demonstrated, the voluntary joinder of the spouses' estates operates much more satisfactorily than any species of legislated community of property. This is because with the

deliberate taking of demonstrable title, there are no 'phantom' rights, titles or interests to plague the parties' dealings between themselves, and with others. Therefore we recommend that during marriage each spouse may be separate as to property. There is little change in that, but the proposed new regime goes further.

We recommend accordingly that the standard regime be one which we have called a deferred community of property. By that we mean deferred equal sharing of the total economic gains realized by either spouse, or both, during the course of their marriage, with certain exceptions which will be specified. The deferral of the sharing would continue until the regime be terminated in the manner which will also be specified in this Report. Basically the property value to be shared upon termination of the standard regime would be the total of whatever assets the spouses have by their joint or individual efforts and good fortune acquired after the solemnization of their marriage.

This pooling of assets for the purpose of equal sharing is logically based on the marriage commitment which the spouses earlier made to each other, 'for better or for worse' in facing the vagaries of life together. Since nothing much is certain in life, the effects of inflation or deflation on the value of the assets will have to be endured as they occur. If an understandable, readily applicable and otherwise appropriate means of rationalizing the effects of inflation or deflation can be devised, as desired by one of the Commissioners, it should be invoked. However, even if the concept of 'perma-bucks' could be accurately applied to the forced sharing of economic gains over the course of years, the application seen by one spouse to be for the better will inevitably be seen by the other to be for the worse.

The designation of the property value to be shared equally by the spouses should be an understandable expression. The Ontario Law Reform Commission designates it as 'the total financial product of the marriage'; and the Alberta Institute of Law Research and Reform calls it 'shareable gains' of each spouse. In our Working Paper we referred to the spouses' *estates* and that term has seemed to be easily and accurately employed by our many correspondents and by those who appeared before us to make oral submissions. We spoke of *residuary* estates, but that adjective seems further removed from colloquial expression than the more indicative term, *shareable*. Sharing is, after all what we are recommending. We therefore propose to refer to that total product or those spousal gains as the combined shareable estate, and when we refer to the shareable value of each spouse's individual gains we shall call it that spouse's shareable estate.

While this recommendation is not so simple as it may seem at first glance, it does have the virtue of conveying to people a close idea of where they stand in relation to property rights. More important, it recognizes the social and familial value of the work

and presence of the spouse who earns no monetary reward for purely spousal, parental and homemaking services while the marriage endures. We refer to this regime, which is a kind of deferred community of property, as the standard marital regime, or S.M.R.

Shareable Estate

Because the standard marital regime cannot begin to take effect earlier than the solemnization of a couple's marriage, the value of property owned prior to marriage cannot reasonably be taken into account in determining a spouse's shareable estate. This principle attracted much support among those who responded to our Working Paper. The inaccessibility of pre-nuptial property serves logic and one other virtue. It protects the widowed, the never-previously-married, and the divorced alike from those who would marry them 'just for their money'. The only estate which is ultimately shareable with a spouse is that which is amassed after the wedding. We think that sharing the value only of post-nuptial gains is the right principle and we recommend it.

The computation of the individual spouse's shareable estate would be worked out as follows:

(a) first the value of all that spouse's property of whatever kind or nature would be determined and totalled, and from it would be deducted all that spouse's liabilities, producing that spouse's net estate;

(b) second, the net estate of the spouse is dimished by any deductions (described later) to which that spouse is entitled, and the amount so remaining is that spouse's shareable estate.

The next stage in the progression is to determine the equal share of each spouse, and it is as follows:

(c) the total of the spouses' shareable estates is the combined shareable estate of the spouses;

(d) each spouse is entitled either to receive a sum of money (or instead, conveyance of title to property of specifically acknowledged value, as may be agreed), or to retain assets, equal to one-half of their combined shareable estates; and

(e) the claim of the spouse with the smaller shareable estate is against the other spouse and is realized by an equalizing payment secured and enforceable by a judgment of the court.

The foregoing is our recommendation of the basic method of deferred equal sharing. More detail is provided under the later heading: Method of Calculation.

In our Working Paper we proposed that the shareable estate

of a spouse should never have a negative value, unless that were attained by deducting debts incurred directly for family maintenance in the form of rent, clothing, food, children's dental work or the like. We think that to be a reasonable proposal, and we recommend that, except for family maintenance debts, all other post-nuptial debts and liabilities be taken into account only to the extent that they could reduce a spouse's shareable estate to zero, but not to a negative value. This then would be the extent of liability of one spouse for the debts of the other in calculating the shareable estate.

In some instances, as we have already mentioned, it could be ruinous to have to make the equalizing payment immediately. We recommend, then, that payment effected according to agreed terms or otherwise by reasonable terms ordered by the court at the time of pronouncing a judgment. We recommend that the maximum time to be accorded for payment of the judgment be 5 years.

Because this judgment for an equalizing payment does not arise from any previous refusal or neglect to pay a debt, it would be unjust if it were treated like any other judgment by credit reporting agencies. We recommend therefore that credit reporting agencies be forbidden to make reference to such a judgment unless it be clearly stated to be a judgment for an equalizing payment, whether or not the judgment debtor be in good standing or in default.

Allowable Deductions from Shareable Estate

Having described the spouses' shareable estates and how they are translated into equal shares through an equalizing payment, we should express our recommendations about excepted property, to which we earlier made passing reference. The value of such excepted property would constitute the deductions from the spouse's net estate, of which the remainder would be the spouse's shareable estate.

Our researches have indicated to us that in many various jurisdictions around the world having some form of community regime, whether instantaneous or deferred, there are inevitably some kinds of post-nuptial acquisitions which are excepted from the community property regime. There are sound reasons for such exceptions.

Where, for example, a gift is made for the exclusive benefit of only one spouse, the intention of the donor is usually respected. It matters not whether the gift be money, real property or a family heirloom. There might well be no gift at all if its value were to be accounted in the recipient spouse's shareable estate. The same can be said of trust benefits intended for the financial security of the beneficiary; or of inheritances of all kinds. Respecting the natural feelings and intentions of the donor, settlor or testator is one major factor here. Another factor, too, is the discouragement

of those who would marry just because the prospective spouse 'is going to come into a big inheritance some day'. Nothing, of course, would prevent the benefactor from conveying the benefit to the spouses jointly, in which case the joint interest of itself renders the value shareable during their joint lifetime.

Because the disposition of wedding gifts sometimes creates *angst*, we specifically recommend that they be subject to the same rules as other gifts. That is, the value of wedding gifts should be shareable, unless it can be demonstrated that the donor intended the benefit of the gift to be that of only one of the newlyweds, in which case it would not be accounted part of that spouse's shareable estate. Frequently, the nature of the gift itself will be determinative of the issue. Thus, a household article, including a piece of furniture, would normally be shareable; but an article of apparel or personal adornment would normally be a non-shareable gift. In the case of a savings bond or the shares of a corporation, the donor's intention would have to be carefully scrutinized and might well be ascertainable from a card or note accompanying the gift.

The consideration of assets such as bonds and shares and the like raises the question of whether income from non-shareable assets ought, itself, to be accounted in the shareable estate of a spouse. We recommend that it should be so accountable, as the general rule. However, in the case of a gift or bequest, the donor or testator should be able to designate not only the asset but also the income from it for the sole benefit of the recipient spouse. Here again the giver's intention should be respected in relation to the income, but only if it be expressed in writing in the will, trust instrument, conveyance or other document relating to the gift.

In our Working Paper we suggested that any capital remainder of a spouse's award of damages for a tort committed against that spouse should be an allowable deduction from the computation of the spouse's shareable estate. Although that principle in its pristine expression attracted a generally favourable response, its implementation involves more consideration.

The straightforward case of damages for personal injuries presents little difficulty. In Quebec, the one Canadian province with a standard deferred sharing regime, such damages are not included in the shareable property. However, the opinions of other law reform bodies differ markedly on how damages are to be treated.

We in Manitoba have particular considerations to take into account. In an earlier Report on family law, our *Report on The Abolition of Inter-spousal Immunity in Tort*, submitted December 19, 1972, we recommended that the law permit one spouse to sue the other for wrongfully inflicted personal injuries as well as for all other kinds of tortious behaviour. Subsequently, the Legislature translated those recommendations into law by appropriate amendments to *"The Married Women's Property Act"*, *"The Tortfeasors and Contributory Negligence Act"* and *"The Criminal Injuries Compensation Act"*, all of which received Royal Assent on May 25, 1973. In view of those earlier and still extant reforms it would be unjust that, in the event of a successful inter-spousal suit, the injured or otherwise wronged spouse should have to share any portion of the damages award with the other spouse who had been, after all, adjudged liable to pay it. We assert that this view should prevail whether the S.M.R. were terminated soon, or long, after the damages were realized. Clearly, any such award should not be accounted part of the spouse's shareable estate. Although no gift, it should be just as exempt as a gift from the other spouse.

We think that the principle above expressed in relation to inter-spousal awards extends logically to tort awards paid by wrongdoers other than the spouse. The pain, the suffering, the impairment, the physical loss if any, or the defamation of character and reputation, for examples, are all essentially personal to the victim. No doubt, a loving spouse would truly and sympathetically share the agony, but that kind of sharing, real and appreciated as it would be, can hardly be quantified through a statutory marital property sharing regime.

The above proposal is, we think, a just one as far as it goes, but it does not wholly dispose of the considerations. Awards for personal injuries especially, often include compensation for out-of-pocket expenses, lost income both actual and prospective, and sometimes diminished expectation of life. Such compensation is almost always specifically quantified if the award be made, and damages assessed, by a court. Not infrequently, however, the damages are paid as a result of negotiation and a comprehensive settlement of compensation claims.

For Manitoba spouses we recommend that all tort awards and settlements be excluded as a general rule except to the extent that damages for personal injury when awarded constituted compensation for actual or prospective economic loss on the part of the spouses as a family unit. We realize full well that our above recommended exception to the exclusion would create some complexity, but the alternative would be, in our opinion, only the

blunt exclusion of all tort awards from computation in a spouse's shareable estate. The balance must favour either complex, deliberate justice or else convenient, less just simplicity. If no rule be enacted, then the balances must be handed over to the judiciary to exercise discretion on a case by case basis.

Life Insurance, Pensions and Annuities

The object of all life insurance and of many pensions and annuities is to transcend life itself. Because of that, and because of inherent features of premiums, cash value and the proceeds of the policy, we think it less confusing to consider these assets separately.

The same questions pertain: what is to be taken into account in computing a spouse's shareable estate; and what is to be designated as an allowable deduction? Here, as in some other considerations, reasonable people in other provinces disagree with each other's opinions and, perforce, with our opinions, too.

Some of the considerations concerning life insurance have been expressed and resolved in existing legislation. For example, Section 15(1) of *"The Dower Act"* provides that a surviving spouse who has not been left 'a one-third share' by will is entitled to receive such share of the deceased spouse's net real and personal property as *together with all moneys paid or payable under or by virtue of any insurance policies on the deceased's life to the surviving spouse or for that survivor's benefit and own use*, equal in value one-third of the deceased's net estate. Thus, the long-standing and still applicable forced sharing provisions of our Manitoba law take into account life insurance proceeds in the sharing of the deceased spouse's estate.

We are convinced that most people consider life insurance and the proceeds of life insurance to be included in the estate which they build up during their married life. So, in the event of the death of the life-insured spouse, insurance proceeds are considered to be part of the security which was intended for the surviving spouse. So, indeed, are such proceeds treated under the cited provision of *"The Dower Act"*, and rightly so. We therefore recommend that when an S.M.R. is terminated by death, then no matter which spouse owns the policy of life insurance, one of two alternatives should apply:

(i) if payable to the surviving spouse, the proceeds should be accounted in computing the surviving spouse's shareable estate; or

(ii) if payable to the estate of the deceased spouse, the proceeds should be accounted in computing the deceased spouse's shareable estate.

We further recommend that where any benefits come to a spouse during the course of marriage, they should be included in that

spouse's shareable property, unless the benefit represents indemnity for personal injuries or some tort caused incident or accident, in which case the rules about damage awards would apply.

We recommend that the value of insurance premiums paid by someone other than one of the spouses be deductible from the shareable property of the spouse intended to be benefitted thereby in the same manner as gifts or bequests.

We also recommend that where the S.M.R. is terminated otherwise than by the death of a spouse, the value of life insurance should be assessed at so much of its cash surrender value as accrued after the solemnization of the spouse's marriage, and that should be accounted as the shareable property of whichever spouse would be entitled to realize that cash surrender value.

Pension plans present more difficulty than life insurance although having some characteristics in common with insurance. Pension rights are of major importance to many Manitobans. The value of these rights often exceeds the value of all of a person's other assets taken together. When an S.M.R. is terminated by divorce, how is it best to share the value of rights in a pension payable to a spouse during the period between retirement and death, which would have then been followed by a survivorship pension to the other spouse? Here it is really the value of incomplete rights which may have to be shared, and frequently long before retirement age!

In view of the importance of pension rights, it is not acceptable simply to ignore them because of the difficulties presented. Nor is it acceptable merely to wish that pension plans bought by married people carried equal and easily severable rights for both spouses. Just as one cannot acceptably ignore the pension rights, so one cannot ignore the termination of the marital regime and decree that the pension plan simply continues, as if the spouses had not parted. A median position consonant with justice, even if not perfect, has to be defined in this instance.

The Ontario Law Reform Commission proposed that the amounts paid by an employee into a pension plan during marriage should be the value attributed to the shareable estate of the contributor spouse. It does seem curious that only the employee's contributions comprise the basis of value, when the employer usually is also making contributions, not as a gift in any sense, but as a contractual feature of the employer's payroll expense of doing business. There are, of course, other pension plans which have no employer contributions whatever as, for example, where the purchaser is self-employed. In this latter case the contributor spouse would be the sole contributor of all amounts paid into the pension plan. With some pension plans it is

possible to identify a present cash value, but it is not so possible with all.

Our answer to the problem will necessarily be a pragmatic one, applicable to pension plans and other kinds of annuities alike.

We recommend that when an S.M.R. is terminated otherwise than by the death of a spouse, an annuity or pension plan should be valued (i) at its cash value, if any, accumulated during the marriage; or (ii) at the total amount contributed during the marriage by the spouse who paid it, if it has no cash value. In both instances the value ought to be accounted in computing the shareable estate of the spouse who is entitled to, or who has paid for, the annuity or pension plan. If the employer's contributions could not be taken or otherwise realized by the employee until retirement age, or as a death benefit, then those employer contributions should simply be 'invisible' and not accounted in sharing upon termination otherwise than by death. In most instances it will be that divorced or separated employee, whose S.M.R. has been terminated, who will complete the pension plan's term by continuing to work until death or retirement. So, in that event the benefit of the employer's contributions will have been 'earned' solely by the employee's continuing to be a contributor until the plan matures one way or the other. This is the pragmatic solution which we recommend.

We also recommend that where an S.M.R. is terminated by the death of a spouse, the value of any benefit, lump sum payment or continuing periodic payments accruing to the surviving spouse should be accounted in computing the shareable estate of that surviving spouse. The value of prospective periodic payments may well have to be estimated by an actuary, because the administration of the deceased's estate should not be postponed on a wait-and-see basis.

Disposition of property upon the death of one of the spouses is the subject of one of our miscellaneous recommendations entitled: Dower and Succession.

Method of Calculation

The recommended standard marital regime is a form of deferred community of property. At its termination, the conditions of which are described later in this Report, account would be taken of the spouses' shareable estates accumulated during the marriage, and sharing would be effected normally by means of the equalizing payment. In that way, the spouses would either receive or retain equal shares of their combined shareable estates. We say that sharing would be effected "normally" by money payment, but in some cases the spouses might agree to, or the court might require, the transfer of title to an actual designated asset, rather than its money value. The method of

computation of a spouse's shareable estate is as follows:

1. VALUE ASSETS

   All assets (except joint interest in marital home) whether real or personal property, of whatever kind or nature, acquired after solemnization of the marriage and of which the spouse is the beneficial owner, including future and contingent interests. In some instances it will be necessary to examine, record and assess the spouse's pre-nuptial assets to determine their net positive value, which would be deducted from the value of all assets, thus leaving the essential value of all assets acquired post-nuptially. If pre-nuptial assets have a net negative value, their deemed value is zero.

2. DEDUCT DEBTS & LIABILITIES

   Just as personal and business assets are to be tallied above, so personal and business debts and liabilities are to be deducted at this stage. This operation produces a net estate.

3. OTHER ALLOWABLE DEDUCTIONS

   These are assets of the spouses which are deemed to be simply 'invisible' and therefore excluded when computing the shareable estate:

   Gifts from the other spouse, unless given specifically as a settlement or endowment intended to augment the recipient's estate and security and thereby to relieve the donor's shareable estate to that extent, in the event of subsequent termination of the S.M.R.

   Gifts and inheritances of personal apparel or adornment and all other gifts, inheritances and trust benefits where the donor's, testator's or settlor's intention is demonstrably to confer the benefit upon the recipient spouse exclusively.

   The income generated by a gift, inheritance or trust benefit where the donor's, testator's or settlor's intention is demonstrably to confer the income upon the recipient spouse exclusively.

   Awards and settlements of damages in tort, except to the extent that the damages are compensation for actual or prospective economic loss on the part of the spouses as a family unit, as distinct from the claimant spouse as an individual.

   The proceeds of an insurance policy and the value of insurance premiums paid by a third party where the payer's intention is demonstrably to confer the benefit of the payment of the premiums or the benefit of the insurance proceeds upon the recipient spouse

exclusively.

4. NET ESTATE MINUS DEDUCTIONS = SHAREABLE ESTATE

   Adding together each spouse's shareable estate produces the combined shareable estate of the spouses, which is to be shared equally.

5. ONE HALF OF THE VALUE OF THE COMBINED SHAREABLE ESTATE IS THE SHARE OF EACH SPOUSE.

6. THE SPOUSE WHOSE OWN SHAREABLE ESTATE IS SMALLER THAN HALF OF THE COMBINED SHAREABLE ESTATE IS ENTITLED TO THE EQUALIZING PAYMENT.

   The equalizing payment may be awarded in a judgment of the court, upon application by either spouse.

The shareable estate of a spouse may be found to be of zero value, but it would be deemed in law not to be of a negative value, even when liabilities and other allowable deductions exceed the value of all assets. The only case in which a spouse's shareable estate could be recognized to be of negative value would be one in which the debts and liabilities which depress it below zero were incurred under the proposed maintenance and support obligations described in Part I.

We should set out, as we shall now do, an example of a valuation of a couple's shareable estates. It will be seen that although property owned by a spouse before marriage is not a shareable asset, it remains important to the computation. This is so because the value of pre-nuptial property, if any, is to be deducted from the value of all assets of a spouse owned as of the date of reckoning the spouses' respective estates for purposes of sharing. If such pre-nuptial assets were not reckoned in computing the total value, but were still deducted from that total, an unfair detriment would be imposed on the other spouse's legitimate expectancy of sharing.

The importance of retaining and including the value of the pre-nuptial assets of each spouse will be seen also in a later passage of this Report in which the Commission considers a remedy for dissipation of a spouse's assets whether pre- or post-nuptial. Although the expectation of sharing relates only to post-nuptial gains, the inclusion of the value of subsisting pre-nuptial assets is essential to a proper computation.

We are here concerned with the net value of the spouses' assets on the eve of their wedding. Here is the example of a hypothetical couple, Mary and John. Mary's shareable estate, at termination of her S.M.R. with John, might be worked out like this:

1.	VALUE ASSETS:		
(a)	Mary owns the lake cottage in clear title	$11,500	
	She has some 'good' pieces of furniture	2,000	
	Has savings and some bonds	6,500	
	TOTAL	$20,000	$20,000
(b)	Before marriage, Mary owned the lake cottage worth $6,000 with a $1,500 mortgage	4,500	
	She had some furniture, enough to furnish a suite, including the particularly good articles	2,100	- 6,600
	THE VALUE OF MARY'S ASSETS		$13,400
2.	DEDUCT DEBTS AND LIABILITIES:		—
3.	OTHER ALLOWABLE DEDUCTIONS:		
	Mary's father gave her one of those bonds 'for her very own' and it is worth		- 1,000
4.	MARY'S SHAREABLE ESTATE:		$12,400

John's shareable estate at termination of the S.M.R. might be worked out like this:

1.	VALUE ASSETS:		
(a)	John owns a car	$ 5,000	
	An insurance policy on his life of which the cash surrender value is	18,000	
	He has paid into a pension plan for ten years in the amount of	12,000	
	He has a power toboggan	3,200	
	Savings and bonds	5,500	
	TOTAL	$43,700	$43,700
(b)	Before marriage John owned an old car $400 on which he owed $100	300	
	A life insurance policy taken out when he was a child then worth	1,500	- 1,800
	THE VALUE OF JOHN'S ASSETS		$41,900
2.	DEDUCT DEBTS AND LIABILITIES		
	Owed on car	3,200	
	Owed on power toboggan	1,000	- 4,200
			$37,700
3.	OTHER ALLOWABLE DEDUCTIONS		
	John's aunt gave him one of his bonds		- 1,000
4.	JOHN'S SHAREABLE ESTATE:		$36,700
5.	COMBINED SHAREABLE ESTATE		
	$12,400 + $36,700		$49,100
	Of which, one-half is the share of each: $24,550		
6.	MARY IS ENTITLED TO AN EQUALIZING PAYMENT FROM JOHN IN THE AMOUNT OF $12,150		

	Shareable Estates		Equalizing Payment		Final Share in Combined Shareable Estate
John	$36,700	*minus*	$12,150	*resulting in*	$24,550
Mary	$12,400	*plus*	$12,150	*resulting in*	$24,550

In the above example, no mention has been made of the marital home, on the assumption that it is jointly owned and its disposition therefore 'takes care of itself' either by the usual agreement to sell the house and share the proceeds equally, or by judicial sale. If the couple had children, then the spouse who had the custody of them might raise the issue of continuing to reside in the house, for determination by the court. Again, if John and Mary had acquired substantial 'equity' in their house approaching or exceeding the equalizing payment in value, Mary might agree to take title in her name alone in order partly or wholly to satisfy the equalizing payment and, of course, any judgment securing it.

Pursuing the above example of Mary and John further, suppose that they had agreed, when their house was first purchased, that one or other would be the sole titleholder. On the supposition that their agreement about the house were just as simple as that, and made no provision for the house to be that spouse's exclusive non-shareable asset, it would be merely one of that particular spouse's owned assets to be taken into account like any other. In that event, the whole amount of the equity would be accounted in the shareable estate of the title-holding spouse.

On the other hand, if in more thorough avoidance of the standard joint ownership prescription John and Mary had expressly agreed that the house was not to be accounted in the computation of shareable assets, it would - if their agreement so provided - be just another allowable deduction. In that event its equity value would be tallied in the titleholder's net estate and could be deducted in accordance with their written agreement just like an allowable deduction. (Note: the house would still have the character of a "homestead", too, unless Mary and John also complied with the provisions for releasing the homestead rights prescribed in *"The Dower Act"*. They would be no less free to do this, if they thought it advisable, than is any married couple today.)

On the further and different assumption that a fond, well-to-do parent had actually given the house to either John or Mary, for exclusive, sole ownership, its value would be an allowable deduction. The same principle would apply if a similarly fond, well-to-do parent had, with the consent of John and Mary, paid off the mortgage for its balance of say, $10,000, demonstrably intending the gift to be for the sole and exclusive benefit of one of the spouses. In such event, whatever proceeds of sale were

yielded, the amount of $10,000 would be an allowable deduction from the shareable estate of the benefitted spouse. Again, had either John or Mary received a legacy intended for one of them exclusively and both had agreed to apply it to their mortgage, the recipient spouse could both do that and preserve the exclusive benefit of the legacy by (a) obtaining the consent of the other spouse, and (b) advisably keeping some objectively provable record of the transaction. If either the donor or the recipient spouse precipitously used the benefit to pay off the mortgage, without getting the other spouse's subsequently provable consent to do so and to preserve the exclusive character of the gift, then, in conformity with the general philosophy of sharing gains, the benefit of the gift would accrue equally to both spouses.

The foregoing observation identifies a principle which we consider to be a necessary feature of the standard marital regime. We recommend, therefore, that it should be a presumption of law, unless the contrary be positively established, that all of the assets of each spouse are shareable. Our colloquial advice then would be: 'If you can't prove it, forget it'. Merely contemplating the alternative amply confirms us in our view.

Memorandum of Separate Opinion of Dale Gibson and Ken Hanly regarding Inflation and Deflation

The Commission's suggestions for evaluating pre-nuptial property and other property excluded from the matrimonial regime assumes that the value of the dollar would remain constant. This is unrealistic, and would, we believe, produce an unfair result for one partner or the other.

Consider the summer cottage referred to above. Its value when brought into the marriage by one spouse was $6,000 and it carried a mortgage debt of $1,500, leaving the owner spouse with an equity of $4,500 at the date of the marriage. At the time of divorce, ten years later, the mortgage has been paid off, and the value has risen to $11,500. The $7,000 increase in equity between marriage and divorce is attributable to three factors: (a) payment of the mortgage, (b) an increase in the intrinsic value of cottage property, and (c) inflation. Whereas the first two items constitute a real increase in the value of the asset during marriage, which should properly be shared by the spouses, the third is artificial. It reflects a decrease in the value of money rather than an increase in actual value. To divide that component of the apparent increase between the spouses would be to reduce the real value of the owner's pre-nuptial equity in the cottage. If, for example, the value of the dollar dropped by 20% between the date of marriage and the date of divorce, the Commission's method of valuation would reduce the owner's equity in the cottage from $4,500 to $3,600 in real terms. The $900 difference would be shared between the spouses. This would be contrary to the principle that pre-nuptial property is not shareable, and

would, therefore, we submit, be unfair to the owner spouse.

If deflation should occur during the marriage, the other spouse would be unfairly affected by the Commission's proposal, because in that case a valuation which took no account of the increased value of dollars would exaggerate the real worth of the owner's pre-marital contribution.

In our opinion fairness requires that property excluded from the matrimonial regime must be valued in terms of some unit that remains constant between the time the property was acquired and the time the regime ends. Enough information about the fluctuations of dollar values over time is now available from Statistics Canada to enable such a calculation to be made. The difference in cost of living index between the date of acquisition and the date of property disposition would probably provide a sufficient guide. An expert could no doubt find disadvantages to using the cost of living index for this purpose, and better guidelines may be available but we are convinced that a valuation of property that took account at least of changes in the cost of living index would be far more just than the Commission's proposal to disregard inflation and deflation altogether.

In short, we submit that the legislation should include a section similar to the following:

> *In determining the value of excluded property account shall be taken of any change in the purchasing power of money between the date the property was acquired and the date of distribution.*

When sharing provisions are to be invoked: Termination of Regime

We have already recommended that couples who are subject to Manitoba law should have the right to contract out of the standard marital regime by an agreement in writing, which may be executed either before or after the solemnization of their marriage. If such an agreement were concluded before their wedding and they never did marry later, the agreement would of course be frustrated, and we recommend that if nothing were done in pursuance of it, the law should treat it as a nullity. (The written agreement could serve as evidence, no doubt, in a suit for breach of promise of marriage and that, we think, is a notion of our law which itself should be scrutinized.)

We have also recommended that any contracting out of the S.M.R., either before or after it had crystallized, would have to be performed only upon independent legal advice, evidenced by the separate certificates of the respective legal advisers. This concept is closely akin to the existing requirements of *"The Dower Act"* in the case of a wife releasing her rights in the homestead. We think it is a salutary requirement, to be applied equally to both husband and wife.

(a) Termination by Agreement

We recommend that the simplest kind of termination of a standard marital regime, with adequate safeguards of independent legal advice and little 'red tape' would be by formal agreement of the spouses. Their written agreement, according to our recommendations, would have to be filed and recorded in a provincial registry of marriage contracts as discussed earlier in this Report.

Such a formal agreement could provide that the parties would be shucking off their S.M.R. either with or without a sharing of their assets to the time at which their agreement was concluded. If there were a sharing provision, and one of them did not comply with it, that would be the timely occasion on which to enforce compliance. Such actions would consist of an application for (i) computation of the combined shareable estate, if not so provided and computed in the agreement, (ii) judgment for an equalizing payment, and (iii) such other relief (injunction, attachment, sequestration) as may be appropriate in the circumstances.

(b) Separation

Legal separation is not divorce in that the marriage subsists in law and precludes either spouse from entering into any form of marriage with another person. Even before Parliament's enactment of the *Divorce Act* in 1968, and more so nowadays, legal separation is a usual prelude to divorce. Indeed the date of a separation agreement, or an order under *"The Wives' and Children's Maintenance Act"* affords good proof of the commencement of the three-year and five-year separation periods comtemplated by the *Divorce Act*. Separation, then, places many couples on the road to divorce, the making of a 'clean break' for themselves and 'a new life' for each of them.

If there were no perceived possibility of reconciliation; and if conciliation leading to a formal agreement to terminate the S.M.R. were equally fruitless: then legal separation would be an apt occasion upon which to invoke the sharing provisions of the standard marital regime by means of court action.

There are instances in which married couples simply stop cohabiting even though they may have no grounds, of the kinds presently prescribed in law, upon which to seek a judicial order or decree. Unless and until equality of grounds for separation be emplaced in the law (for example as is implicit in our recommended mutual spousal support obligation expressed in Part I) a spouse may find himself separated in fact, but unable to be separated in law. This situation could create an undesirable lacuna in an otherwise orderly process of invoking the sharing provisions of the standard marital regime. While one would not wish unnecessarily to precipitate hasty marriage breakdowns, yet there comes a time when it would be unreasonable to keep

either spouse bound into the S.M.R. if there be no viable marriage relationship in fact. We accordingly recommend that either one of the spouses be entitled to apply to the court for termination of the standard marital regime after the two have in fact been living separate and apart for six months, with no reasonable prospect or no definite mutual intention of resuming cohabitation.

We recommend that the application should be permitted on the part of both spouses jointly, or on the part of one alone.

We recommend that the application to the court for termination of the S.M.R. and the awarding of the equalizing payment should be able to be instituted upon:

(a) proof of a separation agreement made by the spouses; or

(b) commencement of proceedings for a decree or order that the spouses be separated, or the pronouncing of such decree or order; or

(c) proof that the spouses have been living separate and apart for a continuous period of six months with no definite mutual intention or no reasonable prospect of resuming cohabitation.

We also recommend that the application for termination should be able to be instituted at any time after the events described in (a), (b) and (c) above, could have been first established, but subject to a limitation period, later described, in the event of divorce or declaration of nullity of marriage. Delay in bringing an application will only increase the complexity of the accounting and make it more difficult for the court to ensure that each spouse is awarded her or his fair share.

We recommend that the court be accorded the discretion to exclude from a spouse's shareable estate the gains achieved by that spouse during a period of separation in which no joint attempts at reconciliation were made. A temporary reconciliation resulting in a resumption of cohabitation of the spouses during a period exceeding ninety days effected any time prior to the pronouncement of judgment for the equalizing payment should have the effect of staying proceedings. Proceedings could then be revived upon the application of either spouse, in which case, the effective date upon which the value of the spouses' shareable estates should be determined would be the date upon which notice of the resumption of the proceedings is filed in court.

(c) Divorce and Nullity

When spouses have separated by agreement or upon court order, they are free to resume the plenitude of their marital status at will. This presents some difficulty in determining when the right to apply for termination of the S.M.R. should expire, if at all. It is clear that the standard marital regime cannot endure beyond

a decree absolute of divorce, because that decree dissolves the marital bond for all purposes of law. But a separation may endure for a long time, even until the death of one of the spouses. Again, a long term separation is likely to end, if not with death, then most likely with divorce, or less likely, with reconciliation of the spouses.

It therefore seems absurd to provide a strictly limited time after separation for bringing an application to terminate the regime. If that time expired, there would then be a hiatus in which no application could be made until divorce proceedings were started, if ever. Such a stagnation of affairs would do nothing good at all for the spouses, the community's respect for the law, or for the courts which have to apply the law.

Once a spouse concludes that the separation is both final and desirable, and that cohabitation will never be resumed, the law should provide every encouragement to get on with the sharing and the terminating of the S.M.R. (We shall make recommendations later in this Report to provide for the instance in which that spouse's conclusion turns out to be wrong.) One such encouragement is the recommended right to permit either spouse to make application to the court. But the law can go only so far in promoting people to exert their rights before the so-called right becomes a positive legal duty, and failure to perform it imports a penalty rather than a benefit. So long as it is *rights* which are being considered, the law can at best provide readily accessible opportunities upon which to exercise them.

An obvious occasion upon which to provide an opportunity to terminate the S.M.R. is upon proceedings for divorce, or nullity of marriage. Indeed, in all logic and reason, a decree pronounced in either kind of proceedings would of necessity terminate a *marital* regime of any description. It is a fact that Parliament under the *Divorce Act* has conferred divorce jurisdiction on the Court of Queen's Bench in Manitoba, and that the court, exercising the powers conferred by Parliament to make rules, has provided by Queen's Bench Rule 708 that "no cause of action except for corollary relief under the Divorce Act (Canada) or for alimony or for the maintenance or custody of children shall be joined with a matrimonial cause". The term "matrimonial cause" includes proceedings for divorce, nullity of marriage and judicial separation.

Now, the prohibition against joining another cause of action must mean that it is not to be expressed in writing on the very same pieces of paper as those employed to articulate the matrimonial cause, because the Court of Queen's Bench in recent years has been pursuing the salutary practice of permitting applications for partition or sale of jointly owned real property to be heard and determined concurrently with divorce proceedings in which the joint owners are involved. We regard this policy as salutary because the law, in consonance with

common sense, leans against a multiplicity of proceedings.

If and when the experimental conferring of all family law jurisdiction upon all Manitoba judges appointed pursuant to Section 96 of *The B.N.A. Act*, which we recommended in March 1973, be carried out, it may well indicate a standard procedure for adjudicating all of a couple's irreconcilable disputes concerning separation, divorce, or nullity of marriage, child custody, maintenance, disposition of the marital home and termination of the S.M.R. all at one hearing. We assert that such a development of itself would constitute a great reform.

Just as a decree absolute of divorce dissolves a marriage in law, a decree of nullity of marriage declares that the married status which both (or at least one) of the spouses intended to be valid is either void from the beginning or is voidable. In either case, it is not a valid marriage. In our opinion, it would not be just to exclude from the S.M.R. couples who thought they were making a legally and socially recognized marriage commitment and intended to do so, but whose marriage attempt turns out to have been abortive. A declaration of nullity is virtually always the product of hindsight. During the relationship, one or both spouses might well have no inkling that they were not entitled to marriage status and, if no contracting out be involved, the sharing provisions should be available when it is discovered that there was no marriage after all.

We therefore recommend that an application for termination of the S.M.R. should be able to be brought for adjudication concurrently with divorce or nullity of marriage proceedings, on the initiative of either spouse. Any law enacted in consequence of our recommendations in this Report should provide for notification procedures to encourage parties in divorce proceedings to apply for termination of the standard marital regime and for judgment for the equalizing payment, concurrently with the divorce or nullity of marriage proceedings.

(d) Dissipation of Property

We are told, according to conventional wisdom, that disagreement over 'money matters' is a major source of marital discord and marriage breakdown. With the standard marital regime, the spouse who has not amassed any significant estate is accorded an interest in expectancy in the gains of the other spouse who may have built up a sizeable estate. Such expectancy is ephemeral at best under the present dispensation of separate property which transcends divorce and annulment. However, it is this very expectancy under the S.M.R. which could make 'money matters' loom large.

We think it likely that termination of the S.M.R., if not by agreement, will most likely be precipitated by 'the unhappy differences' upon which separation or divorce (and nullity)

proceedings are instituted. One can however foresee, perhaps as an incident of a reconciliation agreement, that one spouse would think the time had come to invoke the sharing provisions while not actually wanting to institute separation or divorce proceedings. In an instance of addiction to gambling or other species of extravagance or squandering, one spouse would have good grounds for seeking the security of an equalizing payment. One might speculate that in many instances such action would likely precipitate an action at the instance of the other spouse for separation or divorce, if grounds for the same existed, or might precipitate a worsening of marital relations, but not necessarily so in all instances. There are instances where the alcoholic spouse, for example, finally realizes that he or she cannot be appropriately trusted to manage any money matters involving the family and the other spouse would nevertheless stand by the afflicted spouse if only some proper management could be implemented for family financial security. Many such people cannot live up to an oral agreement concluded with the spouse, but want and need a court order to make them adhere to their undertakings.

We therefore propose that even though still living together either spouse should be entitled to apply to terminate the S.M.R. resulting in judgment for an equalizing payment, upon proof or admission of the other spouse's addiction to alcohol or other drugs, or addiction to gambling of such a nature or extent that there is great risk of dissipation of assets, or the other spouse's squandering of assets in which the applicant has an expectant interest. The above recited dolorous grounds for termination serve to illustrate, but not to limit, the kinds of circumstances we have in mind. Our recommendation which is both broader and more concise is that either spouse should be entitled to apply upon consent, or upon satisfying the court (1) that the other spouse has made or intends to make a substantial gift or transfer of assets for markedly inadequate consideration; or (2) that there is undue risk that the other spouse will dissipate or lose assets to the applicant's detriment.

The law does not and should not concern itself with trifles. Therefore, except in proceedings by consent of both spouses, one would not expect a court to allow the application, where, for example a spouse failed to get a good trade-in allowance on a used car, or sold off through a want-ad some used furniture for less than the expected return. Those matters may not seem to be trifles to the applicant spouse, but objectively and ordinarily, they should not of themselves precipitate termination of the S.M.R. In all events, one would expect the recommended rules to be applied judiciously.

It is all very well to provide that termination of the S.M.R. and sharing of gains may be invoked upon proof of dissipation of property. But what if substantial dissipation occurs before it is

discovered? Grossly irresponsible squandering may go on unrevealed for some time, even where the spouses are obliged to provide financial information to each other as we recommended in Part I of this Report.

On the other hand, one spouse's squandering may be both known and tolerated by the other for many years. One should not be able to convert virtually condoned past dissipation of assets into 'old scores' which remain forever to be settled.

Yet, the more recent the squandering the more likely it figures in the other spouse's anxiety about financial security, and in the unhappy differences pushing the spouses toward separation or divorce.

The feat of balancing the obviation of old condoned dissipations of property against the accounting of recent grievous dissipations necessarily requires somewhat arbitrary proposals. We accordingly recommend that where a transfer for inadequate consideration or an excessive gift is made, the squandering spouse's shareable estate should include the value, if the transfer or gift were made within the six years previous to the time at which the termination of the regime is made effective. Six years is the arbitrary span in this casting of the net.

The net, we think, should cover any person who accepts the gift or transferred property and who knows, or should be taken to know that the donor or transferor is a married person subject to a subsisting standard marital regime, or who did not trouble to enquire astutely. That recipient should have to restore the value to the spouses' combined shareable estates unless it were conveyed with the clear assent of both spouses. This may seem harsh to some, but we think that only a few recoveries would have to be effected in each generation. After all a person, firm or corporation, not being a registered or recognized charity, political party or lottery, should not be entitled to 'play dumb' about the source of substantial gifts or transfers for nominal consideration. We recommend the enactment of appropriate provisions to express the above observations.

(e) The Course of Termination of S.M.R.

We have recommended thus far that the standard marital regime may be terminated upon:

(a) The written agreement of the spouses, with or without court action for an equalizing payment judgment; or

(b) Separation by any legal proceedings leading to either a decree or order; or

(c) Proof that the spouses have been living separate and apart for a continuous period of six months with no definite mutual intention, or no reasonable prospect of resuming cohabitation; or

(d) Divorce or nullity of marriage; or

(e) Application to court on grounds of dissipation of property.

The above-cited events are the occasions on which the S.M.R. may be brought to its end. Two questions are now presented: What is the appropriate time at which the evaluation of the shareable estates ought to be reckoned? How long should an applicant spouse have to invoke the sharing provisions of the standard marital regime?

The Commission considers that the time as of which the evaluation of the spouses' shareable estates ought to be reckoned is 'the beginning of the end'. That delphic aphorism in this context simply means the last date on which the spouses lived together, or the date after which all normal spousal cohabitation ceased, for the last time prior to the commencement of court action for termination of the S.M.R.

Clearly, a written agreement to terminate will be effective as of the date it so provides or, failing that, the date it bears. The written agreement may be brought before the court to secure consent judgment, or it may be the basis of a suit to enforce the equalizing payment it provides in the event of the debtor spouse's default.

In cases of separation, divorce or nullity, once the spouses have ceased to live together as spouses prior to court action being instituted, their respective estates should be conceptually 'frozen' or 'held still' so that the computation can be performed. Naturally they will continue to earn or to spend in reality, and this fact alone is sufficient reason to get on with the sharing proceedings as early as 'the end' is perceived. Some evidence may have to be adduced in order to establish the beginning of the end, and our courts are no strangers to that process.

In a proceeding founded upon the giving away, squandering or other dissipation of a spouse's assets, whether there be subsequent separation, divorce or nullity proceedings or not, the day of reckoning should be (a) the date upon which the application is instituted in court, if the spouses are still cohabiting; or (b) the last date of their most recent cohabitation, prior to instituting the proceedings for termination. One caveat should be imposed here: the value of dissipated assets should also be reckoned by adding it back into the dissipator's estate, notwithstanding the actual day of reckoning. This reaching back should extend to any time within the previous six years before which time the respondent is shown to have been covertly or secretly gifting, squandering or dissipating and when the respondent's estate stood at a greater value, if so, than at the time of commencement of proceedings for termination of the S.M.R.

Of course nothing in law should prohibit the spouses from squandering their estates with the full and demonstrable consent

of both, if they be so inclined. That is their own business no matter how ill advised. However unless the applicant's consent were convincingly proved the value of the squandered assets should be accounted in the respondent's estate. The respondent's responsibility for such value would extend back only throughout the previous six years and not earlier.

Without such provisions as are above expressed, this 'dissipation remedy' would be of meagre utility.

To summarize we recommend that the day of reckoning the spouses' shareable estates should be, in the case of:

(a) Written agreement of the spouses: as of the date which the agreement so provides, or failing such a provision, the date the agreement bears;

(b) Separation, divorce or nullity: as of the date the spouses last lived together as husband and wife prior to the institution of the proceedings for separation, divorce or nullity;

(c) Six months' continuous non-cohabitation: as of the date, at the beginning of the continuous period, on which the spouses last lived together as husband and wife;

(d) Dissipation of Assets: as of the date the spouses last lived together as husband and wife prior to the institution of the proceedings for termination of the standard marital regime, or where the spouses continue to live together as husband and wife, the date of the institution of the proceedings.

Provided that in any case in which either party is shown to have dissipated shareable assets at any time within the six years prior to the day of reckoning, the value of such dissipated assets shall be added into the value of that spouse's shareable estate.

As earlier mentioned, the Commission considers that the sharing provisions should be invoked just as soon as possible after the occurrence of the events which serve as grounds for termination of the S.M.R. It is obvious that sharing is to be effected as of the time the spouses last lived together and not later. Of course, when that day arrives, the spouses or one of them may not actually appreciate that 'today' is, or 'yesterday' was the last day of their lives together. Because of the clear desirability for the individuals concerned and for society at large of achieving a sound reconciliation of marital disputes wherever reasonably possible, some spouses may flinch at precipitating a termination of their standard marital regime right away. Once it is realized that the marriage is dead, the sharing provisions ought to be invoked without delay.

While some spouses come to the realization that their

marriage is dead even before they separate, yet it is only divorce or a declaration of nullity which officially, formally and publicly puts an end to their married status. Needless to emphasize, until divorce or nullity be decreed, the separated spouses are free to resume the plenitude of their marital status at will. The right to apply to the court for the equalizing payment then should remain open so long as the spouses' marriage is not legally dissolved or declared void. The right to commence termination proceedings should be distinguished from the inevitably earlier date as of which the spouses' shareable estates should be computed, described at page 79 as the day of reckoning.

It is only right to give each of the spouses every fair opportunity to bring an action for termination of their standard regime into court, without foreclosing their rights prematurely. On the other hand, the sharing process should not be left hanging around unresolved for a lifetime. If there were to be any time limit for invoking the sharing provisions it ought to start running only upon divorce or nullity. Ideally, at the latest, the sharing provisions ought to be invoked concurrently with divorce or nullity proceedings and be settled at that time.

Ideals are notions of perfection however, and there will inevitably be cases in which it would be unjust that a spouse's right to an equalizing payment be extinguished by pronouncement of a decree of divorce or nullity. For example, the respondent spouse in a matrimonial cause may not have legal advice or be aware of his or her legal rights; indeed, many do not appear at the divorce hearing in court. We therefore recommend that either spouse be entitled to commence court proceedings for an equalizing payment at any time up to and including the first anniversary date of the entry in the court's office of a decree absolute of divorce or of a decree of nullity of marriage, but in ordinary circumstances not thereafter. The foregoing recommendation should be subject to one exception in regard to nullity: any appeal proceedings should have the effect of extending the time until the judgment on that issue is determined, if at all, by the Court of Appeal or the Supreme Court of Canada, or all rights of appeal are exhausted or lapsed.

The Commission considers that an absolute limitation on instituting proceeds for judgment for the equalizing payment would be too harsh in some extraordinary circumstances. There is a provision in *"The Limitation of Actions Act"* for extending the period, but that provision is not appropriate for what the Commission has in mind here. It is therefore recommended that where a person who is entitled to apply for judgment for an equalizing payment

(a) did not know of the dissolution or annulment of his or her marriage until after the expiry of the limitation period, or

(b) was prevented by circumstances beyond that person's control from instituting proceedings within the limitation period,

that person may, upon notice by personal service to the other party to the S.M.R., apply to court at the earliest reasonable opportunity for an order permitting that person to institute proceedings for an equalizing payment and if it appears just in regard to all the circumstances of both parties to do so, the court shall make the order.

Additional opinion of Miss Shack, Mr. Smethurst and Mr. Muldoon

We three Commissioners regard the above recommendation, as it stands, deficient in that it could provide for the proceedings for the equalizing payment to be instituted by some latter-day Enoch Arden many, many years after a decree of divorce or nullity of marriage. We regard such a possibility as undesirable. When a marriage is dissolved in law, all the economic ties should be finally severed within a reasonable time. We think that even in the extraordinary circumstances described in the Commission's recommendation some definite and final limitation of about five years should be imposed, after which, the right to apply for the equalizing payment should at last, lapse. The suggestion of an additional five years in extraordinary circumstances is made only by way of example because no one can pronounce it to be absolutely right. It may be seen to be reasonable in that it would accord a total period of six years for people in the extraordinary circumstances referred to in the Commission's recommendation. In any event some fixed period should be provided. This, we think would be consonant with doing ultimate equal justice to both ex-spouses.

Marital Receivership

Although the Commission has recommended that during the course of a legally uneventful marriage the parties should be separate as to property (except for the marital home, if any), yet the standard marital regime would accord to each spouse an expectant right of sharing which would exhibit some notional similarities to the uncrystallized floating charge which is created by a corporate debenture. In some situations emergencies might well arise in which the process of termination would not be appropriately swift to prevent one spouse from committing acts of dissipation or removal of assets which would deprive the other spouse of the expectant share. Some instrument of legal power should be devised in order to crystallize the dissipating or absconding spouse's estate in order that the sharing process could be effected in an orderly way, without loss.

The power above described should have some or all of the

following characteristics:

— It should be readily invokable in order to obviate the risk of dissipation, transfer, or removal of assets which should remain to be accounted in the combined shareable estates, and which might be sold or ordered transferred toward satisfaction of the equalizing payment;

— It should be capable of crystallizing or 'freezing' the respondent's property including bank accounts upon notice to all who would deal with the respondent in relation to his or her property that they would ignore the overriding power over the estate at the peril of attracting a judgment for debt, damages or contempt of court;

— It should operate as a *lis pendens* does on real property; as an interlocutory charging order does on any government stock, funds, or annuities, or any stock or shares of, or in, a company or corporation in the province; as a writ of sequestration operates against all the other estate or interests of the dissipating or absconding spouse; and as a receiving order pursuant to section 30(1) of *"The Wives' and Children's Maintenance Act"*;

— It should require the respondent's business associates, principals, employers and partners to account for and pay over all net earnings, drawings, wages and salary of the respondent, but it should not authorize the actual managing, operating, or carrying on of the respondent's business or professional undertakings;

— It should be granted by the court on an emergency basis only before judgment, to be confirmed if appropriate for securing a judgment for an equalizing payment, or to be dissolved where the respondent could persuade the court that there would be no risk, or no further risk, of dissipation or absconding.

The above described powers will be seen by some as being draconian, and yet they are not different in extent from those which are regularly confirmed in receivers upon application to the Queen's Bench by holders of corporate debentures. The floating charge accorded by a debenture is created by contractual dealings, and the expectancy of value sharing which would be accorded under the standard marital regime would be created by operation of law. The Commission can perceive no less societal value in permitting a justifiably apprehensive spouse to secure and crystallize a marital floating charge, than there is in permitting an apprehensive debenture holder to secure and crystallize a contractual floating charge on all the assets and undertakings of the corporate debtor.

We should not expect that there would be frequent recourse to

marital receivership because we think that the circumstances in which it would be granted would be rare. In addition we think that the courts would not be easily persuaded to make a marital receiving order, before judgment. Certainly, where the respondent spouse had not committed any act of dissipation of assets, nor of preparation for absconding, we think that the courts simply would not make a marital receiving order. Because of the extent of the power sought, and the drastic nature of its application, clear, cogent evidence would inevitably be required, and would be carefully scrutinized.

A well known English authority on receivers[11] states the objects of appointments as follows:

> A receiver can only be properly appointed for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the persons entitled thereto. The object sought by such appointment is therefore the safeguarding of property for the benefit of those entitled to it. There are two main classes of cases in which the appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realisation, where ordinary legal remedies are defective; and (2) to preserve property from some danger which threatens it.[12]

In regard to the preservation of property, it is stated:

> The second class of cases includes those in which the appointment is made to preserve property pending litigation to decide the rights of the parties, or to prevent a scramble among those entitled, as where a receiver is appointed pending a grant of probate or administration, or to preserve property of persons under disability, or where there is danger of the property being damaged or dissipated by those with the legal title, such as executors or trustees, or tenants for life, or by persons with a partial interest, such as partners, or by the persons in control, as where directors of a company with equal powers are at variance. In all cases within this second class it is necessary to allege and prove some peril to the property; the appointment then rests on the sound discretion of the court. In exercising its discretion the court proceeds with caution, and is governed by a view of all the circumstances. No positive or unvarying rule can be laid down as to whether the court will or will not

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[11]Kerr, *Receivers*. 14th ed. London, 1972.

[12]*Ibid*, p. 5

interfere by this kind of interim protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, it is the common interest of all parties that the court should prevent a scramble, and a receiver will readily be appointed: as, for instance, over the property of a deceased person pending a litigation as to the right to probate or administration. But where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case presents more difficulty. The court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. Where the evidence on which the court is to act is very clearly in favour of the plaintiff, then the risk of eventual injury to the defendant is very small, and the court does not hesitate to interfere. Where there is more doubt, there is, of course, more difficulty. The question is one of degree, as to which, therefore, it is impossible to lay down any precise or unvarying rule.[13]

The rules or guidelines as to the appointing of a receiver in partnership cases bear examination, not only because the Commission has expressed an analogy of the standard marital regime with a partnership, but realistically because there is an actual kind of partnership in community of property which would be deferred under the S.M.R. until the time comes for invoking the sharing provisions. The principles stated in *Kerr on Receivers* are, in part, as follow:

> As the appointment is made for the purpose of preserving the assets pending realisation and of effecting that realisation, the writ should claim a dissolution, but it is not absolutely necessary that it should expressly do so. It is enough if it is plain that it is necessary to put an end to the concern. If this be proved, the case stands upon precisely the same basis as if the action had been brought exclusively for the purpose of the dissolution. The court will, in all cases, entertain an application for a receiver, if the object of the action is to wind up the partnership affairs, and the appointment of the receiver is sought with that view.
>
> If, however, it is doubtful whether there is or is not an unexpired term, a receiver will, having regard to the possible consequences of the appointment if there is in truth no partnership, not normally be appointed, unless,

[13]*Ibid*, pp. 6 & 7.

> of course, there is danger to the assets: so where a partnership is alleged on one side and denied on the other, unless the person in possession of the assets consents.[14]

The question of who should be eligible to be a marital receiver has given us some difficulty. The appointment of some able and disinterested person, nominated by the applicant or agreed to by the parties will surely levy an expense on the parties for the payment of such person's reasonable fees. A banker or chartered accountant would be a likely nominee in such cases.

Avoiding direct cost to the parties through the expansion of the provincial civil service to provide receivers is not at all what we recommend. Other than the provision of judicial services and enforcement facilities, the province has no proper place in this kind of matter. Marital estates in which it would be appropriate to appoint a receiver will never likely be indigent estates or even small estates.

Thus, the only other alternative would be the appointment of the applicant spouse as receiver. So long as the court could be relied upon to filter out vindictive applications, as we believe it could, there would be no conflict of interest in regard to the preservation and maximization of the respondent spouse's shareable estate. Once again, pertinent insights are furnished by the textbook.

> A receiver appointed in an action should, as a general rule, be a person wholly disinterested in the subject-matter; but it is competent to the court, upon the consent of the parties, and in a proper case without such consent, to appoint as receiver a person who is interested in the subject-matter of the action, if it is satisfied that the appointment will be attended with benefit to the estate. Accordingly, in an action to dissolve a partnership, one of the partners is often appointed receiver. In an urgent case the plaintiff has been appointed on his *ex parte* application . . . .
>
> A party to the action will not usually be appointed receiver unless he undertakes to act without salary, though in partnership cases salary is sometimes allowed.
>
> When a party to the action is appointed receiver, he does not thereby lose any privilege belonging to him as such party, nor are his rights as receiver affected by his liabilities as a party.
>
> The appointment of a party as receiver without the consent of the other parties is most frequently made in partnership cases, because in such cases it is likely to be

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[14]*Ibid*, pp. 64 & 65

for the benefit of the estate: if the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the court sometimes appoints him receiver and manager with or without salary according to circumstances. . . .[15]

The appointment of a partner as receiver is evidently not a concept foreign to our legal system. We accordingly recommend that a spouse should be eligible to be appointed as a marital receiver. If the respondent spouse should thereupon be able to persuade the court that the applicant is not a fit person to be a marital receiver, the court would be empowered to replace the applicant as receiver with another person who, by training and experience, would be beyond doubt an appropriate appointee. In such event the court should have the discretion to fix either the respondent or both spouses with the costs occasioned by such replacement and the carrying out of the receiver's duties.

Again, there may be occasions, which we think would be very rare, in which the respondent would consent to the appointment of the applicant spouse as receiver on a rather long term basis. Thus, where the respondent spouse is in the grip of a vice such as alcohol, drug or gambling addiction, acknowledges it or some other lack of financial restraint, and does not wish to be separated or divorced, it should be possible for the applicant spouse, if agreeable, to be accorded more or less long term receivership and management of the respondent's assets and income. In such cases, if any do arise, the respondent's resistance to termination of the regime and the marriage should be weighed as a qualified (but not necessarily conclusive) consent to the other spouse's appointment as marital receiver/manager. Needless to reiterate at length, the court should examine these circumstances most astutely before making the receiving order. Obviously, in such instances, a copy of the receiving order should be filed in the central registry of marriage agreements.

We accordingly recommend the enactment of the marital receivership provisions discussed above, as applicable to the standard marital regime, and to any other species of community of property, if any, which Manitoba couples may adopt by agreement.

Applicability of S.M.R. to Existing Marriages

Thus far, the Commission has recommended that affianced couples should have complete freedom to contract out of the provisions of the standard marital regime before they actually marry, and that married couples, too, should be free to contract out of the S.M.R. at any time they wish to do so.

A contract or agreement is a consensual arrangement, in that it comes into force only if both parties to it be in mutual

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[15] *Ibid.*, pp. 101 & 102.

agreement as to its terms, provisos and conditions. In this regard the best advice is trite, but nevertheless seems to need reiteration from time to time: one should carefully scrutinize the articles of every proposed contract before executing it; and one should decline to execute any contract if the provisions be unacceptable and one will not wish to be bound by them.

It seems clear that one's bargaining position in regard to contracting out of the S.M.R. is stronger before getting married than after the wedding. Yet, we have been told that there are many unsophisticated people who are so eager to get married that they will 'sign anything' just to get into the state of matrimony. That is precisely why the Commission has recommended that no contracting-out agreement should be valid unless it be executed upon and after independent legal advice, so certified by the legal adviser. The above are proposed safeguards for those who would be contemplating marriage and getting married after the time at which the S.M.R. might already have been emplaced in Manitoba law.

Our concern here is with those couples already married when and if the standard marital regime might become a feature of family law in Manitoba. The power of the individual's bargaining position implicit in pre-nuptial contracting out would not be available to either one because they would already be committed, and would be unable to 'back out' if the terms of the agreement were not satisfactory. During the course of our study, we were reminded that some married couples of average to substantial means have made estate plans and arrangements for the disposition of assets in order to minimize the impact of taxation measures which are, in many instances, contrary to the notion of marital partnership and sharing. The importance of such plans and arrangements would of course diminish, if our recommendation to abolish inter-spousal gift tax and succession duties were implemented.

Of course, the Commission has recommended the S.M.R. as a feature of Manitoba family law, because we consider that the sharing provisions would obviate the potential (and in some cases, actual) injustice of the present separate property law. That injustice is just as possible for couples already married as it is for couples who will marry in the future. Therefore we assert that complete avoidance of the standard regime should be available only to married couples who *mutually agree* to avoid it, but not unilaterally to one spouse alone.

After no little deliberation about the equities of the situation, we have come to conclusions which we believe to be the fairest means of treating couples already married when and if the S.M.R. were to come into force in Manitoba. We accordingly recommend that:

(a) A six month period should be provided in the recommended legislation between Royal Assent and the coming into force of the statute in order to accord married couples an opportunity to consider their positions and, if they wish, to obtain legal advice;

(b) if within the first six months of the proposed legislation's coming into force the spouses do nothing under the law to alter their position, they will have thereby come within the provision of the standard marital regime;

(c) if within the first six months of the proposed legislation's coming into force either spouse be dissatisfied with the application of the S.M.R. reaching back to the date of their marriage, that spouse may give to the other written notice in simple statutory form of such dissatisfaction and the standard marital regime will apply to that couple's estate only from the date of its enactment, and the couple will

— be separate as to previously acquired property as as if it were pre-nuptial property; or

— be bound, unless they otherwise agree, by any then existing written agreement regarding the disposition of property, which agreement will be operative and effective only until the date as of which the legislation comes into force;

and thereafter the couple will be subject to the standard marital regime as if their marriage had been solemnized on the date as of which the legislation was proclaimed to be first in force in Manitoba.

(d) upon termination otherwise than by death of the S.M.R. of a couple to whom recommendation (c) applied, their shareable estates should be determined with the proclamation date being substituted for the date of the solemnization of the marriage, and any sharing of the value of property previously acquired during the marriage should be in the court's discretion in awarding an equalizing payment.

Recommendations (b), (c) and (d), it should be noted, are radical. Thus, if a couple who allowed themselves to come within the ambit of (b) had a pre-existing marriage agreement, that agreement would become void and the standard marital regime would govern their estates from the date of their marriage. Where one spouse unilaterally opted for the provisions of recommendation (c), any such agreement would cease to govern

and become void as of the coming into force of the legislation. Only where the two spouses mutually agree, upon independent legal advice, to avoid the S.M.R. would recommendations (b), (c) and (d) be inapplicable to that couple. It should be noted that we recommend in (d) that even the value of property governed by written agreement up to the coming into force of the S.M.R. would, despite the agreement, be exigible to sharing in a judge's discretion if it appeared that one of the spouses were being denied a fair share of the combined post-nuptial assets upon the parting of their ways. In this regard we are not speaking of a judicial discretion which is based primarily on a finding of the spouses' intention once-upon-a-time, and however inarticulate, that the acquired property is for both of them, as noticed in the reports of the *Kowalchuk* case. Although it may not often be invoked, the discretion we here recommend should be thorough-going with power to weigh all the circumstances and actually to equalize, or to come so close to equal sharing as the judge would think consonant with doing justice between the spouses, despite any previous agreement to which only one of them wishes to adhere.

Not satisfied with the present system of separation of property in Manitoba, we think that no economically less secured spouse should have to endure it for the duration of an existing marriage except by informed, formal consent by written agreement executed upon and after independent legal advice. Any spouse who considers that contracting out would be disadvantageous should not lose the prospective benefit of the S.M.R., although benefits which could have accrued before the coming into force of the S.M.R. should be determinable at the instance of either spouse upon notice, as recommended. Thus would the Commission dispose of the thorny question of retroactivity of the S.M.R., in the way which we regard as being the closest possible approach to equal spousal justice.

Memorandum of Dissent and Separate Opinion of Ken Hanly

If the S.M.R. were to apply only to future marriages existing injustices would not be rectified. In section (c) one step is taken toward ameliorating this situation through making the S.M.R. applicable to all marriages after the proclamation of the S.M.R. (Of course through mutual agreement spouses may always opt out.) However, the same article (c) also allows one spouse without the other's agreement to keep as his or her own unshareable property all property he or she has acquired up to the time of the coming into force of the S.M.R. This may create gross injustices. As the Commission said in its Working Paper "If only one spouse regards the new law's effect as being drastic, it may well be just because of the requirement of sharing." There we also said: "This position reasons that if the new regime be truly curative of existing injustices then the disadvantaged spouse of today should not be precluded from access to the more

just laws only because of the other spouse's intractability."

I see no good reason to retreat from this earlier position. There may of course be exceptional conditions under which the resulting 50-50 sharing arrangements would be grossly unjust. This could be rectified through a general judicial discretion as outlined in the dissent of Commissioners Gibson and Hanly at pages 100-1. Given total retroactivity and judicial discretion, sections (c) and (d) become useless complications.

Reconciliation After Termination of S.M.R.

The Commission has recommended that a spouse should be entitled to apply for sharing and the equalizing payment by which sharing would be effected after normal marital cohabitation has ceased. Some provision should be made for cases in which the S.M.R. would be terminated on separation, but before divorce or nullity of marriage were decreed. As we have noted, nothing prevents the spouses from restoring the plenitude of their married status at will while their marriage remains undissolved or unannulled. But, of course, their S.M.R. might well have been terminated at this time while their marriage would subsist, in name, prior to its dissolution.

In some instances the separated spouses might effect a reconciliation after the pronouncement of a judgment for the equalizing payment. If that judgment were simply to be of no further effect upon a resumption of cohabitation for, say, more than 90 days or so, such state of the law might tempt the judgment debtor to 'sweet talk' his or her way back into the good graces, and arms, of the other spouse simply for the purpose of annihilating the judgment debt.

Now, no law which we are recommending would compel people to enforce their rights against others, whether they wish to or not. Therefore, in the situation above described, the enforcement of the equalizing payment could be allowed informally to become dormant if the judgment creditor did not insist upon its realization. However, we recommend that the judgment remain extant unless and until the reconciled couple jointly apply to the court for formal approval of the judgment creditor's renunciation of rights to any balance of the equalizing payment.

If no such application were made, the judgment would remain to be satisfied according to its terms. In such a case the reconciled couple could either contract out of a re-institution of the S.M.R. or, failing such agreement, they would be embarking upon a new standard marital regime. In either case the proceeds of the equalizing payment when and as realized should be regarded as pre-nuptial assets. Having terminated their original S.M.R., they should, in the absence of agreement to the contrary, be regarded as commencing afresh under a new standard marital

regime, but their respective shares from the termination of the original S.M.R. should be treated in law as if they were the separate pre-nuptial assets of each spouse.

Of course, a reconciled couple who had contracted out of the S.M.R. prior to their separation would not then be subject to its provisions. They would, upon reconciliation, revert to their former mutually agreed regime, unless they agreed to terminate that contractual regime, and, if they agreed upon nothing else, they would thereupon be embarking upon the standard marital regime because there would then be no agreement to the contrary in existence.

If an application were jointly made for the court's approval of renunciation of the judgment awarding an equalizing payment, we recommend that approval be granted only upon condition that any money realized or property transferred in part satisfaction of the judgment be and remain outside of any later computation of the creditor spouse's shareable estate, as if it were pre-nuptial assets. Renunciation of the balance might then be approved. The extent of the realization by the creditor spouse would be the same extent by which the debtor spouse's estate would have been diminished. Thus if the reconciliation did not endure, the amount of equalizing payment unpaid by the debtor at the time of the renunciation would have to be regarded equally as if it were pre-nuptial estate. The spouses would have 'started again' at the time of their reconciliation and all their assets prior to that time — including the amount the creditor received in partial satisfaction of the equalizing payment, and the amount of the equalizing payment which would have been renounced — would all be regarded as pre-nuptial assets and deductible as such from the gains realized after that ill-fated reconciliation.

Generally speaking, it would be the better course to have the equalizing payment satisfied after it had been agreed to or judgment for it had been pronounced, even if a reconciliation of marital differences were effected. However, the law cannot sensibly compel the enforcement of rights when people who are entitled to exercise them decline to do so. When a spouse declines to enforce the judgment for an equalizing payment it would be better to renounce it than to let it gather interest for a later oppression of the debtor spouse. Renunciation would operate as a complete satisfaction of the outstanding balance payable and a full discharge of the debtor spouse.

In the case of ordinary judgments the judgment creditor can release the judgment debtor at any time, and usually the latter's solicitor prudently requires and files in court a document called a Satisfaction Piece. This instrument is employed upon payment of the judgment in full as well as upon a negotiated settlement, or upon forgiveness of the amount owing. Because of the nature of the spousal relationship and the greater potential for duress or undue influence, we have recommended that renunciation in

whole or in part of a judgment for an equalizing payment should be effective only upon approval by the court. While expecting that renunciations would be rare, we have however recommended that a renunciation could be sought upon the joint application of the reconciled spouses. A state of anxiety, quite counter-productive to reconciliation would be created if the creditor spouse would neither accept payments against the judgment nor renounce the right to further payments. We therefore recommend two recourses — not mutually exclusive if adopted in sequence — be available to the debtor spouse in the situation above described:

(1) if the creditor spouse declines proferred payments over the course of one year, then upon notice to the creditor spouse, the debtor spouse may apply to the court to declare the judgment satisfied as of the last previous payment made in reduction of its outstanding principal sum and interest;

(2) the debtor spouse may pay into court the whole, or from time to time any part, of the balance of the principal sum and interest, and such payments shall be accounted in reduction of the equalizing payment.

Although we consider that reconciliation after termination, with reversion to a new S.M.R., will likely be of rare occurrence, we think it advisable to provide the above guidelines for sorting out the parties' rights and responsibilities so that genuine reconciliation attempts would not confound either the law or the parties in such an 'on-again-off-again' situation.

Settling in Manitoba and the Applicability of S.M.R.

In recommending a standard marital regime, the Commission has been considering matters which are squarely within the constitutional jurisdiction of the provincial legislature: property and civil rights in the province. However, a provincial Legislature cannot legislate for extra-territorial effect, that is, it cannot make laws to govern people or property outside the province. So it is that Manitobans who own summer cottages in Ontario or Saskatchewan take title, convey and mortgage those properties pursuant to the laws of those provinces and subject to the pronouncements of the courts of those provinces.

If the S.M.R. were enacted as a feature of Manitoba family law, it would be of little concern, if any, to married couples whose ordinary residence is outside the province *unless* and *until* they were to settle in Manitoba. Then such couples would be subject to the law of this province. We think it only fair that married couples taking up residence in Manitoba should enjoy the same rights (and bear the same responsibilities) as married couples who would have been already resident here upon the enactment

of the standard marital regime.

If Manitoba couples have the right to contract out of the S.M.R., then so should the newcomers. If Manitoba spouses already married and resident here, whenever and if ever the S.M.R. be established, have the right to keep their own individual, pre-enactment property out of the regime by giving formal notice, so should the newcomers upon arrival in the province.

Variant, but similar forms of the standard marital regime have been proposed by the Ontario Law Reform Commission and by the Alberta Institute of Law Research and Reform for enactment in their respective provinces. If their proposals be translated into legislation, then those two common-law provinces, in addition to Quebec with its recently enacted 'partnership of acquests' would have standard regimes somewhat similar to the S.M.R. which we are recommending. To married couples moving into Manitoba from those provinces our standard marital regime, if enacted, would not seem alien at all. But, of course, the new Manitobans might well have contracted out of the standard regime, or might be coming into Manitoba from provinces or foreign states in which separation of property is the standard regime and marriage contracts are practically unknown. They, too, should have the opportunity to consider their positions, and have the right to adopt the marital regime which seems best and least alien to them.

Again, if the spouses had made a valid agreement under the law of the place from which they would have come, we know no reason why the law and courts of Manitoba should not also hold their agreement to be valid and enforceable in Manitoba, mutually confirmed in writing upon independent legal advice to each of the spouses. While we have recommended exceedingly narrow scope for unilateral disposition of property, we believe strongly in mutually agreed dispositions.

The Commission therefore recommends for already married couples who establish their ordinary, habitual residence in Manitoba, that

(1) their existing marriage contract or agreement in writing, if any, should determine their marital property regime in Manitoba, provided that within one year of their establishing their ordinary, habitual residence in Manitoba they re-confirm it (with or without amendments) upon and after the obtaining of independent legal advice by each of the spouses;

(2) if, within one year of the couple's establishing their ordinary habitual residence in Manitoba, they have not mutually confirmed any existing contract made

elsewhere, and if either spouse be dissatisfied with the application of the S.M.R. reaching back to the date of their marriage, that spouse may give the other written notice in simple statutory form of such dissatisfaction and the standard marital regime will apply to that couple's estate only from the date of their establishing such residence in Manitoba; and the couple will be bound, unless they otherwise agree, by their then existing written agreement regarding the disposition of property, which agreement will be operative and effective only until the date of establishing such residence; and thereafter the couple will be subject to the standard marital regime as if their marriage had been solemnized on the date on which they established their ordinary, habitual residence in Manitoba;

(3) if the spouses have no written marriage contract or agreement, they shall become subject to the standard marital regime, which shall be conclusively deemed to have commenced on the date of the solemnization of their marriage; provided that

— if, within one year of, but not later than the spouses' starting their ordinary habitual residence together in Manitoba, either spouse be dissatisfied with the application of the S.M.R. reaching back to the date of their marriage, that spouse may give to the other written notice in simple statutory form of such dissatisfaction and the standard marital regime will apply to that couple's estate only from the date of their establishing their ordinary habitual residence together in Manitoba, and the couple will be separate as to property as if their marriage had been solemnized on that date;

(4) upon the termination otherwise than by death of the S.M.R. of a couple to whom recommendations (2) and (3) applied, their shareable estates would be determined with the date of establishing said residence in Manitoba being substituted for the date of solemnization of their marriage and any sharing of the value of property acquired prior to establishing their residence in Manitoba should be in the court's discretion in awarding an equalizing payment.

The foregoing recommendations are identical in thrust with those which we earlier expressed in regard to couples already married when and if the S.M.R. be enacted in Manitoba. They should be read with the same understanding of the ramifications

as to alteration of the present law as we expressed at the conclusion of those earlier recommendations. To this point we think that we have not yet over-emphasized those ramifications.

The judicial discretion recommended here for any sharing of the value of assets acquired prior to moving into Manitoba, would be exactly the same as recommended in the case of Manitoba spouses already married when the new law might be proclaimed in force. There might be no sharing at all, or the shares, if any, might be anything but equal. In exercising judicial discretion within this narrow scope of cases, the court should (if the spouses came before it for termination of the S.M.R.) consider whether they, or either of them would have arranged their estates differently if they had realized, while the shareable gains were being made, that their estates would wind up, and be wound up, under a deferred sharing regime. Since discretion is being recommended for the limited numbers of cases anticipated, the court should give effect to those rare and extraordinary cases in which one or other spouse made utterly no contribution whatever, by any definition, either to the spouses' married life together or to the acquisition of the shareable gains.

More important, however, would be the intent and expectation of the spouse who served the notice within one year of the couple's settling in Manitoba. Was that spouse a willing immigrant? Were the couple's marital relations already strained? Is there good reason to order the equal sharing of the value of those previously acquired assets, or not? The exercise of discretion by an array of different judges in such matters could generate an unsatisfactory state of affairs, but it would be fairer to the notice-giving spouse than to be forced into a full, equal and completely retro-active sharing regime in this new province of residence, like it or lump it.

Memorandum of Dissent and Separate Opinion of Ken Hanly

The same reasons apply here as for the earlier dissent at pages 89-90. If we truly believe this new regime is more just than other regimes why not rectify already existing inequalities? If this does, in exceptional circumstances, cause gross injustice, judicial discretion may be invoked.

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Of course people who move into Manitoba may continue to own real estate in their province of origin or in another province, just as some lifelong residents of Manitoba own realty in other provinces. As previously noted, disposition of realty is effected through the laws of the province in which the realty is located. Therefore, a Manitoba court, in awarding an equalizing payment could not purport to deal with the title to real estate in, say, Saskatchewan. However, it is worth noting that the equalizing payment represents a share of the money value of a spouse's shareable estate and not necessarily the disposition of any particular asset. Thus, the judgment is for a sum of money, and

this is precisely the kind of judgment referred to in *"The Reciprocal Enforcement of Judgments Act"*. Both territories and all provinces of Canada, except Quebec, are reciprocating states for the purposes of the Act, as are three states and two territories of Australia. Having to apply to register a Manitoba judgment for enforcement in another province or either of the territories is one of the small prices we pay for Confederation, but if the assets be worth pursuing, it is a reasonable - and unavoidable - price. Judgment for an equalizing payment is seen then to be the most effective - although never perfect - instrumentality for securing a spouse's share, whether the spouse be a native or immigrant Manitoban.

Judicial Discretion

The Commission has recommended that in the cases of already married couples, either spouse who dislikes complete retro-activity of the S.M.R. could give notice to that effect.

In two situations, one of temporary duration (ie. spouses already married and resident in Manitoba at the S.M.R.'s proclamation into force) and one on-going (ie. couples from another jurisdiction settling in Manitoba) we have reluctantly recommended the application of judicial discretion in any claimed sharing of the value of previously acquired gains. We have done so to moderate the compulsory imposition of a new standard marital regime as a gesture of fairness to the spouse who could not secure agreement to continue along under a pre-existing marriage agreement or under the present legal regime of separation of property. We have done so reluctantly because we think that when the court has a discretion, each party will inevitably attempt to adduce evidence of his or her virtues and lifestyle, and evidence of the other spouse's vices and indifference, in order to induce the judge to exercise favourable discretion and thereby depart from equality of sharing.

The object of our main recommendations is to produce, with as much certitude as is possible, equal shares of the value of the combined shareable estates, built up during the course of marriage whether of long or short duration. We have therefore recommended the division of material wealth (whether great or little) which can be impersonally evaluated and clinically divided, once for all time.

The social policy which we are propounding is that in relation to a couple whose marriage has broken down, the one spouse would never have to part with more, and the other spouse would never have to accept less, than one-half of their combined shareable estates. It would not be surprising in a commercial or professional partnership, for example, that whereas the slothfulness or poor business judgment of one partner would be the cause of the other partner taking steps to terminate the partnership, yet the deficient partner would nevertheless still be

entitled to his or her agreed upon share of the value of the partnership assets. One would not expect those partners to go running off to some tribunal to complain about what a difficult partner each other had been! The assets are divided and each of the former partners is free to meet life's exigencies alone or in partnership with others if willing and able to do so.

In this regard, we favour the recommended social policy being expressed in legislation so that it will be carried out as simply as possible as people expect it to be carried out with no surprise triumphs or wrenching disappointments based on technicalities or the inarticulate major premises of this judge as distinct from that judge. To paraphrase Mr. Justice Pigeon in a recent case in the Supreme Court of Canada,[16] when courts deal with statutory provisions it is their duty to apply the law as the legislature has written it, whether for better or for worse. However when in the realm of judge-made law, one judge's sense of justice may be bound up with technicalities which do not fetter another judge's view of justice, and which moreover may not accord with the social policy of the law.

Some say that merely according to the court a wide judicial discretion in matrimonial property dispositions would simplify the law and would render resort to it less expensive. That may be only a vain hope. Surely, sooner or later, spouses with justiciable property disputes would be retaining accountants and assessors to produce evidence concerning equity values, gains, deductions, and the like. In such circumstances the courts would have to develop a body of jurisprudence which, over the course of a few years or decades, would be of similar complexity to the concepts already expressed by law reform agencies. Generations of insistent litigants, creative lawyers and innovative judges could render the law most uncertain of application in any particular case. One possible advantage of judge-made law is that it would, or could, be responsive to changing societal attitudes, whereas legislation remains in place until amended or given variant interpretations by the courts. In any event judicial response in the eyes of some can equally be seen to be judicial reaction in the eyes of others. So the possible advantage may well be merely illusory.

More precise laws, after a relatively short testing period, could very well induce contending spouses to forge a mutually acceptable settlement for themselves rather than endure the trauma and expense of requiring a court to impose a similar

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[16] Dissenting on behalf of himself, Chief Justice Laskin and Messrs. Justices Spence and Beetz in *Town of Grandview v. Doering* [1976] 1 W.W.R. 388 at 402.

result, after all.

In 1963, the New Zealand parliament enacted marital property sharing provisions which accorded a wide judicial discretion, but directed the courts to have regard to the non-monetary contributions of a spouse in awarding shares upon the breakdown of the marriage. It should be noted that New Zealand is a constitutionally unitary state and therefore its legislature can enact any law it chooses to make; it is not confronted with the jurisdictional membranes which prevent the provincial legislatures and the Parliament of confederated Canada from legislating outside their respective constitutional bounds. In our view the New Zealand legislation got side-tracked from its intended social policy because of the interpretation which the judiciary, exercising a wide discretion, placed on it.

Here are some commentaries on that situation which were expressed by New Zealanders.

> If nothing else, the recent Court of Appeal decision of *E.v.E.* [1971] N.Z.L.R. 859 has drawn attention to some of the complications which surround the legislation providing for the judicial resolution of matrimonial property disputes in New Zealand. There is every excuse for practitioners to remain confused over such matters as the interrelationship of the Matrimonial Property Act 1963 and Part VIII of the Matrimonial Proceedings Act 1963, and the effect which that legislation has had on New Zealand's system of matrimonial property . . . .
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> The judicial discretion is broad enough to enable the Court to consider contributions to the marriage in its entirety if it were so disposed, but the cases suggest that the Courts instead concentrate on contributions to the disputed property alone. Although non-monetary contributions, including those of a usual and unextraordinary nature are considered the judicial approach resembles that which applied under s. 19 of the Married Women's Property Act 1952. Contributions tend to determine the final order and the scales are still weighted in favour of the financial contributor since there is no indication of how non-monetary contributions are to be quantified.
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> . . .
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> There still remain unresolved tensions between contributions to the marriage, conduct, and property rights. Was New Zealand's discretionary system designed as a palliative, whereby a non-financially contributing wife may have a greater property claim than she had under the Married Women's Property Act? Or was the system designed to reflect in a spouse's property rights his contributions to and conduct in the

marriage as a whole? If the latter was the object, a system of deferred community might well achieve a similar result with greater certainty.[17]

And again:

> The most significant finding of the examination of unreported cases was that the only cases in which an application by a wife for an order apportioning ownership of property was successful to the extent where the wife was declared to have an interest as great as half was where the Court found implicit or explicit common intention by the parties that the property should be so held. In no case where such intention was not found was a wife declared to have a fifty percent interest in disputed property.[18]

In the recommended division of the value of material gains, we think that the law should require it to be 'fifty-fifty', and the only discretion could be the voluntary generosity of one of the concerned spouses, themselves, but nobody else's discretion should be involved. Indeed, if that law were enacted and got to be widely known and understood (as we think it would), it is entirely probable that in most cases the parties would not require a full adjudication by the court. It is probable that the spouses, with some professional help, would be ready, willing and able to perform the evaluations and computations so that they would simply have to ask the court to give judgment, by consent, for the equalizing payment. Consent proceedings would, of course, effect no little saving of time, energy, anxiety and expense for all concerned.

All this is not to say that there are no instances in which judicial discretion would be appropriate. Indeed, it is recommended in this Report in two previously noted situations of an already married spouse expressing dissatisfaction with the retro-active application of the S.M.R. It must be acknowledged that the non-discretionary application of law is directed more to social or distributive justice than to individual justice. The Commission does not pass lightly over the conundrum of balancing discretionary powers which at best can fashion *individually 'tailor-made' solutions to disputes, against rigid* formulas which apply to all indiscriminately in pursuance of legislative policy. In our opinion, the scales tip away from discretion. We accordingly recommend that in according to

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[17]Priestly, J.M. "Matrimonial Property Systems". (1972) *N.Z.L.J.* 244.

[18]Mansell, W.M. "Whither Matrimonial Property?" (1971) 4 *N.Z.U.L.R.* 271 at p. 275.

spouses equal shares in the value of post-nuptial shareable gains, there should be no discretion vested in the court to vary the equality of sharing by one iota.

If the mandatory equal sharing which we have recommended as a feature of the standard marital regime be seen as too inflexible, it should be recalled that we have also recommended that couples be free to contract out of the S.M.R. either before or after the celebration of their marriage. There is always some risk in committing one's life and fortune to another person. Indeed, some social workers, doctors and lawyers have suggested - not entirely whimsically in light of the social problems they encounter - that getting a marriage licence should be at least as difficult as getting a driver's licence, and not less. Be that as it may. Our recommendations at least do not run counter to the notion of going into marriage, if at all, without blinkers, and with one's eyes wide open, the better to scrutinize objectively the prospective spouse. Certainly, those to whom material acquisitions are important would have every inducement, under the proposed law, to be most astute before engaging themselves to be married. For everyone in the S.M.R., the law would require an equal division of the value of acquired post-nuptial gains when and if the marriage dies.

Memorandum of Separate Opinion of Dale Gibson and Ken Hanly re Judicial Discretion

Human relationships are so infinitely varied and changeable that no single pattern of rights and obligations can possibly be appropriate for every instance. The Commission has, in part, recognized this fact by providing that parties might "opt out" of the standard regime by means of special marriage contracts. Contracting out is not a complete solution to the problem, however, because, as we pointed out above, the contracts themselves lack the flexibility to deal with changing circumstances.

It is not difficult to imagine examples of undue hardship caused to one or other marriage partner by rigid adherence to a particular regime - whether that proposed by the Commission, or some other arrangement established by marriage contract. We pointed out in an earlier comment how unwise marriage contracts might result in unfair distribution of matrimonial property in a variety of conceivable situations. Many other examples spring readily to mind.

Suppose the case of a widow with a small child, who owns a modest home and has a well-paying job. She marries again, and adopts her new husband's suggestion that she give up her job. The husband turns out to be a wastrel and a lout. He squanders both his income and his wife's savings, and abuses both her and her child. After a few years of trying in vain to make the marriage

work, the wife obtains a separation or divorce. She is unable to return to her old job or to find employment that pays as well. Fortunately, property values have soared during the term of the marriage, but when she sells the house to raise money for current expenses she encounters a claim from the husband for half of the amount by which the property has appreciated. Is it fair that his claim should succeed?

Or consider the husband with the alcoholic and irresponsible wife whom he dearly loves, but who has made virtually no contribution to the marriage. Despite her prodigality he has managed to put aside a considerable sum which he hopes soon to use for the purchase of a family home. By patient persuasion, the husband has encouraged the wife to join Alcoholics Anonymous, and the future begins to look brighter. Eventually, however, the wife succumbs once more to her addiction and takes up with a worthless drifter who persuades her to leave her husband and children and to demand her share of the assets. Is it right that she and her lover should be entitled to dissipate fully half the family savings on a European drinking spree?

This list of examples could be extended indefinitely. While the Commission's proposals would, in our opinion, deal satisfactorily with most situations, every social worker or lawyer who has dealt extensively with family problems could cite cases in which rigid adherence to the proposals would produce grievous inequities.

It would be possible to avoid many such inequities if the court had a discretionary power in extraordinary circumstances to vary terms of the standard regime or a marriage contract which would result in great injustice or hardship. We understand our colleagues' concern that the possibility of judicial discretion would encourage litigation and make it more difficult for spouses to know their precise property rights in advance, but we think it would be possible to preserve a high degree of predictability by stating the discretion in such a way that courts would be unlikely to exercise it in any but the most unusually deserving of cases. In any event, there are times when predictability must be sacrificed to justice, and we believe this to be one of them.

We recommend, therefore, that the legislation establishing the new matrimonial regime contain a provision along the following lines:

> *Notwithstanding anything contained in this Act the Court may in extraordinary circumstances and in order to avoid great injustice or great hardship, vary the terms of any marriage contract or award, more or less than 50% of the shareable assets to any spouse.*

MISCELLANEOUS RELATED RECOMMENDATIONS

Abolition in Manitoba of Taxation of Inter-Spousal Transactions

In studying family law, the subject of inter-spousal taxation has confronted us squarely and specifically.

No doubt a large proportion of Manitobans regard marriage as the foundation of the family, and the family as the foundation of our society. Yet, it is perplexing to people that the taxation laws of Canada and of the province seem to operate in ways which are counter-productive to these notions of social structure.

For example, the federal Registered Home Ownership Savings Plan (RHOSP) is designed for the laudable purpose of assisting couples through tax relief to save for the purchase of a family home; but one of the effects of the plan is to encourage already married people to register title to their existing family home in the name of the non-earning spouse so that the taxpaying spouse may obtain the tax relief intended for the purchase of a family home! While we agree that spouses should be free to contract between themselves for separate ownership of their property we think that the impact of taxation should operate so as to encourage the unity of the marriage partners and their property. The tax system's encouragement of separation of property is regressive in our opinion.

The complexities of *"The Gift Tax Act (Manitoba)"*, Cap. G55, C.C.S.M., whether it be strictly enforced or not, are such to place many married couples unwittingly in conflict with the will of the Legislature. Under the gift tax statute a person may make gifts totalling $5,000 per annum to his or her spouse without attracting tax. This effect is perceived through the following provision of the Act:

Deductions in computing taxable value.

11(1) In computing the taxable value of a gift (except a gift made by the creation of a settlement or the transfer of property to a trust) made by a donor in a year to a donee who is an individual, there may be deducted

(b) in the case of gifts made to the spouse of the donor, the lesser of

(i) the value of the gift, or

(ii) the amount, if any, by which five thousand dollars exceeds the value of all other gifts (except gifts that are exempt from tax under this Act and gifts made by the creation of a settlement or the transfer of property to a trust) made by the donor to the donee in the year and before the time when the gift was made;

but in any year not more than an aggregate of fifteen thousand dollars may be deducted under this section

from the value of gifts made by the donor in that year.

It is conceded that $5,000, taken together with any other gifts whose aggregate value does not exceed $100 and which are 'invisible' under section 10(g) of the Act, constitutes a goodly deduction. However the donor spouse's liability under this tax statute is not completely defined in the above quoted passage. The Act exacts the filing of returns and provides penalties for failure to file, thus:

Returns

18 (1) Every donor who makes gifts in any year the aggregate value of which exceeds two thousand dollars, but not including in that aggregate the value of gifts exempt under clause (g) of section 10, shall, without any demand therefor, file with the minister on or before the thirtieth day of April in the next succeeding year a return in prescribed form.

Failure to file return

21 (3) Every person required to file a return under section 18 who fails to file the return within the time fixed or allowed for the filing of the return is liable to a penalty, to be assessed by the minister, not exceeding ten dollars for each day during which the failure continues.

It cannot be very rare in Manitoba that where title to a marital home has been taken in the joint names of the spouses and only one spouse makes the down payment and makes the mortgage payments, a gift of the value of one half of those payments is conferred on the non-paying spouse in excess of $2,000 in any year. Of course we cannot know to a certainty whether Manitobans in the above described circumstances are scrupulously filing gift tax returns, but our knowledge of the incidence and value of family residence acquisitions leads us to the not unreasonable surmise that many Manitobans are in breach of the filing requirements of the Act.

In its Working Paper No. 8, published in March 1975, on Family Property, the Law Reform Commission of Canada expressed itself on the subject of spousal taxation as follows:

Tax Considerations

Any major redistribution of property rights and financial obligations within the family structure will inevitably have significant tax implications. Exactly what these may be will obviously vary according to the nature of the reforms. While we anticipate that many of the reforms discussed in this working paper would not be effected at the federal level, it will, in any event, be incumbent upon Parliament to insure that the tax burdens on an individual are no greater following a change of property and financial laws between married

persons than they are now, as well as to ensure that, where any significant shift in rights or duties occurs from one spouse to another, the applicable tax burdens are reallocated accordingly. There is a further obligation upon Parliament, flowing from the nature and concept of federalism itself, to lend encouragement to the development of changes in the law of separate property within any given province or territory by providing positive support to such changes through amendments to the taxation laws and other laws dealing with family financial arrangements, whether or not those changes happen to coincide with Parliament's views of the ideal legal relationship between husbands and wives. The same requirement, we should add, also rests upon various federal departments, so that matters of administration and policy assist, rather than hinder the movement towards legal equality within marriage in Canada.

With the above statement, we respectfully agree. Moreover the principles expressed above attracted universal favour, without exception, from the persons who appeared before this Commission at its public hearings, although one such person did allow that the group whom she represented probably would not favour diminution or abolition of inter-spousal taxation unless they were to consider the question specifically in light of the proposed deferred community of property.

We are not at all impressed with a line of argument which asserts that there is no need to be concerned with statutory provisions of the kind above-cited because they are not going to be enforced oppressively, any way. Surely the appropriate question is not whether to enforce or not to enforce the solemnly expressed will of the Legislature, but rather, whether the Legislature's will is appropriately expressed in that solemn enactment. The Commission's recommendation is that all taxes on *inter vivos* transactions between spouses be abolished by legislation, and that the requirement to file returns in regard to those transactions be accordingly eliminated. Similarly, we recommend that inter-spousal succession duties should be abolished in Manitoba.

Memorandum of Dissent and Separate Opinion of Ken Hanly

It is in the public interest to redistribute large estates. A surviving spouse should not expect to inherit an unlimited amount without being subject to tax any more than should any other person expect to escape succession duties. The present level of exemption from succession duties is sufficiently high that the vast majority of spouses will be totally unaffected.

Dower and Succession

In Manitoba for many years now the rigours of a completely separate property regime have been somewhat ameliorated by the provisions of *"The Dower Act"*,*"The Devolution of Estates Act"* and *"The Testators Family Maintenance Act"*. In circumstances where the spouses' marriage is dissolved by the death of one of them, a limited form of deferred sharing of property is available to the surviving spouse by virtue of *"The Dower Act"*.

There may well be cases in which married couples would contract out of the S.M.R. in favour of a regime of separation of property such as is presently in vogue in Manitoba. Married couples are now entitled to contract out of the dower statute's provisions, but unless such provisions remain in force, couples who contract out of the standard marital regime might inadvertently fail to provide such security as is now available under that Act. If a married couple want such thoroughly separate property that they will not abide even the contingent deferred sharing provided by *"The Dower Act"*, they should address their minds specifically to its avoidance.

Moreover, it would be anomalous to say the least, if the law were such that a divorced or separated spouse could be awarded a full half share of the combined shareable estates, whereas a spouse who remained married to the other spouse until death dissolved their marriage could obtain no more than one-third of the deceased spouse's estate. When considering the dissolution of marriage by the death of one of the spouses we are no longer concerned with according shares to start both spouses upon 'a new life'. While the progeny either of a previous marriage or of the marriage dissolved by death should not be overlooked, we think that the main concern should be the surviving spouse. If there be minor children then, of course, the surviving spouse would have the responsibility to look after them.

It should be remembered, too, that the disposition of property effected under *"The Dower Act"* and *"The Devolution of Estates Act"* comprehends both post-nuptially and pre-nuptially acquired estate assets. We should not wish to recede from the order of justice which the law already accords to a widowed spouse. It is to be observed that the forced one-third share of the deceased spouse's net estate under *"The Dower Act"* may well in many instances be less than the one-half share of the spouses' combined shareable estates to be awarded under the proposed S.M.R. That such could often be the result is unacceptable to us.

We therefore recommend that the provisions described in *"The Dower Act"* as "Widow's Share of Estate" (more felicitously to be described as "Surviving Spouse's Share of Estate") should be retained, and the share should be augmented to "one-half of the testator's net estate".

We also recommend that, with necessary alterations to avoid conflict with the proposed standard marital regime, *"The Dower Act"* be retained to serve, as it now does, as a 'security net' for those who from whatever cause find themselves outside the S.M.R., and for security to all surviving spouses, who are inadequately provided for according to the will of the deceased spouse.

We also recommend that section 6(2) of *"The Devolution of Estates Act"* be amended so that clause (a) would provide: "where the intestate dies leaving a surviving spouse and children, one half of the residue shall go to the surviving spouse"; and that clause (b) be repealed.

We recommend that *"The Devolution of Estates Act"* be retained.

We recommend, as well, that *"The Testators Family Maintenance Act"* be retained.

If and when the recommended standard marital regime be enacted, it would, of course, be necessary to scrutinize the above mentioned statutes whose retention we have recommended, to eliminate any inconsistencies with the S.M.R. It is necessary to mention also that adoption of the S.M.R. would require substantial gutting and revision of *"The Married Women's Property Act"*. Such tasks, we well know, are best confided to the care and expertise of legislative counsel.

Revocation of Certain Bequests

Whether it be well or little known, *"The Wills Act"*, Cap. W150, C.C.S.M. provides:

> **Revocation by marriage**
>
> 17 A will is revoked by the marriage of the testator except where,
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage; or
>
> (b) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

There is good reason for this provision—made somewhat better by the provisions of our dower and devolution of estates statutes.

Considering the ever increasing incidence of divorce in our society in recent years, and considering the possibility of even more substantial marital property rights being enacted, we would abide by the provision expressed in Section 17(a) above, even though it may be a kind of trap to the unwary. However,the *omission* of a complementary provision constitutes a real trap to

those who are similarly unwary. We would assume that those who have been recently divorced and divested of half the value of their post-nuptial property would likely wish to consider the accounts closed as between themselves and their ex-spouses.

We know from the experience some of us have as practising barristers that the Will, if any, is usually not uppermost in the mind of a newly divorced person, nor, indeed, in the minds of most persons. Once having made a Will, most people are content (ill-advisedly) to leave it unreviewed and unrevised for a lifetime.

We venture to assert that the newly divorced person will wish to make a new life and will wish to dispose of his or her estate in favour of kin or recipients other than the ex-spouse. But if that newly divorced person leaves an old Will without embarking on a new lawful marriage the ex-spouse will have got **half** of the shareable assets on divorce and may well be inadvertently put in receipt of all or much of the **rest** of the testator's estate, early or late, after divorce.

The above observations were expressed in our Working Paper, which was issued in January, 1975. The situation which we envisaged was in the meanwhile illustrated by a judgment of Mr. Justice Morse of the Court of Queen's Bench in the matter of *The Estate of Philip Hart Koslovsky, deceased.*[19] In that case the husband made a will leaving a substantial portion of his estate to his wife. Later the spouses separated and entered into an agreement whereby they renounced *inter alia* all financial claims "past, present and future" upon each other. They were subsequently divorced, and the husband neglected (as it may reasonably be inferred) to alter or revoke his will. That will therefore stood as the husband's last will, subject to the determination of the rights, if any, of the testator's ex-spouse. A passage from Mr. Justice Morse's reasons for judgment is instructive:

> I think it was intended by this that once the agreement had been signed and performed, the wife would have no further rights against her husband. Such rights would normally arise by virtue of the type of statutes referred to. In my opinion, however, in the absence of clear language to the contrary, the wording of the agreement does not preclude the husband from continuing to benefit his wife under the terms of his Will or the wife from claiming the benefit of such voluntary act on the part of her husband.
>
> It is, I think, significant that paragraph 5 of the agreement speaks of a full and final settlement of the wife's rights against her husband but does not specifically provide that this affects any future rights which the wife might have except "such rights as the

[19](Not yet reported).

Wife now has or might hereafter have under and by virtue of" the statutes to which reference is made. I note, also, a reference in paragraph 2 of the agreement to any and all rights to maintenance and alimony, past, present and future (underlining supplied).

So far as paragraph 7 of the agreement is concerned the intention was, in my view, merely to acknowledge that once the agreement had been performed neither party would have any right or claim against any property possessed by the other. Once the agreement was performed, therefore, the wife did not have any right or claim to her husband's property. However, the wording of paragraph 7 is in the present tense and does not, in my opinion, preclude [the ex-spouse] from taking the benefits conferred on her by the Will. She had no right or claim to be named as a beneficiary of her former husband's estate, but she did not by the agreement waive her right to claim if her husband chose not to alter his Will so as to eliminate her as a beneficiary.

Therefore, we recommend the enactment of a statutory provision in the following or similar language:

DIVORCED SPOUSE DEEMED TO HAVE PREDECEASED

In case of dissolution or annulment of marriage, where a spouse's will executed prior to the divorce or annulment makes reference to, or confers any benefit upon, the other spouse, it shall be read as if the other spouse predeceased the testator or testatrix.

If a divorced testator remarries the Will in question is revoked in any event. If a divorced testator who does not remarry wishes, after all, to benefit the ex-spouse, a new provision specifically naming the ex-spouse will have to be drawn.

SPREADING THE WORD

The standard marital regime which we have recommended is simple in concept: upon termination of the S.M.R. otherwise than by death, the spouses are each entitled to an equal share of the value of their combined shareable estates.

The Commission is certainly conscious of the incidental, inherent complexities of our recommended standard marital regime made necessary by the need for accounting, adjudication, enforcement and transitional provisions. About the time of the publication of our Working Paper in January, 1975, we specifically were urged by some interested groups: to make recommendations for equal spousal sharing and to be quick about it; and not to let the probable necessary complexities of the projected reform stand in the way of eradicating the potential and often real injustices inherent in Manitoba's present separate marital property regime. It is arresting to note that while some correspondents have characterized the Commission's basic proposal as too radical, others have characterized it as too reactionary.

We observe, as we have done on previous occasions, that whenever the law erects a new system of rules which accord new rights and impose concomitant, new responsibilities, the law inevitably does not thereby become less complex. The new legal institution requires human time and effort merely to be 'serviced'. Fundamentally, it is injustice which is simple, expedient and inexpensive to administer. Justice is often complex, deliberate and dear, unless it be expressed in the outright repeal of an oppressive or unjust requirement of law.

In concept the standard marital regime is indeed simple, but because it would be merely a standard regime and is not intended to be a compulsory regime, the people of Manitoba who are not, we think, avid readers of the statutes, would need information if not instruction concerning it. When the choice of rights is expanded to accord people the opportunity to consent to this or that course, the great need for people is to be able to make an informed choice - to express an informed consent.

We have recommended that married couples would become subject to the standard marital regime, unless they chose, either before or after the solemnization of marriage, to contract out of it. They should have the means of knowing what it is they would be either undertaking or avoiding. We accordingly recommend the compiling of a pamphlet or booklet to be distributed:

(a) to high school students;

(b) to applicants for marriage licenses; and

(c) to affianced persons in relation to whose wedding banns are to be published, in lieu of a licence.

The above would be a minimal distribution. The initial

circulation should be made on the same basis as the Manitoba Property Tax Credit information is distributed throughout the province. The information booklet should in addition be available through provincial government offices throughout Manitoba, to everybody who may evince an interest in the subject. Such booklets should continue to be published and re-issued for so long as it may take the S.M.R., if adopted, to become part of the lore of our people. The longer it would endure as a feature of Manitoba family law, of course, the better known it would become. If the Legislature views this innovation as a means of advancing marital equality and justice, it should spread the word.

SUMMARY OF MAJOR RECOMMENDATIONS IN PART I AND PART II

PART I — THE SUPPORT OBLIGATION

A. CHILDREN

1. *CHILDREN HAVE THE RIGHT TO BE MAINTAINED BY BOTH PARENTS, WHO HAVE A CORRESPONDING OBLIGATION TO SUPPORT THEIR CHILDREN, JOINTLY OR ALONE. (p. 10)*
2. *THE OBLIGATION TO SUPPORT CHILDREN IS BORNE EQUALLY BY PARENTS, BUT WITH REGARD TO THE ACTUAL FINANCIAL CIRCUMSTANCES OF EACH. (p. 10)*
3. *NOTWITHSTANDING ANY LAW EXCEPT* "THE CHILD WELFARE ACT" *TO THE CONTRARY, EVERY PERSON IS LEGALLY LIABLE TO SUPPORT, MAINTAIN AND SEE TO THE EDUCATION OF,*
   (a) *HIS/HER OWN NATURAL OR ADOPTED CHILDREN;*
   (b) *THE CHILDREN OF HIS/HER SPOUSE WHO ARE IN THE CUSTODY OF THAT PERSON OR THE SPOUSE WHENEVER, AND TO SUCH EXTENT AS, THE NATURAL OR ADOPTIVE PARENT OF SUCH CHILDREN DOES NOT CONTRIBUTE REASONABLY TO THEIR SUPPORT AND MAINTENANCE;*

   UNTIL EACH CHILD ATTAINS THE AGE OF 18 YEARS. (p. 11)
4. *SUBJECT TO THE PROVISIONS OF* "THE CHILD WELFARE ACT" *A PARENT IS NOT RESPONSIBLE TO SUPPORT AND MAINTAIN A CHILD OVER THE AGE OF 16 YEARS WHO HAS WANTONLY DISCONTINUED APPROPRIATE FORMAL EDUCATION AND TRAINING AND WHO*
   (a) *THROUGH GAINFUL EMPLOYMENT IS ABLE TO BE SELF-SUPPORTING; OR*
   (b) *IS BEYOND THE CONTROL OF HIS OR HER PARENTS OR OTHER PARENTALLY DE-*SIGNATED PERSON IN WHOSE CHARGE HE *OR SHE IS. (p. 11)*
5. *WHEN CHILDREN ARE BROUGHT BY ONE PARENT INTO A "COMMON LAW" LIAISON, THE OBLIGATION OF BOTH NATURAL PARENTS*

WILL ENDURE AND THE NEWLY-ACQUIRED "COMMON LAW" STEP-"PARENT" WILL ALSO BE FIXED WITH AN ALTERNATE (SECONDARY) OBLIGATION TO MAINTAIN THOSE CHILDREN. (p. 11)

6. *WHERE IT IS PRACTICALLY IMPOSSIBLE FOR BOTH NATURAL PARENTS OR ONE OF THEM TO SUPPORT A CHILD THE OBLIGATION IS TO BE BORNE: FIRSTLY - BY A LAWFULLY WEDDED SPOUSE OR A "COMMON LAW" MATE WITH WHOM THE PARENT WITH CUSTODY OF THE CHILD IS LIVING; AND SECONDLY - BY THE PROVINCE. THE FACT OF A CHILD BEING IN THE CUSTODY OR CARE OF THE DIRECTOR OF CHILD WELFARE OR OF A CHILDREN'S AID SOCIETY DOES NOT, OF ITSELF, RELIEVE EITHER NATURAL PARENT OF THE OBLIGATION TO SUPPORT SUCH CHILD. (p. 11)*

7. *ANY ASSESSMENT OF THE AMOUNTS PAYABLE FOR MAINTENANCE OF CHILDREN SHALL TAKE ACCOUNT OF APPROPRIATE TOTAL COSTS OF CHILD MAINTENANCE, INCLUDING AMONG OTHER FACTORS THE COSTS OF RESIDENTIAL ACCOMMODATION, REASONABLE HOUSEHOLD ASSISTANCE, NOURISHMENT, CLOTHING, RECREATION AND SUPERVISION, AND HAVE REGARD TO THE CHILD'S OR CHILDREN'S NEED FOR A STABLE ENVIRONMENT. (p. 11)*

8. *IN AWARDING CHILD MAINTENANCE, THE COURT MAY ORDER PERIODIC PAYMENTS OF UNIFORM OR VARIANT AMOUNTS, AND MAY DIRECT THAT ANY OR ALL SUCH MAINTENANCE BE PAID TO:*

   (a) THE CUSTODIAL PARENT OR GUARDIAN;

   (b) THE COURT CLERK, ACCOUNTANT, ENFORCEMENT OFFICER OR OTHER OFFICIAL;

   (c) TRUSTEES; or

   (d) RECEIVERS

   TO BE APPLIED AS, WHEN AND FOR SUCH PARTICULAR PURPOSES, ON SUCH TERMS AND CONDITIONS, IF ANY, AS THE COURT CONSIDERS APPROPRIATE. (p. 12)

9. *IN ADJUDICATING MATTERS OF CHILD MAINTENANCE THE COURT MAY ORDER THE*

PAYMENT OF A SPECIFIC SUM TO STAND ON DEPOSIT IN COURT OR ON DEPOSIT WITH AN APPROPRIATE INDEPENDENT PERSON, TRUSTEE, FIRM, BANK OR DEPOSITORY OTHER THAN THE CUSTODIAL PARENT OR GUARDIAN, AS SECURITY FOR FUTURE PERIODIC MAINTENANCE PAYMENTS IN THE EVENT OF DEFAULT OR LAWFUL INCREASE OF PERIODIC PAYMENTS, AND OTHERWISE TO BE RESTORED TO THE MAINTENANCE DEBTOR, WITH INTEREST, AND LESS ONLY NECESSARY ADMINISTRATION COSTS. (p. 12)

10. *NOTHING IN THE ABOVE RECOMMENDATIONS SHOULD PRECLUDE THE COURT FROM ENTERTAINING AN APPLICATION TO VARY THE AMOUNT OF MAINTENANCE BECAUSE OF ALTERED CIRCUMSTANCES OF THE CHILD, OF THE CUSTODIAL PARENT OR GUARDIAN, OR OF THE MAINTENANCE DEBTOR. (p. 12)*

[Dissent and Separate Opinion of Commissioners Werier, Shack and Hanly as to recommendation 4 above.]

We would favour the deletion of Section 4 in the specific recommendations regarding the support obligation for children. (p. 13)

B. SPOUSES

General Principles

1. *EVERY MARRIED PERSON IS OBLIGED TO CONTRIBUTE TO THE SUPPORT AND MAINTENANCE OF HIS OR HER SPOUSE BY SUCH FINANCIAL MEANS AND/OR SERVICES AS SPOUSES MAY BY WRITTEN OR ORAL ARRANGEMENT OR BY CONDUCT AGREE. (p. 14)*
2. *WHERE, BY AGREEMENT, ONE SPOUSE IS ENGAGED IN TAKING CARE OF THE HOME AND/OR FAMILY AND HAS NO SIGNIFICANT INDEPENDENT INCOME, WHILE THE OTHER SPOUSE IS EMPLOYED OUTSIDE THE HOME, THE AT-HOME SPOUSE IS ENTITLED BY REASON OF HER OR HIS UNPAID WORK IN THE HOME, TO BE, AND TO BE CONSIDERED AS, A FULL AND EQUAL PARTNER IN THE ECONOMIC AND FINANCIAL ASPECTS OF THE MARRIAGE. (p. 15)*

Disclosure and Allowance

3. *EVERY SPOUSE DURING COHABITATION IS ENTITLED:*

(1) TO RECEIVE PERIODIC AND COMPLETE INFORMATION FROM THE OTHER SPOUSE CONCERNING FAMILY FINANCIAL CONDITIONS INCLUDING INTER ALIA:

(a) A COPY OF THE OTHER SPOUSE'S INCOME TAX RETURN LAST FILED TOGETHER WITH ASSESSMENT NOTICES AND REVISED RETURNS;

(b) A STATEMENT OF THE OTHER SPOUSE'S GROSS AND NET EARNINGS AND DEDUCTIONS WHICH, IF NOT VOLUNTARILY PROVIDED BY THE SPOUSE, SHALL, ON REQUEST, BE PROVIDED DIRECTLY BY THE SPOUSE'S EMPLOYER, PARTNER, PRINCIPAL OR THE ACCOUNTANT OR BOOKKEEPER OF ANY OF THEM;

(c) A STATEMENT OF THE OTHER SPOUSE'S DEBTS;

PROVIDED, THAT IF THE OTHER SPOUSE BE A PRINCIPAL OR PARTNER IN ANY INDUSTRIAL, COMMERCIAL OR PROFESSIONAL FIRM OR UNDERTAKING, NOTHING HEREIN ENTITLES THE APPLICANT SPOUSE TO ANY INFORMATION OR KNOWLEDGE OF THE PERSONAL INCOME, DRAWINGS OR DEDUCTIONS OF THE OTHER PRINCIPALS OR PARTNERS IN THE FIRM OR UNDERTAKING;

(2) TO PARTICIPATE IN DECISIONS CONCERNING EXPENDITURE OF ALL SPOUSAL INCOME;

(3) TO A REASONABLE STANDARD OF LIVING IN ACCORDANCE WITH THE FAMILY'S AVAILABLE MEANS, INCLUDING AS OF RIGHT:

(a) A PERIODIC CLOTHING ALLOWANCE, BY CASH OR UPON THE FAMILY INCOME EARNER'S CREDIT, TO BE DISPOSED ACCORDING TO THE SPOUSE'S SOLE DISCRETION; AND

(b) A WEEKLY OR MONTHLY SUM OF MONEY FOR THE SPOUSE'S OWN USE ABSOLUTELY, AS A PERSONAL ALLOWANCE; AND

THE ACTUAL AMOUNTS PAID UNDER THIS PROVISION SHALL BE REASONABLE, TAKING INTO ACCOUNT THE FINANCIAL CIRCUMSTANCES OF THE FAMILY AND THE ACTUAL AMOUNTS EXPENDED BY THE OTHER SPOUSE FOR SUCH PURPOSES;

(4) A SPOUSE WHO DURING COHABITATION IS

UNABLE TO SECURE THE RIGHTS ABOVE DECLARED AND ACCORDED BY LAW, MAY APPLY TO THE COURT FOR A DECREE SPECIFICALLY DEFINING THAT SPOUSE'S RIGHTS, WHICH MAY BE ENFORCED BY ORDER, WARRANT, WRIT OR SUBPOENA, AS MAY BE APPROPRIATE TO EFFECT THE DECREED RIGHTS AS AGAINST THE OTHER SPOUSE AND ALL OTHERS DESIGNATED BY IMPLICATION IN PARAGRAPH ONE ABOVE;

(5) THE CROWN IS BOUND BY THE FOUR PROVISIONS ABOVE;

(6) AN APPLICATION UNDER PARAGRAPH FOUR, ABOVE, MAY BE MADE NOT MORE OFTEN THAN ONCE PER TWELVE MONTH PERIOD, EXCEPT THAT SUCH AN APPLICATION MAY BE MADE EARLIER THAN THE EXPIRY OF TWELVE MONTHS AFTER A PREVIOUS APPLICATION IF IT IS MADE IN CONNECTION WITH SEPARATION OR DIVORCE PROCEEDINGS. *(pp. 16-17)*

Interspousal Maintenance

4. *WHERE, AFTER SEPARATION OR DIVORCE, AN APPLICATION IS MADE BY ONE SPOUSE OR FORMER SPOUSE FOR A MAINTENANCE ORDER AGAINST THE OTHER SPOUSE OR FORMER SPOUSE, THE JUDGE IN DETERMINING WHETHER AND IN WHAT AMOUNT TO ORDER MAINTENANCE SHALL CONSIDER ALL THE CIRCUMSTANCES OF THE CASE, INCLUDING:*

(a) THE RESPECTIVE RESPONSIBILITIES OF THE SPOUSES FOR THE CUSTODY AND SUPPORT OF CHILDREN OF THE MARRIAGE;

(b) THE RESPECTIVE RESPONSIBILITY OF THE SPOUSES FOR THE SUPPORT OF OTHERS;

(c) THE LENGTH OF THE MARRIAGE AND THE EXTENT TO WHICH EACH SPOUSE HAS CONTRIBUTED TO IT;

(d) THE EXTENT TO WHICH THE APPLICANT SPOUSE IS DEPENDENT UPON THE EARNINGS OF THE OTHER SPOUSE, AND THE CAUSES AND REASONS FOR SUCH DEPENDENCY;

(e) THE PROBABLE AMOUNT OF PROCEEDS OF ANY POSSIBLE OR LIKELY PROPERTY SETTLEMENT BETWEEN THE SPOUSES, OR THE ACTUAL OR DETERMINED AMOUNT IF KNOWN;

(f) *THE SPOUSES' STANDARD OF LIVING AND THEIR FINANCIAL SITUATION;*

(g) *THE RELATIVE MEANS AND ABILITY OF THE SPOUSES TO BE OR BECOME ECONOMICALLY INDEPENDENT; AND*

(h) *THE RELATIVE RESPONSIBILITY OF BOTH SPOUSES FOR THE SEPARATION OR MARITAL BREAKDOWN OR FOR THE REFUSAL OR NEGLECT TO PROVIDE SUPPORT;*

AND IF IT BE JUST TO DO SO, THE JUDGE SHALL ORDER THE OTHER SPOUSE TO PAY TO THE APPLICANT SPOUSE PERSONALLY OR FOR HIS OR HER USE TO ANY THIRD PERSON ON HIS OR HER BEHALF, SUCH WEEKLY, OR OTHER PERIODICALLY PAYABLE SUM AS THE JUDGE CONSIDERS REASONABLE, AND UPON SUCH TERMS AND CONDITIONS AS THE JUDGE PRESCRIBES.

JUDGES TO WHOM APPLICATIONS ARE MADE FOR MAINTENANCE ORDERS SHOULD BE DIRECTED TO ITEMS (a) to (h) AS GUIDELINES TO BE FOLLOWED IN SEEKING A JUST SOLUTION FOR EACH INDIVIDUAL CASE, HAVING REGARD TO ALL THE CIRCUMSTANCES OF THE PARTICULAR CASE, AND THE NEEDS OF EVERYONE INVOLVED, BOTH SPOUSES AND CHILDREN, AND WITHOUT GIVING PRIORITY TO ANY OF THE ITEMS AS AN OVERALL PRINCIPLE. (pp. 21-22)

Non-Marital Cohabitation

5. *IN THE CASE OF UNMARRIED CO-HABITATION, EITHER PARTY TO THE UNION MAY APPLY TO A JUDGE FOR MAINTENANCE ON THE SAME TERMS AS IF THE PARTIES TO THE UNION WERE MARRIED TO EACH OTHER IF:*

   (a) *A CHILD OR CHILDREN HAS BEEN BORN OR IS LIKELY TO BE BORN AS A RESULT OF THE UNION; OR*

   (b) *THE UNION HAS IMPAIRED THE ECONOMIC SELF-SUFFICIENCY OF THE APPLICANT SPOUSE, EITHER PERMANENTLY OR TEMPORARILY. (p. 23)*

   [Dissent and Separate Opinion of Commissioners Bowman, Smethurst and Muldoon]

   Complementary General Principle to 1 on Page 14.

   1a. *Upon separation, a spouse is obliged to do everything or anything which is lawful and within his or her ability to maintain himself or herself.*

Interspousal maintenance

1 *"Infant child of the marriage" means every natural or adopted child of the spouses and any child to whom either the husband or the wife stands* in loco parentis *and who is under the age of 7 years, or, if 7 years of age or over, is in need of special and continuing care and attention. (p. 31)*

2(1) *Where an application for a maintenance order is made on behalf of the spouse of a childless marriage, including one of which there are no infant children of the marriage, or on behalf of a spouse who has not been awarded the custody of any infant child of the marriage, the judge, in determining whether and in what amount maintenance should be awarded shall consider all the circumstances of the case, including* inter alia*:*

(a) the extent to which the applicant spouse is dependent upon the earnings of the other spouse, and the causes and reasons for such dependency;

(b) the probable amount of proceeds of any possible or likely property settlement between the spouses, or the actual or determined amount if known;

(c) the spouses' standard of living and their economic and financial situation;

(d) the relative means and ability of the spouses to be or become economically independent; and

(e) the respective responsibilities of the spouses for the support of others;

and if it be just to do so, the judge may order that the other spouse pay to the applicant spouse personally, or for his or her use to any third person on his or her behalf, such periodically payable sum as the judge considers reasonable, and upon such terms and conditions as the judge prescribes to the end that the applicant spouse should, if possible, and within a reasonable time, become self-supporting. (p. 31)

(2) *No maintenance order shall be made against the respondent spouse under the provisions of subsection (1) unless the paramount responsibility for the separation or marital breakdown or for the refusal or neglect to provide support, resides in the conduct of the respondent spouse. (p. 32)*

3(1) *Where an application for a maintenance order is made on behalf of a spouse to whom the custody of infant children of the marriage has been awarded, the judge, in determining whether and in what*

amount maintenance for the applicant spouse should be awarded, shall consider all the circumstances of the case including inter alia:

(a) the relative responsibility of both spouses for the separation or marital breakdown or for the refusal or neglect to provide support;

(b) the extent to which the applicant spouse is dependent upon the earnings of the other spouse, and the causes and reasons for such dependency;

(c) the probable amount of proceeds of any possible or likely property settlement between the spouses, or the actual or determined amount if known;

(d) the spouses' standard of living and their economic and financial situation;

(e) the relative means and ability of the spouses to be or become economically independent; and

(f) the respective responsibilities of the spouses for the support of others;

and if it be just to do so, the judge shall order the other spouse to pay to the applicant spouse personally or for his or her use to any third person on his or her behalf, such periodically payable sum as the judge considers reasonable, and upon such terms and conditions as the judge prescribes to the end that the applicant spouse should, if possible and within a reasonable time before the seventh birthday of any infant child of the marriage whose custody has been awarded to the applicant, become self-supporting.

(pp. 31-32)

(2) If, in considering the circumstances expressed in subsection (1)(a), the judge concludes that paramount responsibility for the separation of marital breakdown, or for the refusal or neglect to provide support does not reside in the conduct of the respondent spouse, the judge shall so certify, and in that event liability under any maintenance order awarded shall endure only so long as the applicant spouse has lawful custody of any infant child of the marriage and not further. [No finding, or silence, the matter of paramount responsibility shall be in all respects the equivalent of a finding that paramount responsibility does not reside in the conduct of the respondent.] (p. 32)

4 If no appeal as to a finding or silence on the matter of paramount responsibility whether certified or not certified by the judge be taken in the time and

manner provided by law such finding, whether certified or not, shall not afterwards be open to question and the parties shall be bound by the judge's disposition of the matter. (p. 33)

5 *Notwithstanding the provisions of section 2(2) and 3(2) regarding paramount responsibility, the following exceptions for rehabilitative maintenance shall be applied without regard to responsibility for the separation or marital breakdown:*

(1) Where by reason of (a) the employment of a spouse's time in and about the home, and/or (b) the spouse's lack or paucity of job skills, it is not reasonably possible for the spouse to become presently or ultimately self-sufficient or where by reason of (a) and/or (b) above a spouse's earning capacities have been significantly prejudiced, then in any such circumstances transitional maintenance, reviewable and renewable by the court, but of not more than 1 year's aggregate duration, may be awarded to such spouse to be paid by his or her marriage partner. (p. 33)

(2) Where the court is satisfied of the applicant's good faith and ability to complete a course of study or training exceeding one year in duration in order to augment the applicant's employment skills and financial self-sufficiency, and if it appears reasonable to do so, the court may extend the duration of maintenance for the purpose of enabling the applicant to pursue such a course for any reasonable period or periods not exceeding four years' aggregate duration beyond (a) the date of disposition of an application under section 2(1), or (b) the period provided in section 3(2). (p. 33)

Non-Marital cohabitation

1 *"Infant child of the union" in relation to non-marital cohabitations or domestic arrangements, including those referred to as "common law marriages", has the same meaning as "infant child of the marriage" as to marriages. (p. 36)*

2 *In regard to any union, cohabitation or domestic arrangement where the man and woman are not married to each other, including those unions referred to as "common law" marriages, if there be no infant children of the union in the lawful custody of either of the parties, neither party to the union, cohabitation or arrangement shall be obliged by law or be ordered to provide support or maintenance to*

the other party unless one or both of the parties gave some formal objectively provable and subsisting contractual undertaking to do so. (p. 36)

3(1) An application for a maintenance order may be made by or on behalf of a party to the union, cohabitation or arrangement to whom the custody of an infant child of the union has been awarded, and the judge, in determining whether and in what amount maintenance for the applicant party should be awarded, shall consider all the circumstances of the case including inter alia*:*

(a) the extent to which the applicant party is dependent upon the earnings of the other party, and the causes and reasons for such dependency;

(b) the relative means and ability of the parties to be or become economically independent; and

(c) the respective responsibilities of the parties for the support of others;

and if it be just to do so, the judge shall order the other party to pay to the applicant party personally or for his or her use to any third person on his or her behalf, such periodically payable sum as the judge considers reasonable, and upon such terms and conditions as the judge prescribes to the end that the applicant party should, if possible become self-supporting within a reasonable time before the seventh birthday of any infant child of the union whose custody has been awarded to the applicant. (pp. 36-37)

(2) In any event, liability under any maintenance order awarded shall endure only so long as the applicant party has lawful custody of any infant child of the union, and not further, unless the respondent party gave some formal, objectively provable and subsisting contractual undertaking to provide maintenance of longer duration. (p. 37)

PART II — PROPERTY DISPOSITION

A. MARITAL HOME

1(1) *"MARITAL HOME" MEANS A DWELLING HOUSE, OCCUPIED BY THE OWNER THEREOF AND HIS OR HER SPOUSE AS THEIR HOME, WHICH MARITAL HOME IS:*

(a) A DWELLING HOUSE IN A CITY, TOWN OR VILLAGE, AND THE LANDS AND PREMISES APPURTENANT [*continues as in homestead definition*];

(b) A DWELLING HOUSE OUTSIDE A CITY, TOWN OR VILLAGE AND THE LANDS AND PREMISES APPURTENANT [*continues as in homestead definition*, mutatis mutandis]. (p.50)

(2) *"MARITAL HOME" ALSO MEANS A UNIT AND COMMON INTERESTS, WITHIN THE MEANING OF* "THE CONDOMINIUM ACT", *OCCUPIED BY THE OWNER THEREOF AND HIS OR HER SPOUSE AS THEIR HOME.* (p.50)

2 *EVERY LEGAL OR EQUITABLE RIGHT, TITLE AND INTEREST OF A SPOUSE IN A MARITAL HOME*

(a) ACQUIRED BEFORE THE SOLEMNIZATION OF THE SPOUSES' MARRIAGE AND IN SPECIFIC CONTEMPLATION OF THE MARRIAGE; OR

(b) ACQUIRED AFTER THE SOLEMNIZATION AND DURING THE COURSE OF THE SPOUSES' MARRIAGE

IS, FOR ALL PURPOSES OF LAW, HELD JOINTLY WITH THE OTHER SPOUSE, WHETHER OR NOT IT IS SO RECORDED IN ANY DEED, GRANT, CERTIFICATE OR ORTHER INSTRUMENT OR EVIDENCE OF TITLE, AND THE ACQUISITION OF INTEREST BY THE OTHER SPOUSE WHETHER FORMALLY OR BY OPERATION OF THIS SECTION SHALL NOT BE CONSIDERED, ACCOUNTED OR TAXED AS A GIFT UNDER ANY TAXATION MEASURE OF THE PROVINCE OF MANITOBA. (p.50)

3. *WHERE THE OWNER OF A MARITAL HOME AND HIS OR HER SPOUSE PROVIDE BY FORMAL AGREEMENT WITH INDEPENDENT LEGAL ADVICE THAT THE DWELLING HOUSE OR CONDOMINIUM UNIT SHALL NOT BE JOINTLY OWNED, THE JOINT TENANCY PROVISION OF*

B. EQUAL DISPOSITION OF POST NUPTIAL ASSETS

1. *THERE SHOULD BE ENACTED IN MANITOBA A STANDARD FORM OF DEFERRED EQUAL, NO-FAULT SHARING OF THE VALUE OF POST-NUPTIALLY ACQUIRED SPOUSAL PROPERTY TO BE CALLED THE STANDARD MARITAL REGIME (S.M.R.)* (pp. 55 and 58)

2. *THE STANDARD MARITAL REGIME SHOULD GOVERN THE PROPERTY RELATIONS OF ALL MARRIED COUPLES WHO DO NOT CONCLUDE A PRE-NUPTIAL OR POST-NUPTIAL AGREEMENT TO AVOID OR CONTRACT OUT OF THE PROVISIONS OF THE S.M.R.* (pp. 55 and 56) (see recommendation #27 below)

3. *AN AGREEMENT TO CONTRACT OUT OF THE PROVISIONS OF THE STANDARD MARITAL REGIME, IN ORDER TO BE LEGALLY VALID, MUST BE EXPRESSED IN WRITING AND*

   (a) *SHOULD BE EXECUTED ONLY AFTER INDEPENDENT LEGAL ADVICE TO EACH OF THE PARTIES, THE TENDERING OF WHICH ADVICE SHOULD BE CERTIFIED IN WRITING ON THE WRITTEN AGREEMENT; AND*

   (b) *A COPY OF THE WRITTEN AGREEMENT SHOULD BE FILED IN A PUBLIC REGISTRY LIKE THAT PROVIDED UNDER s. 6(1) OF* "THE MARRIAGE SETTLEMENT ACT", Cap. M60 OF THE C.C.S.M. (p.55)

4. *A MARRIAGE CONTRACT PROVIDING FOR THE COMPLETE AND NON-SHAREABLE SEPARATION OF THE SPOUSES' RESPECTIVE PROPERTY IN THE EVENT OF SEPARATION, DIVORCE OR ANNULMENT OF MARRIAGE SHOULD BE SO DESIGNATED IN THE CERTIFICATES OF INDEPENDENT LEGAL ADVICE.* (p. 56)

5. *EVERY MARRIAGE CONTRACT, OR OTHER AGREEMENT TO CONTRACT OUT OF THE PROVISIONS OF THE STANDARD MARITAL REGIME, SHOULD, UPON BEING FILED IN THE REGISTRY, BE A MATTER OF PUBLIC RECORD AND BE AVAILABLE TO BE EXAMINED AS SUCH.* (p.56)

   [Dissenting recommendation of Commissioner Gibson]

   > *No contract between spouses or prospective spouses with respect to matrimonial property shall be valid unless executed more than one year after the date of marriage.*

6. *THE STANDARD MARITAL REGIME SHOULD PROVIDE FOR THE DEFERRED EQUAL SHARING OF THE VALUE OF THE TOTAL ECONOMIC GAINS REALIZED BY EITHER SPOUSE, OR BOTH, WHICH THEY HAVE BY THEIR JOINT OR INDIVIDUAL EFFORTS AND GOOD*

FORTUNE ACQUIRED AFTER THE SOLEMNIZATION OF THEIR MARRIAGE, SUBJECT TO THE EXCEPTIONS NOTED BELOW. (p. 58)

7. *UPON TERMINATION OF THE STANDARD MARITAL REGIME OTHERWISE THAN BY THE DEATH OF ONE OF THE SPOUSES, EACH SPOUSE WOULD BE ENTITLED (IN REGARD TO POST-NUPTIAL GAINS) TO ONE-HALF OF THE VALUE OF THE COMBINED SHAREABLE ESTATES. (p. 59)*

8. *THE CLAIM OF THE SPOUSE WITH THE SMALLER SHAREABLE ESTATE WOULD BE AGAINST THE OTHER SPOUSE AND WOULD BE REALIZED BY AN EQUALIZING PAYMENT, WHICH WHEN MADE, WOULD LEAVE EACH SPOUSE WITH AN EQUAL SHARE OF THE COUPLE'S COMBINED SHAREABLE ESTATES. (p. 59)*

9. *THE EQUALIZING PAYMENT COULD BE SECURED AND ENFORCEABLE BY A JUDGMENT OF THE COURT.(p.59)*

10. *THE SHAREABLE ESTATE OF A SPOUSE SHOULD NEVER BE REDUCED, DESPITE THE EXTENT OF DEBTS AND LIABILITIES, TO A NEGATIVE VALUE, UNLESS THAT WERE ATTAINED BY THE EXISTENCE OF DEBTS INCURRED DIRECTLY FOR FAMILY MAINTENANCE OBLIGATIONS. (p. 59)*

11. *THE EQUALIZING PAYMENT COULD BE EFFECTED ACCORDING TO AGREED TERMS OR ACCORDING TO REASONABLE TERMS IMPOSED BY THE COURT AT THE TIME OF PRONOUNCING JUDGMENT; AND THE MAXIMUM TIME TO BE ACCORDED FOR PAYMENT OF THE JUDGMENT SHOULD BE FIVE YEARS. (p. 60)*

12. *CREDIT REPORTING AGENCIES SHOULD BE FORBIDDEN TO MAKE REFERENCE TO SUCH A JUDGMENT UNLESS IT BE CLEARLY STATED TO BE A JUDGMENT FOR AN EQUALIZING PAYMENT, WHETHER OR NOT THE JUDGMENT DEBTOR BE IN GOOD STANDING OR IN DEFAULT. (p. 60)*

13. *IN RECKONING A SPOUSE'S SHAREABLE ESTATE THERE SHOULD BE ALLOWED AS DEDUCTIONS FROM THE VALUE OF THAT SPOUSE'S NET ESTATE THE FOLLOWING ASSETS:*

    GIFTS, INHERITANCES AND TRUST BENEFITS ACCORDED WITH THE INTENTION OF CONFERRING THE BENEFIT UPON THE RECIPIENT SPOUSE EXCLUSIVELY; (p. 61)

    THE INCOME FROM SUCH GIFTS, INHERITANCES AND TRUST BENEFITS WHERE THE DONOR'S, TESTATOR'S OR SETTLOR'S INTENTION HAD BEEN SPECIFICALLY TO CONFER

THE INCOME BENEFIT ON THE RECIPIENT SPOUSE EXCLUSIVELY; (p. 51)

AWARDS AND SETTLEMENTS OF DAMAGES IN TORT, UNLESS AND TO THE EXTENT THEY WERE COMPENSATION FOR ACTUAL AND PROSPECTIVE ECONOMIC LOSS TO THE FAMILY UNIT; (pp. 62-63)

THE PROCEEDS OF AN INSURANCE POLICY CLAIM AND THE VALUE OF INSURANCE PREMIUMS PAID BY A THIRD PARTY AS A GIFT. (p. 64)

14. *WHERE ANY INSURANCE BENEFITS COME TO A SPOUSE DURING THE COURSE OF MARRIAGE, THEY SHOULD BE INCLUDED IN THAT SPOUSE'S SHAREABLE PROPERTY, UNLESS THEY COME WITHIN THE RULES FOR DAMAGES AWARDS. (p. 64)*

15. *WHERE THE STANDARD MARITAL REGIME IS TERMINATED OTHERWISE THAN BY THE DEATH OF A SPOUSE, THE VALUE OF LIFE INSURANCE SHOULD BE ASSESSED AT SO MUCH OF ITS CASH SURRENDER VALUE, IF ANY, AS ACCRUED AFTER THE SOLEMNIZATION OF THE COUPLE'S MARRIAGE, AND THAT VALUE SHOULD BE RECKONED AS SHAREABLE PROPERTY OF THE SPOUSE ENTITLED TO REALIZE THE CASH SURENDER VALUE. (p. 64)*

16. *WHERE THE STANDARD MARITAL REGIME IS TERMINATED OTHERWISE THAN BY THE DEATH OF A SPOUSE, AN ANNUITY OR PENSION PLAN SHOULD BE VALUED (i) AT ITS CASH VALUE, IF ANY, ACCUMULATED DURING THE MARRIAGE; OR (ii) AT THE TOTAL AMOUNT CONTRIBUTED DURING THE MARRIAGE BY THE SPOUSE WHO PAID IT, IF IT HAS NO CASH VALUE, AND IN EITHER INSTANCE SUCH VALUE SHOULD BE RECKONED AS SHAREABLE PROPERTY OF THE SPOUSE WHO IS ENTITLED TO, OR HAS PAID FOR, THE ANNUITY OR PENSION PLAN. (p. 65)*

17. *THE METHOD OF COMPUTATION OF A SPOUSE'S SHAREABLE ESTATE FOR THE PURPOSE OF DETERMINING THE EQUALIZING PAYMENT SHOULD BE AS FOLLOWS:*

Value Assets

All assets (except joint interest in marital home) whether real or personal property, of whatever kind or nature, acquired after solemnization of the marriage and of which the spouse is the beneficial owner, including future and contingent interests. In some instances it will be necessary to examine, record and assess the spouse's

pre-nuptial assets to determine their net positive value, which would be deducted from the value of all assets, thus leaving the essential value of all assets acquired post-nuptially. If pre-nuptial assets have a net negative value, their deemed value is zero.

Deduct Debts and Liabilities

Just as personal and business assets are to be tallied above, so personal and business debts and liabilities are to be deducted at this stage. This operation produces a net estate.

Other Allowable Deductions

These are assets of the spouses which are deemed to be simply 'invisible' and therefore excluded when computing the shareable estate:

gifts from the other spouse, unless given specifically as a settlement or endowment intended to augment the recipient's estate and security and thereby to relieve the donor's shareable estate to that extent, in the event of subsequent termination of the S.M.R.;

gifts and inheritances of personal apparel or adornment and all other gifts, inheritances and trust benefits where the donor's, testator's or settlor's intention is demonstrably to confer the benefit upon the recipient spouse exclusively;

the income generated by a gift, inheritance or trust benefit where the donor's, testator's or settlor's intention is demonstrably to confer the income upon the recipient spouse exclusively;

awards and settlements of damages in tort, except to the extent that the damages are compensation for actual and prospective economic loss on the part of the spouses as a family unit, as distinct from the claimant spouse as an individual;

the proceeds of an insurance policy and the value of insurance premiums paid by a third party where the payer's intention is demonstrably to confer the benefit of the payment of the premiums or the benefit of the insurance proceeds upon the recipient spouse exclusively.

Net Estate Minus Deductions = Shareable Estate

Adding together each spouse's shareable estate produces the combined shareable estate of the spouses, which is to be shared equally.

ONE HALF OF THE VALUE OF THE COMBINED SHAREABLE ESTATE IS THE SHARE OF EACH

SPOUSE.

THE SPOUSE WHOSE OWN SHAREABLE ESTATE IS SMALLER THAN HALF OF THE COMBINED SHAREABLE ESTATE IS ENTITLED TO THE EQUALIZING PAYMENT

The equalizing payment may be awarded in a judgment of the court, upon application by either spouse.(pp. 66-67)

[Separate recommendation of Commissioners Gibson and Hanly]

In determining the value of excluded property account shall be taken of any change in the purchasing power of money between the date the property was acquired and the date of distribution.

18. *IT SHOULD BE A PRESUMPTION OF LAW, UNLESS THE CONTRARY WERE POSITIVELY ESTABLISHED,THAT ALL OF THE ASSETS OF EACH SPOUSE ARE TO BE RECKONED IN THAT SPOUSE'S SHAREABLE ESTATE.(p.70)*

19. *THE TERMINATION OF A STANDARD MARITAL REGIME AND THE DETERMINATION OF THE EQUALIZING PAYMENT, IF ANY, SHOULD BE ABLE TO BE EFFECTED BY WRITTEN AGREEMENT OF THE SPOUSES, WITH INDEPENDENT LEGAL ADVICE. (p. 72)*

20. *SUBJECT TO THE LIMITATION PERIOD RECOMMENDED LATER, THE APPLICATION TO THE COURT FOR TERMINATION OF THE S.M.R. AND THE AWARDING OF THE EQUALIZING PAYMENT SHOULD BE ABLE TO BE INSTITUTED UPON OR AFTER:*

    (a) *PROOF OF A SEPARATION AGREEMENT MADE BY THE SPOUSES; OR (p. 73)*

    (b) *COMMENCEMENT OF PROCEEDINGS FOR A DECREE OR ORDER THAT THE SPOUSES BE SEPARATED, OR THE PRONOUNCING OF SUCH A DECREE OR ORDER; OR (p. 73)*

    (c) *PROOF THAT THE SPOUSES HAVE BEEN LIVING SEPARATE AND APART FOR A CONTINUOUS PERIOD OF SIX MONTHS WITH NO DEFINITE MUTUAL INTENTION, OR NO REASONABLE PROSPECT OF RESUMING COHABITATION; OR (p. 73)*

    (d) *COMMENCEMENT OF PROCEEDINGS FOR DIVORCE OR NULLITY OF MARRIAGE; OR (p.75)*

    (e) *APPLICATION TO COURT ON GROUNDS OF DISSIPATION OF PROPERTY. (p. 76)*

21. *THE VALUE OF DISSIPATED ASSETS MADE WITHIN THE SIX YEAR PERIOD PRIOR TO THE APPLICATION FOR TERMINATION OF THE S.M.R. SHOULD BE ADDED*

TO THE VALUE OF THE SQUANDERING SPOUSE'S SHAREABLE ESTATE.

22. *EITHER SPOUSE SHOULD BE ENTITLED TO TRACE EXCESSIVE GIFTS MADE WITHIN THE SIX YEAR PERIOD AND RECOVER THE VALUE THEREOF BY COURT ACTION FROM THE RECIPIENT FOR RESTORATION TO THE COMBINED SHAREABLE ESTATES OR FOR* PRO TANTO *SATISFACTION OF THE EQUALIZING PAYMENT, UNLESS THE GIFT WERE MADE WITH THE CLEARLY PROVED ASSENT OF BOTH SPOUSES. (p. 76)*

23. *IN TERMINATING A STANDARD MARITAL REGIME, THE DAY OF RECKONING OF THE SPOUSES' SHAREABLE ESTATES SHOULD BE IN THE CASE OF:*

    (a) *WRITTEN AGREEMENT OF THE SPOUSES: AS OF THE DATE WHICH THE AGREEMENT SO PROVIDES, OR FAILING SUCH A PROVISION, THE DATE THE AGREEMENT BEARS;*

    (b) *SEPARATION, DIVORCE OR NULLITY: AS OF THE DATE THE SPOUSES LAST LIVED TOGETHER AS HUSBAND AND WIFE PRIOR TO THE INSTITUTION OF THE PROCEEDINGS FOR SEPARATION, DIVORCE OR NULLITY;*

    (c) *SIX MONTHS' CONTINUOUS NON-COHABITATION: AS OF THE DATE, AT THE BEGINNING OF THE CONTINUOUS PERIOD, ON WHICH THE SPOUSES LAST LIVED TOGETHER AS HUSBAND AND WIFE;*

    (d) *DISSIPATION OF ASSETS: AS OF THE DATE THE SPOUSES LAST LIVED TOGETHER AS HUSBAND AND WIFE PRIOR TO THE INSTITUTION OF THE PROCEEDINGS FOR TERMINATION OF THE STANDARD MARITAL REGIME, OR WHERE THE SPOUSES CONTINUE TO LIVE TOGETHER AS HUSBAND AND WIFE, THE DATE OF THE INSTITUTION OF THE PROCEEDINGS;*

    PROVIDED THAT IN ANY CASE IN WHICH EITHER PARTY IS SHOWN TO HAVE DISSIPATED SHAREABLE ASSETS AT ANY TIME WITHIN THE SIX YEARS PRIOR TO THE DAY OF RECKONING, THE VALUE OF SUCH DISSIPATED ASSETS SHALL BE ADDED INTO THE VALUE OF THAT SPOUSE'S SHAREABLE ESTATE. (p. 79)

24. *THE LIMITATION PERIOD, IN ORDINARY CIRCUMSTANCES, FOR TAKING COURT ACTION FOR THE EQUALIZING PAYMENT SHOULD EXTEND TO AND INCLUDE THE FIRST ANNIVERSARY DATE OF THE*

ENTRY OF A FINAL DECREE OF DIVORCE OR NULLITY AFTER ALL APPEALS, IF ANY, BE EXHAUSTED OR LAPSED. (p. 80)

25. *IT SHOULD BE FURTHER PROVIDED THAT WHERE A PERSON WHO IS ENTITLED TO APPLY FOR JUDGMENT FOR AN EQUALIZING PAYMENT*

    (a) *DID NOT KNOW OF THE DISSOLUTION OR ANNULMENT OF HIS OR HER MARRIAGE UNTIL AFTER THE EXPIRY OF THE LIMITATION PERIOD, OR*

    (b) *WAS PREVENTED BY CIRCUMSTANCES BEYOND THAT PERSON'S CONTROL FROM INSTITUTING PROCEEDINGS WITHIN THE LIMITATION PERIOD,*

    THAT PERSON MAY, UPON NOTICE BY PERSONAL SERVICE TO THE OTHER PARTY TO THE S.M.R., APPLY TO COURT AT THE EARLIEST POSSIBLE OPPORTUNITY FOR AN ORDER PERMITTING THAT PERSON TO INSTITUTE PROCEEDINGS FOR AN EQUALIZING PAYMENT AND IF IT APPEARS JUST IN REGARD TO ALL THE CIRCUMSTANCES OF BOTH PARTIES TO DO SO, THE COURT SHALL MAKE THE ORDER. (pp. 80-81)

    [Additional recommendation of Commissioners Shack, Smethurst and Muldoon]

    Even in the extraordinary circumstances described above, some definite and final limitation period of reasonable duration should be imposed, after which, the right to apply for the equalizing payment should lapse absolutely. (pp. 81-82)

26. *WHERE SPOUSES' ESTATES ARE SUBJECT TO THE STANDARD MARITAL REGIME, OR BY AGREEMENT SUBJECT TO ANY OTHER SPECIES OF COMMUNITY PROPERTY, THE COURT SHOULD BE EMPOWERED TO MAKE A RECEIVING ORDER (ON THE TERMS AND CONDITIONS REVIEWED ON PAGES 81 TO 86) IN CASES OF ACTUAL OR APPREHENDED ABSCONDING OR DISSIPATION OF ASSETS. (p. 86)*

27. *THE ESTATES AND PROPERTY RELATIONS OF COUPLES ALREADY MARRIED WHEN AND IF THE S.M.R. WERE TO COME INTO FORCE IN MANITOBA SHOULD BE GOVERNED BY THE FOLLOWING PROVISIONS:*

    (a) *A SIX MONTH PERIOD SHOULD BE PROVIDED IN THE RECOMMENDED LEGISLATION BETWEEN ROYAL ASSENT AND THE COMING INTO FORCE OF THE STATUTE IN ORDER TO ACCORD*

MARRIED COUPLES AN OPPORTUNITY TO CONSIDER THEIR POSITIONS AND, IF THEY WISH, TO OBTAIN LEGAL ADVICE;

(b) *IF WITHIN THE FIRST SIX MONTHS OF THE PROPOSED LEGISLATION'S COMING INTO FORCE THE SPOUSES DO NOTHING UNDER THE LAW TO ALTER THEIR POSITION, THEY WILL HAVE THEREBY COME WITHIN THE PROVISION OF THE STANDARD MARITAL REGIME;*

(c) *IF WITHIN THE FIRST SIX MONTHS OF THE PROPOSED LEGISLATION'S COMING INTO FORCE EITHER SPOUSE BE DISSATISFIED WITH THE APPLICATION OF THE S.M.R. REACHING BACK TO THE DATE OF THEIR MARRIAGE, THAT SPOUSE MAY GIVE TO THE OTHER WRITTEN NOTICE IN SIMPLE STATUTORY FORM OF SUCH DISSATISFACTION AND THE STANDARD MARITAL REGIME WILL APPLY TO THAT COUPLE'S ESTATE ONLY FROM THE DATE OF ITS ENACTMENT, AND THE COUPLE WILL*

- *BE SEPARATE AS TO PREVIOUSLY ACQUIRED PROPERTY AS IF IT WERE PRE-NUPTIAL PROPERTY; OR*
- *BE BOUND, UNLESS THEY OTHERWISE AGREE, BY ANY THEN EXISTING WRITTEN AGREEMENT REGARDING THE DISPOSITION OF PROPERTY, WHICH AGREEMENT WILL BE OPERATIVE AND EFFECTIVE ONLY UNTIL THE DATE AS OF WHICH THE LEGISLATION COMES INTO FORCE;*

AND THEREAFTER THE COUPLE WILL BE SUBJECT TO THE STANDARD MARITAL REGIME AS IF THEIR MARRIAGE HAD BEEN SOLEMNIZED ON THE DATE AS OF WHICH THE LEGISLATION WAS PROCLAIMED TO BE FIRST IN FORCE IN MANITOBA.

(d) *UPON TERMINATION OTHERWISE THAN BY DEATH OF THE S.M.R. OF A COUPLE TO WHOM RECOMMENDATION (c) APPLIED, THEIR SHAREABLE ESTATES SHOULD BE DETERMINED WITH THE PROCLAMATION DATE BEING SUBSTITUTED FOR THE DATE OF THE SOLEMNIZATION OF THE MARRIAGE, AND ANY SHARING OF THE VALUE OF PROPERTY PREVIOUSLY ACQUIRED DURING THE MARRIAGE SHOULD BE IN THE COURT'S DISCRETION IN AWARDING AN EQUALIZING*

PAYMENT. (p. 88)

[Separate recommendation of Commissioner Hanly]

The standard marital regime should apply universally and retroactively to all couples already married when it comes into force, but any sharing upon termination of the S.M.R. should be determined upon general judicial discretion in all cases.(p.89-90)

28. *IN THE CASE OF SPOUSAL RECONCILIATION AFTER PRONOUNCEMENT OF JUDGMENT FOR THE EQUALIZING CLAIM THE JUDGMENT SHOULD REMAIN IN FORCE UNLESS AND UNTIL THE RECONCILED COUPLE JOINTLY APPLIED TO THE COURT FOR A STAY AND FORMAL APPROVAL OF THE JUDGMENT CREDITOR'S RENUNCIATION OF RIGHTS TO ANY BALANCE OF THE EQUALIZING PAYMENT. (p. 90)*

29. *APPROVAL OF RENUNCIATION SHOULD BE GRANTED UPON THE CONDITION TO BE ACKNOWLEDGED BY THE SPOUSES THAT ANY MONEY REALIZED OR PROPERTY TRANSFERRED IN PART SATISFACTION OF THE JUDGMENT BE REGARDED THENCEFORTH AS PRE-NUPTIAL PROPERTY OF THE JUDGMENT CREDITOR AND THAT THE VALUE OF THE UNPAID BALANCE OF THE JUDGMENT BE REGARDED THENCEFORTH AS PRE-NUPTIAL PROPERTY OF THE JUDGMENT DEBTOR. (p. 91)*

30. *IN CASES WHERE A RECONCILED SPOUSE WOULD NEITHER ACCEPT PAYMENTS UNDER THE JUDGMENT, NOR JOIN IN AN APPLICATION FOR RENUNCIATION, THE FOLLOWING RECOURSES OR EITHER OF THEM SHOULD BE AVAILABLE TO THE DEBTOR SPOUSE:*

   (a) *IF THE CREDITOR SPOUSE DECLINES PROFERRED PAYMENTS OVER THE COURSE OF ONE YEAR, THEN UPON NOTICE TO THE CREDITOR SPOUSE, THE DEBTOR SPOUSE MAY APPLY TO THE COURT TO DECLARE THE JUDGMENT SATISFIED AS OF THE LAST PREVIOUS PAYMENT MADE IN REDUCTION OF ITS OUTSTANDING PRINCIPAL SUM AND INTEREST;*

   (b) *THE DEBTOR SPOUSE MAY PAY INTO COURT THE WHOLE, OR FROM TIME TO TIME ANY PART, OF THE BALANCE OF THE PRINCIPAL SUM AND INTEREST, AND SUCH PAYMENTS SHALL BE ACCOUNTED IN REDUCTION OF THE EQUALIZING PAYMENT. (p. 92)*

31. *THE ESTATES AND PROPERTY RELATIONS OF*

COUPLES ALREADY MARRIED AND WHO ESTABLISH THEIR ORDINARY, HABITUAL RESIDENCE IN MANITOBA AFTER THE COMING INTO FORCE OF THE S.M.R. SHOULD BE GOVERNED BY THE FOLLOWING PROVISIONS:

(a) THEIR EXISTING MARRIAGE CONTRACT OR AGREEMENT IN WRITING, IF ANY, SHOULD DETERMINE THEIR MARITAL PROPERTY REGIME IN MANITOBA, PROVIDED THAT WITHIN ONE YEAR OF THEIR ESTABLISHING THEIR ORDINARY, HABITUAL RESIDENCE IN MANITOBA THEY RE-CONFIRM IT (WITH OR WITHOUT AMENDMENTS) UPON AND AFTER THE OBTAINING OF INDEPENDENT LEGAL ADVICE BY EACH OF THE SPOUSES;

(b) IF, WITHIN ONE YEAR OF THE COUPLE'S ESTABLISHING THEIR ORDINARY HABITUAL RESIDENCE IN MANITOBA, THEY HAVE NOT MUTUALLY CONFIRMED ANY EXISTING CONTRACT MADE ELSEWHERE, AND IF EITHER SPOUSE BE DISSATISFIED WITH THE APPLICATION OF THE S.M.R. REACHING BACK TO THE DATE OF THEIR MARRIAGE, THAT SPOUSE MAY GIVE THE OTHER WRITTEN NOTICE IN SIMPLE STATUTORY FORM OF SUCH DISSATISFACTION AND THE STANDARD MARITAL REGIME WILL APPLY TO THAT COUPLE'S ESTATE ONLY FROM THE DATE OF THEIR ESTABLISHING SUCH RESIDENCE IN MANITOBA; AND THE COUPLE WILL BE BOUND, UNLESS THEY OTHERWISE AGREE, BY THEIR THEN EXISTING WRITTEN AGREEMENT REGARDING THE DISPOSITION OF PROPERTY, WHICH AGREEMENT WILL BE OPERATIVE AND EFFECTIVE ONLY UNTIL THE DATE OF ESTABLISHING SUCH RESIDENCE; AND THEREAFTER THE COUPLE WILL BE SUBJECT TO THE STANDARD MARITAL REGIME AS IF THEIR MARRIAGE HAD BEEN SOLEMNIZED ON THE DATE ON WHICH THEY ESTABLISHED ORDINARY, HABITUAL RESIDENCE IN MANITOBA;

(c) IF THE SPOUSES HAVE NO WRITTEN MARRIAGE CONTRACT OR AGREEMENT, THEY SHALL BECOME SUBJECT TO THE STANDARD MARITAL REGIME, WHICH SHALL BE CONCLUSIVELY DEEMED TO HAVE COMMENCED ON THE DATE OF THE SOLEMNIZATION OF THEIR MARRIAGE; PROVIDED THAT IF, WITHIN

ONE YEAR OF, BUT NOT LATER THAN THE SPOUSES' STARTING THEIR ORDINARY HABITUAL RESIDENCE TOGETHER IN MANITOBA, EITHER SPOUSE BE DISSATISFIED WITH THE APPLICATION OF THE S.M.R. REACHING BACK TO THE DATE OF THEIR MARRIAGE, THAT SPOUSE MAY GIVE TO THE OTHER WRITTEN NOTICE IN SIMPLE STATUTORY FORM OF SUCH DISSATISFACTION AND THE STANDARD MARITAL REGIME WILL APPLY TO THAT COUPLE'S ESTATE ONLY FROM THE DATE OF THEIR ESTABLISHING THEIR ORDINARY HABITUAL RESIDENCE TOGETHER IN MANITOBA, AND THE COUPLE WILL BE SEPARATE AS TO PROPERTY AS IF THEIR MARRIAGE HAD BEEN SOLEMNIZED ON THAT DATE;

(d) *UPON THE TERMINATION OTHERWISE THAN BY DEATH OF THE S.M.R. OF A COUPLE TO WHOM RECOMMENDATIONS (b) AND (c) APPLIED, THEIR SHAREABLE ESTATES WOULD BE DETERMINED WITH THE DATE OF ESTABLISHING SAID RESIDENCE IN MANITOBA BEING SUBSTITUTED FOR THE DATE OF SOLEMNIZATION OF THEIR MARRIAGE AND ANY SHARING OF THE VALUE OF PROPERTY ACQUIRED PRIOR TO ESTABLISHING THEIR RESIDENCE IN MANITOBA SHOULD BE IN THE COURT'S DISCRETION IN AWARDING AN EQUALIZING PAYMENT. (pp. 94-96)*

[Commissioner Hanly asserts the same dissent here, as expressed on *Page 89*]

32. *IN ACCORDING TO SPOUSES EQUAL SHARES IN THE VALUE OF POST-NUPTIAL SHAREABLE GAINS, THERE SHOULD BE NO DISCRETION VESTED IN THE COURT TO VARY THE EQUALITY OF SHARING. (p. 99)*

[Separate recommendation of Commissioners Gibson and Hanly]

Notwithstanding anything contained in this Act the Court may in extraordinary circumstances and in order to avoid great injustice or great hardship, vary the terms of any marriage contract or award, more or less than 50% of the shareable assets to any spouse. (p. 101)

33. *INTER-SPOUSAL SUCCESSION DUTIES AND ALL TAXES ON* INTER VIVOS *TRANSACTIONS BETWEEN SPOUSES SHOULD BE ABOLISHED AND THE REQUIREMENT TO FILE RETURNS IN REGARD TO*

THOSE TRANSACTIONS SHOULD BE ACCORDINGLY ELIMINATED. (p. 189)

[Dissent of Commissioner Hanly]

Inter-spousal succession duties should be retained. (pp. 103-104)

34. *THE PROVISIONS OF* "THE DOWER ACT" *UNDER WHICH A SURVIVING SPOUSE IS ACCORDED A SHARE OF THE DECEASED SPOUSE'S ESTATE SHOULD BE RETAINED AND THE SHARE AUGMENTED TO "ONE HALF OF THE TESTATOR'S NET ESTATE". (p. 104)*

35. *"THE DOWER ACT" ITSELF SHOULD BE RETAINED. (p. 105)*

36. *SECTION 6(2) OF* "THE DEVOLUTION OF ESTATES ACT" *SHOULD BE AMENDED TO PROVIDE: "WHERE THE INTESTATE DIES LEAVING A SURVIVING SPOUSE AND CHILDREN, ONE HALF OF THE RESIDUE SHALL GO TO THE SURVIVING SPOUSE"; AND CLAUSE (b) OF SECTION 6(2) SHOULD BE REPEALED. (p. 105)*

37. "THE DEVOLUTION OF ESTATES ACT" *SHOULD BE RETAINED. (p. 105)*

38. "THE TESTATORS FAMILY MAINTENANCE ACT" *SHOULD BE RETAINED. (p. 105)*

39. *ANY INCONSISTENCIES IN THE ABOVE MENTIONED ACTS AS WELL AS* "THE MARRIED WOMEN'S PROPERTY ACT" *WITH THE PROVISIONS OF THE STANDARD MARITAL REGIME, SHOULD BE ELIMINATED IN FAVOUR OF THE S.M.R. (p. 105)*

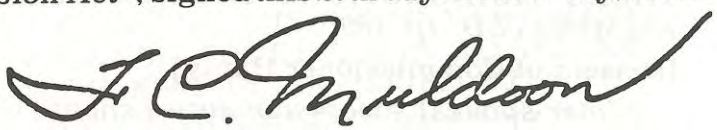
40. "THE WILLS ACT" *SHOULD BE AMENDED TO INCLUDE A PROVISION TO THE FOLLOWING EFFECT:*

Divorced Spouse Deemed To Have Predeceased

IN CASE OF DISSOLUTION OR ANNULMENT OF MARRIAGE, WHERE A SPOUSE'S WILL EXECUTED PRIOR TO THE DIVORCE OR ANNULMENT MAKES REFERENCE TO, OR CONFERS ANY BENEFIT UPON, THE OTHER SPOUSE, IT SHALL BE READ AS IF THE OTHER SPOUSE PREDECEASED THE TESTATOR OR TESTATRIX. (p. 107)

41. *IF ADOPTED IN MANITOBA, THE CONCEPT AND OPERATIVE DETAILS OF THE S.M.R. OUGHT TO BE DESCRIBED, PUBLISHED AND WIDELY DISSEMINATED IN PAMPHLET FORM THROUGHOUT THE PROVINCE; AND RE-PUBLISHED AND MADE AVAILABLE TO THE PUBLIC UNTIL THEY ARE FAMILIAR TO OUR PEOPLE. (p. 109)*

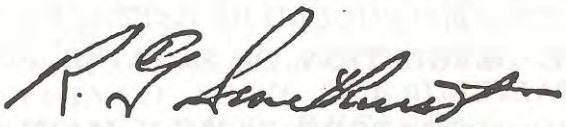
These are Reports pursuant to Section 5(3) of *"The Law Reform Commission Act"*, signed this 27th day of February, 1976.



Francis C. Muldoon, Chairman

R. Dale Gibson, Commissioner

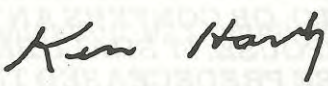
C. Myrna Bowman, Commissioner



R.G. Smethurst, Commissioner

Val Werier, Commissioner

Sybil Shack, Commissioner



Kenneth R. Hanly, Commissioner

APPENDIX A

Partial* list of persons and groups who responded in writing to the Commission's Working Paper issued in January, 1975, and/or who appeared at the Commission's public hearings

Women's Place in Manitoba
J.S. Fenn
Winnipeg Council of Self-Help
William Klassen
Iva Chomyn
Jean Geary
Steina Gohl
Cathy Martin
Enid Murphy
Helen Olmstead
Mary Joy Olmstead
Linda Fletcher
Roland Perrin
Ray Kreitzer
Marge Barclay
The Family Bureau of Greater Winnipeg
Y.W.C.A.
Mrs. W.F. Uhrich
Women's Bureau, Department of Labour
Canadian Federation of University Women (Brandon Branch)
Phyllis Hogan
Manitoba Action Committee on the Status of Women
Estate Planning Council
Status of Women Committee of the New Democratic Party of Manitoba
Nora Rhea Collin
Laura Nosé
Yvonne Roy
University Women's Club of Winnipeg
Jeanne Woychyshyn
Muriel Smith
Ron Schultz
Edith Lunn
Laurie Zechoval
Manitoba Association of Women and the Law
Lou McPhillips
Dan Bachewich
Mrs. A. Richardson

Family Law Committee (Board of Directors, Children's Aid Society of Western Manitoba)
Manitoba Bar Association
Alice Steinbart
Ruth Pear
John Wade
Elsie Jawolick
James Wright
Provincial Council of Women of Manitoba
Co-ordinator of the Family Life Education Centre (Committee)
Manitoba Action Committee on the Status of Women (Brandon Branch)
C. Scott
Dr. John B. Bond
F.A. Williams
Dolly Finkbeiner
Manitoba Farm Bureau
Portage la Prairie University Women's Club
Mrs. L. Sargent
Karen Lister
Laurel White
Berenice B. Sisler
Cedric Vendyback
Mrs. S. Gaudry
Robert C. Mack
C. Hansell
H. Adams
Mrs. L. Milton
Janet Osborne
J. Harms
Roy H. Britton
Lewis D. Wasel
E.H.C. Spender
Marion Fulton
Flin Flon Business and Professional Women's Club
Mrs. Jean Kimber
Judge W.A. Molloy

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*Some correspondents signed themselves with designations such as "abandoned wife" or were otherwise anonymous. In some instances of signed responses, it was apparent to us upon reading the narratives that it would be indiscrete of the Commission to identify the correspondents.

APPENDIX B

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