LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT ON

"THE MARRIED WOMEN'S PROPERTY ACT"
AND RELATED MATTERS

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

The Commissioners are:

Clifford H.C. Edwards, Q.C., *Chairman*
Knox B. Foster, Q.C.
Lee Gibson
John C. Irvine
Gerald O. Jewers, J.

Chief Legal Research Officer:

Ms. Donna J. Milller

Legal Research Officers:

Ms. Iris Allen
Ms. Nancy Harwood
Ms. Valerie C. Perry

Secretary:

Miss Suzanne Pelletier

The Commission offices are located at 521 Woodsworth Building, 405 Broadway, Winnipeg, Manitoba R3C 3L6. Tel. (204) 945-2896.

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TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

1.01 In May, 1985 the Attorney-General referred *"The Married Women's Property Act"*, C.C.S.M. c. M70, to the Commission for study and reform. It was requested that the Commission give high priority to this task so that any appropriate recommendations for change could be implemented by the government at the next Session of the Legislature. Subsequently, the Commission was asked to broaden its terms of reference to include within its mandate certain miscellaneous provisions in other statutes which pertain to the legal status of married women. Accordingly, the scope of this Report extends not only to an examination of *"The Married Women's Property Act"*, but also to certain ancillary provisions relating to married women. We shall assess whether reform of this legislation is called for and, if so, specify the extent and nature of that reform.

1.02 During the past decade in Manitoba, extensive change has occurred to alter fundamentally the legal framework for determining spousal rights. *"The Marital Property Act"*, C.C.S.M. c. M45, and *"The Family Maintenance Act"*, C.C.S.M. c. F20, are the two principal statutes by which this has been accomplished.[1] When these two statutes were passed, their effect upon and relationship to other provincial statutes was clarified. With respect to *"The Married Women's Property Act"* ("the Act"), a section was added to make the Act subject to *"The Marital Property Act"*.[2] However, no comprehensive review of the Act was undertaken to examine the need for its provisions nor was there any real study of its proper role in light of these family law statutes.

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[1]Both statutes were enacted in October, 1978 and were substantially based upon recommendations in the Commission's earlier Reports on family law reform. See Manitoba Law Reform Commission, *Report on Family Law, Part I: The Support Obligation* and *Part II: Property Disposition* (Reports #23 and #24, 1976).

[2]See section 9.1 of *"The Married Women's Property Act"*, enacted S.M. 1978, c. 27, s. 8.

1.03 In this Report, we attempt to provide such a review. It is a timely study, given this recent family law reform and the subsequent advent of the *Canadian Charter of Rights and Freedoms*. We begin, in Chapter 2, with a brief historical background to married women's property legislation to determine its origins - why it was passed, what changes it sought to effect, etc. We then summarily trace the amendments which were made to the legislation since its inception in the late 19th century and conclude with an overview of its present provisions. In Chapter 3, we discuss the legislation in greater detail and set forth all of our recommendations for reform. A list of these recommendations is contained in Chapter 4 at the conclusion of our Report.

CHAPTER 2

HISTORICAL BACKGROUND

2.01 The common law regarded a married woman as a mere dependant of her husband. Well over a century ago, John Stuart Mill observed that "[m]arriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house".[1] A married woman was assigned a unique status which denied her legal existence as a person independent of her husband. Blackstone, amongst other jurists, has explained the unique legal status of a married woman via the doctrine of unity of legal personality:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta*: is said to be *covert baron*, or under the protection and influence of her husband, her *baron* or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.[2]

More recently, Pollock and Maitland have countered that the main idea which governed the law of husband and wife was not that of "unity of person" but that of guardianship, which the husband had over the wife and her property.[3] "Guardianship", rather than that of the "unity of legal personality" may be the more precise term to describe the unique status of a

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[1] J. S. Mill, *The Subjugation of Women* (2d ed. 1869) at 147.

[2] W. Blackstone, *Commentaries on The Laws of England* (19th ed. 1836) at 442.

[3] 2 F. Pollock and F. Maitland, *The History of English Law* (2d ed. 1968) at 405-406.

married woman since the latter expression fails to address adequately the fact that it was the wife's legal personality which fused with the husband's, and not *vice versa*, or collectively as a distinct status.

2.02 A married woman's legal dependence upon her husband was based, in part, upon her proprietary restrictions. That is, the common law placed certain restrictions on a married woman with respect to her ability to own, acquire and dispose of property. These limitations varied in accordance with the type of property involved. With respect to personalty, a married woman was incapable of owning, acquiring or disposing of it. On marriage, her personalty vested absolutely in her husband: he could dispose of it, either during his lifetime or by will, as well as make it available to his creditors.[4] Similarly, a married woman was incapable of acquiring or disposing of her freehold land. On marriage, although she retained title to her freehold land, her husband became entitled to its immediate possession and to all rents and profits from it during the course of the marriage. Her husband could dispose of his interest in the land; it was only upon his death that a married woman regained her full property rights. Leasehold interests and interests in intangible movable property (e.g. interests in debts or contracts) could neither be acquired nor disposed of by a married woman. Her husband was entitled to all rents and profits from the leasehold interests. He could dispose of them during marriage and could assign his rights to the profits.[5] A husband was entitled to intangible movable property so long as he recovered it into his possession. Having accomplished this, he could then do with the property as he wished, even disposing of it by will.

2.03 Because a married woman had no property during marriage, she was incapable of satisfying any debt or liability which might be imposed upon her. Distinct rules were developed in the common law as a result of her proprietary disabilities. These rules governed her legal capacity in those

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[4]An exception to this rule pertained to paraphernalia (apparel, ornaments, etc.) of the wife. Although this property belonged to the husband during the marriage and he could dispose of it *inter vivos*, he could not dispose of it by will, and it reverted to his wife on his death.

[5]His wife resumed her rights at her husband's death if the property was not alienated during marriage. However, if the wife predeceased her husband, she lost all rights to the leasehold interest.

branches of the law pertaining to contract, tort, wills and estate as well as certain rules of civil procedure. In the area of contract, a married woman was incapable of contracting on her own behalf. The rights to any pre-nuptial contracts vested in her husband on marriage and she and her husband were made jointly liable for them during the course of their marriage.[6] In the field of tort, a woman upon marriage remained capable of committing a tort and liable for any torts committed by her, but her husband became jointly liable with her for all torts regardless of whether they were committed prior to or during the course of their marriage. The doctrine of interspousal immunity in tort meant that neither husband nor wife could sue one another in tort. In the area of wills and estates, a married woman was incapable of making a will without her husband's irrevocable consent. Finally, special rules of civil procedure developed for a married woman such that she could not sue or be sued without her husband being joined in the action.

2.04 The common law rules which pertained to married women's property were thought to be unfair to married women. In response to the unfairness, equity modified the common law rules by three principles. The first principle was known as the wife's equity to a settlement. When a husband took court action to obtain possession of his wife's property, equity compelled him to settle a portion of the property on his wife and children. Later, the Court of Chancery permitted claims for the settlement of property to be initiated by the wife or children. The second modification was the doctrine of separate property. This doctrine allowed property to be given to a trustee for the separate use of a married woman. The married woman could dispose of the separate property both *inter vivos* and by will. Later, in the absence of a trustee being appointed, the Court of Chancery deemed the married woman's husband to hold her property in trust for her. This separate property principle allowed a married woman to protect some of her property from her husband and his creditors. The doctrine of restraint on anticipation was the third principle. It restrained a married woman, to whom property had been given for her separate use, from alienating the property or anticipating the future income from the property during her marriage. This third principle was beneficial for three reasons. It prevented the husband from unduly influencing his wife with respect to her property. It also allowed a settlor

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[6]After her husband's death, a woman could again sue and be sued on her ante-nuptial contracts.

to benefit his married daughter without interference from her husband. Finally, it protected the interests of those persons who would be entitled to inherit on the death of the married woman.

2.05 These three principles devised by equity helped to alleviate the restrictions of the common law rules respecting a married woman's property. They did not, however, satisfactorily resolve the plight of married women. The chief criticism of the equitable principles was that they principally benefitted the "daughters of the wealthy".[7] The doctrine of separate estate, for example, "could only be invoked through the mechanism of a will or a marriage settlement and the latter was such a cumbersome and expensive vehicle that only the rich could afford it".[8] Accordingly, although equity removed some of the proprietary limitations of married women, it introduced one law for rich women and another for poor women. Legislators were called upon in the latter half of the 19th century to rise to the task of implementing broader reforms directed to both the inequalities at common law and at equity.

2.06 The British Parliament, through a series of Married Women's Property Acts, sought to give married women equality with married men in matters of status and capacity and to introduce a regime of separate property. The earliest of these reforms were received into Manitoba law as of July 15, 1870[9] and can be briefly summarized. By virtue of legislation passed in England in 1857, a married woman could dispose of her reversionary interests in her own estate as if she were a *feme sole*. She could also release or extinguish her right to a settlement out of her own estate to which she might be entitled, with her husband's concurrence, if there were no restraint on alienation.[10] Other legislation passed in the same year gave her the status of *feme sole* with regard to property which she acquired or inherited while

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[7]M. McCaughan, *The Legal Status of Married Women in Canada* (1977), at 19.

[8]*Ibid*.

[9]See subsection 51(3) of *"The Queen's Bench Act"*, C.C.S.M. c. C280.

[10]*The Married Women's Reversionary Interests Act, 1857*, 20 & 21 Vict., c. 57, s. 1 (U.K.).

judicially separated from her husband.[11] She was also considered a *feme sole* for the purposes of contract and tort, and to sue and be sued in civil proceedings, while judicially separated.

2.07 Not long after Manitoba became a province in 1870, the Legislature passed a series of Marital Property Acts to modify the rules of common law and equity governing a married woman. Most of these were patterned after the English legislation. Not surprisingly, these reforms were easily accepted in Manitoba as well as the other prairie provinces:

> The egalitarian environment of the Canadian frontier created a society in which women were as vital to the economic and social fabric of the community as their spouses. While they did not often trespass into roles traditionally reserved for males, pioneer women were of equal importance with their husbands and brothers in the domestic economy, and were able to participate in community institutions from schools and churches to farm organizations. Not surprisingly, therefore, reforms adopted in industrial England were easily accepted on the Prairies.[12]

2.08 The underlying philosophy in these various Married Women's Property Acts was to secure reform through numerous small extensions to existing rules rather than via a broad restructuring of the legal framework governing married women. This method "precluded the possibility of a clear statement of the law and resulted in a series of complicated and often ambiguous statutes".[13] The reforms introduced by the various Married Women's Property Acts, and related legislation, are summarized below, according to subject classification.

1. Property. Manitoba legislation enacted in 1875 introduced inroads into the common law rules which restricted a married woman's ability to own and enjoy property. It provided that a married woman could

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[11] *The Matrimonial Causes Act, 1857*, 20 & 21 Vict., c. 85, ss. 25, 26 (U.K.).

[12] Law Reform Commission of Saskatchewan, *Tentative Proposals for an Equality of Status of Married Persons Act* (1981) at 1-2.

[13] *Supra* n. 7, at 20.

hold and enjoy her personal and real property.[14] However, the married woman was still not entitled to her earnings during marriage, except in limited circumstances.[15] Reforms in 1881 provided that a married woman was entitled to her wages during marriage, and could hold, enjoy and dispose of her earnings as if she were a *feme sole*.[16] Conveyances between husband and wife became valid and a married woman over 21 years of age became able to convey her property without the concurrence of husband as if she were a *feme sole*.[17] The Act of 1900 further modified the common law restrictions: the married woman could acquire, hold and dispose of any of her property, without restriction, by will or otherwise.[18] Finally, in 1945 the equitable doctrine of restraint on anticipation as well as alienation

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[14] *An Act respecting separate rights of property of married women*, S.M. 1875, c. 25, s. 1. This rule applied to women who married on or after May 14, 1875 without a marriage settlement, and to all her real and personal property whether the property was obtained before or after her marriage, with the exception of property received from her husband during the marriage. Women who married prior to May 14th, 1875 without a marriage settlement, were entitled to hold and enjoy property not then possessed by their husbands (*An Act respecting separate rights of property of married women,* S.M. 1875, c. 25, s. 2).

[15] A married woman was only entitled to her earnings if she were granted an order of protection, which was obtainable where a wife was deserted by her husband, where her husband was a lunatic or in other limited circumstances (*An Act respecting separate rights of property of married women,* S.M. 1875, c. 25, ss. 5, 6).

[16] *An Act to amend certain of the Acts forming part of the Consolidated Statutes of Manitoba*, S.M. 1881, c. 11, ss. 74, 75.

[17] *"The Real Property Act of 1889"*, S.M. 1889, c. 16, ss. 32, 33; *"The Married Woman's Real Estate Act"*, S.M. 1890, c. 17, s. 3.

[18] *"The Married Women's Property Act"*, S.M. 1900, c. 27, s. 3. In addition, the married woman in her will could appoint certain, property to be liable for her debts and other obligations.

of a wife's property (which could not attach to a man's property) was abolished.[19]

Concurrent with these reforms respecting a married woman's capacity to own and enjoy her property, married women's property legislation gradually reduced a husband's rights to his wife's property. The 1875 legislation provided that a husband could no longer claim against his wife's separate property during her lifetime, nor could he render her property liable for his debts.[20] In 1881, when a married woman's earnings became part of her separate estate, her husband could no longer render them subject to his debts. Neither could his wife's personal property be subject to his debts, even if he had possession of them.[21]

2. Contracts. In 1875, legislation was passed whereby a married woman became liable for her ante-nuptial contracts and debts to the extent of her separate property.[22] She was made responsible as well for any debts, liabilities or obligations contracted or incurred with respect to her separate property, in her own name, during the

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[19] *"The Married Women's Property Act"*, S.M. 1945, c. 34, ss. 4(2), (3), (4). This provision applied to instruments executed after January 1, 1946; restrictions on alienation and anticipation attaching to property in documents executed prior to January 1, 1946 remained unchanged. The 1945 Act was based on The Married Women's Property Act which was recommended at the Conference of Commissioners on Uniformity of Legislation in Canada, in 1943: Conference of Commissioners on Uniformity of Legislation in Canada, *Model Acts Recommended from 1918 to 1961 inclusive* (1962) at 223-226.

[20] *An Act respecting separate rights of property of married women*, S.M. 1875, c. 25, ss. 1, 2, 13, 20.

[21] *An Act to amend certain of the Acts forming parts of the Consolidated Statutes of Manitoba*, S.M. 1881, c. 11, s. 75.

[22] *An Act respecting separate rights of property of married women*, S.M. 1875, c. 25, s. 14. This rule applied to women who were married after May 14th, 1875 and who owned separate property, not settled by ante-nuptial contract.

marriage.[23] Her liability was later increased so that she became liable on any contract respecting her realty as if she were a *feme sole*.[24] A married woman's capacity to contract and her liability for her contracts were further increased by the Act of 1900. A married woman became capable of entering into and rendering herself liable on any contract, and while her liability for her ante-nuptial debts and contracts continued only to the extent of her separate property and jointly with her husband, her property became "primarily" liable in any action. As to the contractual liability incurred by a married woman subsequent to the 1900 Act, she was liable to the extent of her separate property, but her liability was broadened to bind property which she actually possessed at the date of the contract and property which she thereafter acquired or to which she became entitled.[25] Property which was subject to restraint on anticipation was excluded. It was not until 1937[26] that a married woman's liability for her debts and contracts ceased to depend on the extent of her property and attached to her personally, with liability being imposed upon her property.

Meanwhile, a husband's liability for his wife's obligations decreased proportionately. In 1875[27] a husband's liability for his wife's ante-nuptial debts and contracts was reduced so that he was liable only to the extent of the interest that he obtained in his wife's separate property on marriage. In addition, no longer was a husband liable for the debts, obligations and liabilities contracted and

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[23] *An Act respecting separate rights of property of married women*, S.M. 1875, c. 25, ss. 20, 22.

[24] *An Act to amend certain of the Acts forming part of the Consolidated Statutes of Manitoba*, S.M. 1881, c. 11, s. 77.

[25] *"The Married Women's Property Act"*, S.M. 1900, c. 27, ss. 11, 12, 15.

[26] *An Act to amend "The Married Women's Property Act"*, S.M. 1937, c. 28, ss. 1, 2.

[27] *An Act respecting separate rights of property of married women*, S.M. 1875, c. 25, ss. 15, 22.

incurred by his wife in her own name during their marriage, with respect to her separate property. The reforms which were introduced in 1881[28] eliminated a husband's liability for his wife's employment and business debts and her own contracts. In 1945, a husband's liability for his wife's ante-nuptial debts and contracts was eliminated.[29]

3. Torts. In 1875, a husband's liability for his wife's torts was effectively reduced.[30] Although a husband remained liable for his wife's torts, execution on any such judgment was first to be levied against her separate property. In 1937, a husband's liability for his wife's torts, *qua* husband, was finally abolished.[31] However, the common law rule that a husband and wife could not sue one another in tort continued. A limited encroachment on the interspousal immunity in tort rule was made in 1945[32] when a husband and wife became able to sue one another in tort while living apart pursuant to a judicial separation, if the tort was committed during the separation period. Interspousal immunity in tort was finally abolished in 1973.[33]

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[28] *An Act to amend certain of the Acts forming parts of the Consolidated Statutes of Manitoba*, S.M. 1881, c. 11, s. 56.

[29] *"The Married Women's Property Act"*, S.M. 1945, c. 34, s. 5(1)(b).

[30] *"An Act respecting separate rights of property of married women"*, S.M. 1875, c. 25, s. 3.

[31] *An Act to amend "The Married Women's Property Act"*, S.M. 1937, c. 28, s. 1.

[32] *"The Married Women's Property Act"*, S.M. 1945, c. 34 s. 7(2). The section also permitted a married woman to sue her husband in tort in order to protect and secure her property.

[33] See *"The Married Women's Property Act"*, S.M. 1973, c. 12, s. 1, which enacted the recommendations of The Manitoba Law Reform Commission, *Report on the Abolition of Interspousal Immunity in Tort* (Report #10, 1972). An

(Footnote continued to page 12)

4. Wills and estates. Because a married woman could not acquire, hold or dispose of property, she was not able to act as a trustee of other persons' property, nor could she dispose of property by will. Married women's property legislation in the late 19th century and early 20th century modified the common law in the area of a married woman's capacity to act as a trustee and to dispose of property by will. With respect to her capacity to act as a trustee, legislation was enacted in 1900 to allow her to be an executrix or administratrix of the estate of a deceased person, or a trustee of property subject to a trust. In this capacity, she could be sued or could sue, and could transfer any trust property as if she were a *feme sole*.[34] Later legislation summarized her capacity to act as a trustee by providing that she could act as a fiduciary or in a representative capacity as if she were unmarried.[35] A married woman's ability to dispose of property by will expanded in incremental steps. In 1875, legislation provided that a married woman could devise or bequeath her separate property to or among her children or issue and, if she had no issue, to her husband.[36] The married woman's capacity to dispose of property by will was completely expanded in 1900, when she became capable of disposing of any of her property by will as if she were unmarried.[37]

(Footnote continued from page 11)
exception was made for torts committed prior to the coming into force of the Act.

[34] *"The Married Women's Property Act"*, S.M. 1900, c. 27, s. 17. This section was inserted into *"The Trustee Act"* in 1931 (S.M. 1931, c. 52, s. 29) and continues to be retained in *"The Trustee Act"*, C.C.S.M. c. T160, s. 36.

[35] *"The Married Women's Property Act"*, S.M. 1945, c. 34, s. 3(f).

[36] *"An Act respecting separate rights of property of married women"*, S.M. 1875, c. 25, s. 16.

[37] *"The Married Women's Property Act"*, S.M. 1900, c. 27, ss. 3, 6.

5. Rules of civil procedure. As to a married woman's capacity to sue and be sued, the first legislative inroads in 1875 provided that she could sue or be sued alone on her ante-nuptial contracts or debts.[38] However, so long as her husband remained in Manitoba, he was to be made a party to any action respecting these obligations. The 1881 legislation[39] further altered a married woman's common law inability to sue or be sued by providing that she had the same remedies to protect her separate property as if unmarried; she could maintain an action in her own name for the recovery of her separate property and could be sued alone with respect to her separate debts, contracts and torts. In 1900[40] a married woman became able to sue or be sued on any of her contracts and in tort, as if she were a *feme sole*, and her husband no longer had to be joined in any action brought by or taken against her. The 1937 Act[41] specified that a married woman could sue and be sued in all respects as if she were a *feme sole*.

2.09 *"The Married Women's Property Act"* today consists of 10 sections. The legislation is reproduced in Appendix A. Sections 3, 5 and 7 are enabling provisions. Collectively, they essentially stipulate that a married woman has full independent rights in the fields of property, contract, tort, wills and estates and civil procedure. Section 3 is the major provision. It lists six rights and obligations and states, in respect to these, that a married woman shall be treated as if she were unmarried. To paraphrase, it stipulates that a married woman (1) can acquire, hold and dispose of any property; (2) is liable for all her ante-nuptial obligations; (3) can enter into and incur liability for any contract, debt or obligation; (4) can sue or be sued alone in any action; (5) can be personally liable on a judgment or order; and (6) can act in a fiduciary or representative capacity. Section 5 is complementary

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[38] *"An act respecting separate rights of property of married women,"* S.M. 1875, c. 25, ss. 18, 22.

[39] *An Act to amend certain of the Acts forming part of the Consolidated Statutes of Manitoba*, S.M. 1881, c. 11, s. 78.

[40] *"The Married Women's Property Act"*, S.M. 1900, c. 27, s. 11.

[41] *An Act to amend "The Married Women's Property Act"*, S.M. 1937, c. 28, s. 1.

to section 3 in that it clarifies that a husband is not liable *qua* husband for any torts committed by his wife or for any pre-nuptial contracts.[42] Pursuant to section 7, a husband and wife may use any remedy for the protection and security of their respective properties against all persons, including one another. Subsection 7(2) abolishes interspousal immunity in tort.

2.10 The remainder of the Act deals with essentially procedural and transitional matters. Section 8 is one of the more commonly used provisions in the legislation. It establishes a procedure by which either spouse may apply, in a summary way, to have the court determine any question regarding title to or possession of property. The exact use of this procedure will be set forth in greater detail in the succeeding Chapter. Suffice it to say here that the court's discretionary power under section 8 is limited because the Act is made subject to both *"The Dower Act"* and *"The Marital Property Act"*.[43] Section 4 generally establishes transitional rules with respect to property matters and abolishes restraint on anticipation. Finally, section 6 encompasses certain saving provisions, the first of which is specifically addressed in Chapter 3 in reference to a married woman's right as agent to pledge her husband's credit.

2.11 It can be seen that the Act as it stands today contains a hotchpotch of various provisions which loosely pertain to the legal status of married women. No doubt, for reasons of clarity alone, the legislation needs redrafting. There are also, however, certain provisions in the legislation itself, and generally in the common law, which substantially require updating. These are addressed in Chapter 3 where we also set forth our recommendations for reform. It is our hope and expectation that these proposed reforms, if adopted, would accomplish two objectives. The first is to effect full equality for married men and women under the law. The second is

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[42]This provision, which is contained in subsection 5(1) is, by subsection 5(2), made subject to *"The Highway Traffic Act"*, C.C.S.M. c. H60. It would seem that this proviso refers to subsection 153(3) of *"The Highway Traffic Act"* whereby a driver of a motor vehicle is expressly deemed to be the agent or servant of the owner thereof if (s)he lives with the owner and is a family member.

[43]See sections 9 and 9.1 of the Act (Appendix A).

to cause the removal of many obscure, archaic provisions and their replacement with clearly articulated legislative principles aimed at married persons generally.

CHAPTER 3

RECOMMENDATIONS FOR REFORM

A. GENERAL PROVISION REGARDING EQUALITY

3.01 We saw in the preceding Chapter that married women's property legislation removed the principal disabilities respecting legal status and property rights which affected married women. The necessary changes to the common law were made by way of a series of piecemeal reforms put into place a little at a time, over the course of many years. This process accounts for the archaic language of Manitoba's present Act, its confusing structure, and its lack of a clear statement respecting equality.

3.02 The question for consideration now is to what extent *"The Married Women's Property Act"* can be both simplified and modernized. Our concern with the Act is that because of its exclusive focus on married women, the tone is paternalistic, and because of its age and structure, the language is unnecessarily obscure and complex. The Law Reform Commission of Saskatchewan points out:

> In practice, many of the anachronistic aspects of [the Act] . . . are often ignored. Moreover, the archaic form in which it is cast makes it increasingly difficult to translate it into modern practice. Perhaps one reason for leaving the legislation unchanged is that not even lawyers and judges are any longer sure just what some of the more obtruse [sic] provisions really mean, and what the consequences of repeal might be.[1]

3.03 It is the Commission's view that the essential reforms contained within *"The Married Women's Property Act"* should now be housed within more general, and inclusive, legislation. Three other provinces have taken such an approach.[2] The text of the Ontario provisions, for example, is as follows:

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[1]Law Reform Commission of Saskatchewan, *Tentative Proposals for an Equality of Status of Married Persons Act* (1981) at 5.

[2]*Family Law Reform Act*, R.S.O. 1980, c. 152, s. 65; *Family Law Reform Act*, R.S.P.E.I. 1974, c. F-2.1, s. 60; *The Equality of Status of Married Persons Act*, S.S. 1984-85, c. E-10.3, s. 2.

> 65(1) For all purposes of the law of Ontario, a married man has a legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband.
>
> (2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if such person were an unmarried person.
>
> . . .
>
> (4) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference therein resulting from any common law rule or doctrine, and subsections (1) and (2) shall be so construed.[3]

3.04 Subsection (1) of Ontario's section 65 states that both married men and married women have legal personalities separate and distinct from their spouses. The purpose of the subsection is to remove from the law any remaining implications from the notion of unity of personality. The effect of subsection (2) is to ensure for all married persons the capacity to sue and be sued, to contract, and to acquire and dispose of property. The Ontario Court of Appeal has interpreted these provisions as being sufficient to take away a man's right to bring an action based on criminal conversation because the new equality provision "abolishes any proprietary interest that it is said a husband previously had in his wife".[4]

3.05 Both subsections (1) and (2) of Ontario's section 65 are specifically limited by the rule of construction found in subsection (4).[5] There are two

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[3]R.S.O. 1980, c. 152.

[4]*Skinner* v. *Allen* (1977), 18 O.R. (2d) 3 at 9 (C.A.). In Manitoba, the action for criminal conversation was abolished in 1982 by paragraph 2(1)(a) of *"The Equality of Status Act"*, C.C.S.M. c. E130.

[5]For a discussion of the Ontario provision, see M.C. Cullity, "Family Law
(Footnote continued to page 18)

limitations. First, subsection (4) restricts the operation of subsections (1) and (2) to inequities "resulting from any common law rule or doctrine". This phrase has been interpreted to mean that statutory rules are unaffected. Thus in *Kendall* v. *Kendall*[6] and *Demers* v. *Demers*[7] the Ontario High Court of Justice found that the statutory action for alimony, which is available only to a wife, is unaffected by the general equality statements found in subsections (1) and (2) of the Ontario section.

3.06 Secondly, subsection (4) states that subsections (1) and (2) are to be construed in light of a particular purpose, which is that the law should apply equally to married men and married women. In our view, this limitation is intended to preserve laws which have their basis in the concept of unity of personality but which do not discriminate against the wife. Thus the law of criminal conspiracy, which is that neither husband nor wife can be found guilty of conspiring together because they are to be considered as one person,[8] would likely be unaffected by subsections (1) and (2). So, too, would the rule that neither spouse is compellable to disclose any communication made by his or her spouse during marriage,[9] and the rule that

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(Footnote continued from page 17)
Reform - A Legislative Response!" (1976-77) 3 E.T.Q. 129. It is of note that the rule of construction is omitted from both Prince Edward Island and Saskatchewan legislation.

[6](1978), 82 D.L.R. (3d) 278 (Ont. H.C.J.).

[7](1978), 3 R.F.L. (3d) 207 (Ont. H.C.J.).

[8]*Kowbel* v. *The Queen*, [1954] 4 D.L.R. 337 (S.C.C.). However, it is not clear whether or not a provincial equality statute will affect the interpretation of federal legislation in any event: see *Kowbel*, at 341 (Taschereau J.) and 343 (Estey J.).

[9]This rule is found in *"The Evidence Act"*, C.C.S.M. c. E150, s. 10, and would therefore be unaffected by a general equality provision which is limited in its application to non-statutory law. Abolition of the rule has been recommended by the Federal/Provincial Task Force on Uniform Rules of Evidence: Canada, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982) at 413.

communication of a defamatory statement between spouses does not constitute publication which would give rise to an action for defamation.[10] All of these rules recognize the confidential relationship between spouses and none is discriminatory. The rule of construction found in subsection (4) is, in our view, intended to ensure continued recognition for such rules as long as they afford equal treatment for men and women.[11]

3.07 The Commission believes that legislation similar to that found in subsections 65(1), (2) and (4) of the Ontario *Family Law Reform Act* should be enacted in Manitoba. Such legislation would effectively abolish the basis which existed at common law for the disabilities placed upon married women. The specific provisions contained within sections 3 and 5 and subsections 7(1) and (3) of *"The Married Women's Property Act"* could then be repealed. The abolition of interspousal tort immunity now located in subsection 7(2) will be discussed later in this Report at para. 3.74.

3.08 One change which we would make to Ontario's subsection (4) is to include the words "or equitable" after "common law" so as to ensure that rules of equity are included within the ambit of the legislation. It is to be noted that the equitable presumptions of advancement and resulting trust will be looked at in detail beginning at para. 3.36.

3.09 The Commission recommends:

RECOMMENDATION 1

That sections 3 and 5 and subsections 7(1) and (3) of "The Married Women's Property Act" be repealed and replaced by legislation which reads as follows:

(1) For all purposes of the law of Manitoba, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.

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[10] J.G. Fleming, *The Law of Torts* (6th ed. 1983) at 507, 533.

[11] Whether the confidential nature of the spousal relationship *should* be preserved depends upon considerations which are outside the scope of this report.

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person.

(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law or equitable rule or doctrine, and subsections (1) and (2) shall be so construed.

B. SPECIFIC PROVISIONS REGARDING EQUALITY

3.10 In this portion of Chapter 3, we consider specific provisions in the married women's property legislation and generally in the common law which are in need of reform.

1. Married Woman's Right as Agent to Pledge Her Husband's Credit

(a) The present law

3.11 The right of a married woman to act as agent to pledge her husband's credit is not dealt with expressly under *"The Married Women's Property Act"*. Paragraph 6(b), however, does state that the Act does not exempt a husband from liability in respect of those contracts entered into and those debts incurred by his wife for which he would otherwise be liable at common law. The effect of this legislation is to perpetuate the common law rules pertaining to a husband's liability for his wife's contracts and debts and, in particular, those agency principles whereby she can pledge her husband's credit.

3.12 There are two agency principles which pertain to the relationship of husband and wife. The first principle applies during cohabitation.[12] That

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[12]The first requirement is cohabitation, not marriage. As such, the principle can apply to situations where persons live together as husband and wife, whether as an unmarried couple (*Ryan* v. *Sams* (1848), 12 Q.B. 460, 116 E.R. 940) or as a man and his housekeeper (*Dehenham* v. *Mellon* (1880), 6 App. Cas. 24 (H.L.)).

is, when a husband and wife live together in a domestic establishment,[13] a wife is presumed to have her husband's authority to acquire necessaries[14] that are suitable to his style of living,[15] or that which is permitted by him to be assumed by his wife. The presumption is one of fact, and may be rebutted by the husband showing that his wife did not, in fact, have his

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[13]The second requirement is a domestic establishment. The leading case on this requirement is *Debenham* v. *Mellon*, *id.* at 33, in which Lord Selborne stated that the hotel in which the husband and wife resided did not constitute a domestic establishment.

For a general description of the first principle, see *Phillipson* v. *Hayter* (1870), L.R. 6 C.P. 38 at 42. The principle has been applied in Manitoba in *Volpi* v. *Bell* (1908), 17 Man. R. 417 (C.A.).

[14]Necessaries include the reasonable supply of actual necessaries of life, whether food, garments or medical attention, but do not include articles of luxury or articles which are extravagant or purchased in excessive quantity: *Miss Gray, Limited* v. *Earl Cathcart* (1922), 38 T.L.R. 562 at 565-566 (K.B.). For other authorities, see 22 *Halsbury's Laws of England* (4th ed., 1977) at 680, fn. 1, and for Canadian examples, see *Zealand* v. *Dewhurst* (1873), 23 U.C.C.P. 117 at 120-122; *Price* v. *Price* (1910), 21 O.L.R. 454 at 456 (H.C.J.); *Gebbie* v. *Kershaw*, [1927] 3 D.L.R. 156 at 157 (Sask. C.A.); *Seldon* v. *Zamborski*, [1928] 1 D.L.R. 638 (B.C.C.A.); *Owen Sound General and Marine Hospital* v. *Mann*, [1953] 3 D.L.R. 417 at 423 (Ont. H.C.).

[15]The husband's standard of living which he permitted his wife to adopt, and not that which is reasonable in light of his salary, is relevant in a determination of what constitutes necessaries. See *Bowstead on Agency* (14th ed. 1976) at 97, fn. 70; 22 *Halsbury's Laws of England*, *supra* n. 14, fn. 8.

authority.[16] The second agency principle is that a deserted wife[17] is an agent of necessity[18] for the purpose of pledging her husband's credit for necessaries. This principle arises where the wife is faultless[19] and does not have sufficient means to pay for the necessaries.[20] Once this second

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[16]The husband can negative the presumption of agency by proving that:

(1) he expressly warned the tradesman not to supply goods on credit;
(2) the wife was already supplied with a sufficiency of the articles in question;
(3) the wife was supplied with a sufficient allowance or sufficient means for the purpose of buying the articles without pledging the husband's credit;
(4) the husband expressly forbade his wife to pledge his credit;
(5) the order, though for necessaries, was excessive "in point of extent" or . . . "extravagant"; or
(6) the supplier of necessaries gave credit exclusively to his wife as principal.

See *Miss Gray, Limited* v. *Earl Cathcart*, *supra* n. 14, at 565 referring to *Smith's Leading Cases*, v. 2 (12th ed.) at 476-477, and at 566.

[17]The desertion may be actual or constructive. *Biberfeld* v. *Berens*, [1952] 2 Q.B. 770 at 777 ff. (C.A.).

[18]The term "agency of necessity" was first used by Lush, J. in *Eastland* v. *Burchell* (1878), 3 Q.B.D. 432. While the wife can be analogized to an agent as she can pledge her husband's credit for necessaries and a third party from whom she obtains necessaries can sue her husband, she is not a true agent because she acts without her husband's authority. Hence, the wife's agency has been referred to as quasi-agency. See J. S. Ewart, Book Review (*Anson's Law of Contracts*) (1920), 33 Harv. L. Rev. 627.

[19]The wife will not be entitled to pledge her husband's credit if she has committed adultery, unless her husband connived at or condoned the offence.

[20]*Liddow* v. *Wilmot* (1817), 2 Stark 86, 171 E.R. 581 (K.B.); *Biberfeld* v. *Berens*, *supra* n. 17.

(Footnote continued to page 23)

agency principle arises, it becomes an irrebutable rule of law.[21]

3.13 In addition to the above two special principles, a wife can be an agent of her husband by general agency rules which permit an agent to act on behalf of his principal by virtue of actual or apparent authority.[22] The general agency rules, unlike the special agency principles, do not limit the scope of a wife's agency to the purchase of necessaries. They apply equally

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(Footnote continued from page 22)

Sufficient means may be available to the wife from any source, whether employment earnings or payments made to her by her husband pursuant to a court order (*Lineham* v. *Holden*, [1933] 4 D.L.R. 187 at 192-193 (B.C.C.A.). But see *Sandilands* v. *Carus*, [1945] K.B. 270 at 276 (C.A.) where it was held that the wife could pledge her husband's credit notwithstanding the payments to her from her husband pursuant to a court order, as the order provided her with an amount that would satisfy only her immediate and pressing needs. See also *Hatfield Hall* v. *Walters and MacDonald*, [1955] O.W.N. 66 at 67 (C.A.) where Laidlaw J.A. found the wife to have authority to pledge her husband's credit for the amount in excess of the sum that she received from him for her support (pursuant to a court order), in order to obtain reasonable support and maintenance having regard to the station in life of the parties.

[21]*Fridman's Law of Agency* (3d ed. 1971) at 72.

[22]An agent may have his principal's actual authority to represent him or act on his behalf by virtue of (i) a verbal or written agreement between himself and his principal (express agency); or (ii) the principal's conduct which would lead a reasonable third party to conclude that the other is his agent for the purpose of entering into contracts incidental to the activity for which the person has express authority (implied agency).

An agent may have his principal's apparent authority when his principal acts in a manner that leads a third party to believe that he has authorized a person to act on his behalf, and the third party, relying on his belief, enters into a transaction with the apparent agent, that is within the scope of the agent's ostensible authority. The principal will be estopped from denying the agency, whether the ostensible agent had no authority or merely acted in excess of his authority (agency by estoppel). See *Bowstead on Agency*, *supra* n. 15, at 69-70.

to married men and women, and do not require either cohabitation (as does the presumed agency of cohabitation) or desertion by the husband with faultless conduct by the wife (as does the wife's agency of necessity). On the other hand, the general agency rules are more restrictive than the wife's agency of necessity in that the latter allows a wife to pledge her husband's credit for necessaries even when her husband has specifically forbidden her to pledge his credit or has forbidden a third party from extending credit in her favour. As earlier stated, the agency of necessity gives rise to an irrebuttable presumption of law; conversely, the general agency rule is dependent upon actual or apparent authority and may be revoked at will.

3.14 These two special agency principles arose at common law because of the distinctive legal position of married women. In particular, the first principle (which presumes agency during cohabitation) developed at common law because a married woman could neither own property nor enter into contracts on her own behalf. Accordingly, she would have no credit of her own. Typically, however, she managed the household and dealt with tradespeople when she purchased necessaries for the household. The rule developed for the benefit of both married women and tradespeople. That is, married women had the convenience of using their husbands' credit to purchase necessaries, while tradespeople had the protection of being able to sue husbands for payment of the necessaries purchased by their wives. The second principle - that of the wife's agency of necessity - evolved because of the proprietary disabilities of a married woman and her inability to sue her husband. The principle allowed her to pledge her husband's credit for necessaries, and thereby enforce her common law right to receive maintenance and support.

(b) The need for reform

3.15 At the very least, both agency principles need to be reformed to make the right to pledge credit applicable to married men as well as married women. There is no compelling reason to confine these agency principles to a married woman given that her legal position generally is no longer distinctive from a married man. In particular, a married woman no longer lacks contractual capacity, nor are there any legal impediments with respect to her owning property.[23] In short, she can have her own credit, quite independent

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[23] *"The Married Women's Property Act"*, C.C.S.M. c. M70, s. 3(b), (c).

of her husband. Consequently, there is nothing intrinsic in her status which entitles her alone to the continuance of both special agency principles. Nor should there be, given the principle of sexual equality now embodied in section 15 of the *Canadian Charter of Rights and Freedoms*.[24]

3.16 Reciprocity of the agency principles would recognize that the traditional roles of men and women today may very well be reversed, with married men occupying domestic roles and married women working outside the home. But reciprocity can only be supported if there is reason to continue the principles. Do they perform a valuable role such that their continuance can be justified? Or, has their function been overtaken by history?

3.17 First, let us examine the agency principle which applies during cohabitation. Should this principle be retained? This question was answered in the affirmative by three other law reform agencies who studied this agency principle during the 1960s and 1970s, namely the English Law Commission (1969),[25] the Ontario Law Reform Commission (1975)[26] and the Alberta Institute of Law Research and Reform (1978).[27] The English Commission described the agency principle as "reasonable and useful to the wife",[28] but did not elaborate further. The Ontario Commission saw no justification for repealing the principle and stated, with respect to its repeal, that "it could be potentially disruptive to the management of many households if this were done".[29] While the Alberta Institute tentatively recommended abolition of

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[24]*Canadian Charter of Rights and Freedoms*, s. 15(1).

[25]The Law Commission, *Family Law, Report on Financial Provision in Matrimonial Proceedings* (Report #25, 1969) at 52, para. 108-109.

[26]Ontario Law Reform Commission, *Report on Family Law, Part VI: Support Obligations* (1975) at 143.

[27]Institute of Law Research and Reform, *Matrimonial Support* (Report #27, 1978) at 173.

[28]*Supra* n. 25, para. 109.

[29]*Supra* n. 26, at 135.

the principle in its Working Paper on Matrimonial Support,[30] in their final Report it concluded "that . . . [the agency principle] is not harmful and might as well continue".[31]

3.18 The principle has been more recently examined by the Law Reform Commission of Saskatchewan (1982).[32] That Commission was of the view that the agency principle should not be retained. In support of its conclusion, the Commission cited essentially three reasons, namely:

(1) the rule does not provide any substantial benefit;

(2) it is based on a conception of marriage which cannot be cured merely by making obligations mutual between spouses; and

(3) the ordinary law of agency provides all the authority that is necessary in cases in which it is convenient for one spouse to act for the other.[33]

3.19 Although all of these reports provide some guidance to us in determining whether this agency principle should be retained, they are not in themselves determinative of any right solution for Manitoba. The answer instead lies in examining what practical role, if any, this agency principle plays in this particular province. It may very well be the case that local distinctions explain the different responses of the various law reform agencies on the question of the need for the principle's retention.

3.20 First, is the agency principle used in Manitoba? This is a difficult question to answer in the absence of extensive empirical research. However, we did conduct a survey of four major retail stores. We found that none of

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[30]Institute of Law Research and Reform, *Matrimonial Support*, Working Paper (1974) at 114.

[31]*Supra* n. 27, at 173.

[32]The Law Reform Commission of Saskatchewan, *Proposals for an Equality of Status of Married Persons' Act* (1982) at 13-14.

[33]*Id.*, at 14.

the four allows a spouse the right to use the other's store credit card without the actual authority of the cardholder spouse.[34] This gives some credence to the claim that the agency principle has no practical application in a complex and impersonal marketplace.

3.21 If the principle is not widely used, is it at least of potential benefit to spouses? In the event a spouse is without the means to purchase necessaries, the law provides that (s)he may apply for an order of maintenance from the other spouse.[35] This right of application is based upon the mutual obligation spouses have to contribute reasonably to each other's support and maintenance.[36] If a spouse reneges on that obligation, social assistance may also be available as a fall-back.[37] Moreover, the agency principle provides no guarantee that a married woman will be able to purchase necessaries given that her husband may revoke the authority at will. Accordingly, it would appear that there are other, more effective legal mechanisms for obtaining support during cohabitation than this first agency principle.

3.22 We have concluded that there is no justification for continuing this agency principle. The limited use made of the principle, the more effective mechanism of receiving support via court order, combined with the general right to act as an agent of another person (including a spouse) through actual or apparent agency authority, all suggest that the function of this agency principle has indeed been overtaken by history. We also agree with the Law Reform Commission of Saskatchewan that the agency principle is based on a conception of marriage which cannot be cured merely by reciprocating the obligation. We recommend:

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[34]The survey showed that two of the four retail stores allow a spouse to use the other spouse's credit card, without requiring that the user's name be on the card, so long as the user had the cardowner's permission. The other two stores required that the user have his/her personal credit card, a joint card or his/her name on the spouse's card as an authorized user.

[35]*"The Family Maintenance Act"*, C.C.S.M. c. F20.

[36]*"The Family Maintenance Act"*, C.C.S.M. c. F20, s. 2(1).

[37]*"The Social Allowances Act"*, C.C.S.M. c. S160, and *"The Municipal Act"*, C.C.S.M. c. M225, Part VII.

RECOMMENDATION 2

That the common law principle which presumes that a married woman is entitled to pledge her husband's credit for necessaries during cohabitation be abolished.

3.23 We think that the second agency principle should also be abolished. The reasons advanced in favour of abolition of the first agency principle apply to the agency of necessity principle *mutatis mutandis*. In addition, the second principle is fault-based in that the agency authority is denied to an adulterous wife. This makes the principle out-of-step with family law reform principles whereby conduct is considered an immaterial factor in determining maintenance.[38] Moreover, once this agency authority arises, it becomes irrevocable. This may cause difficulties where a married woman is also receiving court-awarded maintenance. That is, a married woman who is exercising her agency authority may also be receiving court-awarded maintenance in an amount which does not take into account the fact that she would be pledging her husband's credit. Although variation of the court-awarded maintenance could be sought, the fact that the amount spent on necessaries would probably vary from week to week would make it difficult for the court to fix an appropriate award. The benefits of the agency principle are tenuous when a spouse is already the recipient of reasonable maintenance payments. This is particularly the case since the government became actively involved with the enforcement of these payments. In Canada, the principle has been abolished in Ontario,[39] Saskatchewan, Prince Edward Island, New

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[38] *"The Family Maintenance Act"*, C.C.S.M. c. F20, s. 2(2). At present, conduct continues to be a factor that the courts consider in determining maintenance in divorce proceedings (*Divorce Act*, R.S.C. 1970, c. D-8, s. 11). However, Bill C-47, "An Act respecting divorce and corollary relief", 33rd Parl., 1st Session, Second Reading, May 22, 1985, if enacted, will remove conduct as a factor to be considered in maintenance awards on divorce.

[39] *Family Law Reform Act*, R.S.O. 1980, c. 162, s. 33:

> (1) During cohabitation, a spouse has authority to render himself or herself and his or her spouse jointly and severally liable to a third

(Footnote continued to page 29)

Brunswick and the Yukon Territory.[40] It has also been abolished in England.[41] We recommend:

RECOMMENDATION 3

That the common law principle which presumes that a deserted wife is entitled to pledge her husband's credit for necessaries be abolished.

(Footnote continued from page 28)

party for necessaries of life, except where the spouse has notified the third party that he or she has withdrawn the authority.

. . .

(3) Where persons are jointly and severally liable with each other under this section, their liability to each other shall be determined in accordance with their obligation to provide support.

(4) The provisions of this section apply in place of the rules of common law by which a wife may pledge the credit of her husband.

There is ambiguity as to whether this legislation actually does abolish the rule. If the words "during cohabitation" in s. 33(1) colour the meaning of the entire section, then s. 33(4) would be effective in abolishing only the wife's agency of cohabitation, and the wife's agency of necessity would survive. However, if s. 33(1) is interpreted so that the opening words of s. 33(1) do not affect s. 33(4), then the deserted wife's agency of necessity is abolished. It has been suggested that the second interpretation is the better one. (See, 1 MacDonald *et al*, *Law and Practice under the Family Law Reform Act of Ontario* (1980) at 2-73 - 2-74.)

[40]*The Equality of Status of Married Persons Act*, S.S. 1984-85, c. E-10.3; *Family Law Reform Act*, R.S.P.E.I. 1974, c. F-2.1, s. 33; *Family Services Act*, S.N.B. 1980, c. C-2.1, s. 127; *Matrimonial Property and Family Support Ordinance*, O.Y.T. 1979 (2nd), c. 11, s. 30.24.

[41]*Matrimonial Proceedings and Property Act, 1970*, c. 45, s. 41 (U.K.).

3.24 It remains to consider the nature of the legislation to abolish both special agency principles. The ambit of the legislation will need to be carefully drafted so as to ensure that the abolition does not extend to general agency principles which permit a spouse to act on behalf of the other by virtue of actual or apparent authority. We have studied the Saskatchewan legislation which abolished these two special agency principles and recommend that similar legislation be implemented in Manitoba. We recommend:

RECOMMENDATION 4

That legislation to implement Recommendations 2 and 3 be similar to the Saskatchewan provision which is as follows:

Spouse as agent. -- A husband or wife does not, merely because of his or her status as a spouse, have authority to pledge the credit of the other spouse for necessaries or to act as agent for the other spouse for the purchase of necessaries.[42]

2. Section 8 of *"The Married Women's Property Act"*

3.25 We turn now to consider whether section 8 of *"The Married Women's Property Act"* has continued relevance. Subsection 8(1) reads as follows:

> **Summary disposal of questions between husband and wife as to property.**
>
> 8(1) In any question between husband and wife as to the title to or possession of property, either party, or any corporation, company, public body, or society, in whose books any stocks, funds, or shares, of either party are standing, may apply in a summary way to a judge of the Court of Queen's Bench, or, at the option of the applicant irrespective of the value of the property in dispute, to the judge of the County Court of the district in which either party resides; and the judge may make such order with respect to the property in dispute and as to the costs of, and consequent on, the application as he thinks fit, or may direct the application to stand over from time to

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[42] *The Equality of Status of Married Persons Act*, S.S. 1984-85, c. E-10.3, s. 5.

time and any inquiry or issue touching the matters in question to be made or tried in such manner as he thinks fit.

Section 8 provides a summary procedure for the settlement of disputes over marital property. Either spouse may apply for an order, as may a corporation or public body in which either spouse holds stock, funds or shares. The section has been typically invoked by a spouse seeking ownership or possession of chattels,[43] or a beneficial interest in the family home where title is in the name of the other spouse.[44] Where sale or partition of jointly owned real property is sought under *"The Law of Property Act"*, *"The Married Women's Property Act"* has also been invoked by a spouse alleging entitlement to more than the usual one-half share.[45]

3.26 Although the language of section 8 suggests that a judge has a broad discretion to make any "order . . . he thinks fit", the section has not been so interpreted. The Supreme Court of Canada in *Thompson* v. *Thompson*,[46] determined that there was no power under married women's property legislation to vary legal title so as to achieve a fair distribution of property between the spouses; rather the Court relied upon legal considerations based on the principle of separate property.[47] In England, too, the House of Lords,

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[43]See, for example, *Barker* v. *Duczek*, [1981] 2 W.W.R. 481 (Man. Q.B.); *Babyak* v. *Babyak* (1980), 7 Man. R. (2d) 98 (Q.B.); *Leippi* v. *Leippi* (1977), 30 R.F.L. 342 (Man. C.A.).

[44]See, for example, *Lawson* v. *Lawson* (1965), 54 W.W.R. 466 (Man. Q.B.).

[45]See, for example, *McCrea* v. *Berman* (1984), 30 Man. R. (2d) 41 (Q.B.). In the cases of *Berard* v. *Berard* (1980), 10 Man. R. (2d) 292 (Q.B.)and *Germain* v. *Germain* (1969), 70 W.W.R. 120 (Q.B.), the Manitoba Court of Queen's Bench allowed an application for an unequal division to proceed under *"The Law of Property Act"*, but said that the application should have been brought under *"The Married Women's Property Act"*.

[46][1961] S.C.R. 3.

[47]A typical case in which this reasoning was adopted is *Lawson* v. *Lawson*, *supra* n. 44. The wife, a homemaker who had made no direct

(Footnote continued to page 32)

reversing a series of earlier decisions, determined in 1969 in *Pettitt* v. *Pettitt*[48] that *The Married Women's Property Act* did not confer upon the court a discretion to create property rights inconsistent with the traditional concept of the spouses' separate property. The relevant English provision was interpreted as being procedural in nature and not to be regarded as creating any rights not available in any other form of proceeding.

3.27 Section 8 was made largely irrelevant in Manitoba by the enactment in 1977 of a deferred sharing regime under *"The Marital Property Act"* C.C.S.M. c. M45. That regime provides a legislative scheme for the equitable distribution of marital property, regardless of which spouse actually owns the property. Accordingly, applications under *"The Married Women's Property Act"*, grounded as that Act is in the principle of separate property, are now of limited practical value.

3.28 There continue to be some situations, however, in which section 8 provides a useful procedure. For example:

(1) Where spouses separated prior to May 6, 1977. In this circumstance *"The Marital Property Act"* will not apply and the summary procedure of *"The Married Women's Property Act"* may be useful.

(2) Where one spouse has in his or her possession personal property belonging to the other spouse who desires its return. First, the property may be an exempt asset under *"The Marital Property Act"* and a judge hearing an application under that Act has no jurisdiction to make an order respecting it. *"The Married Women's Property Act"* currently provides a summary remedy. Secondly, even where property is subject to *"The Marital*

(Footnote continued from page 31)
financial contribution to the acquisition of the family home registered in the husband's name, applied to be registered as a joint owner. Wilson J. held that the simple fact of marriage, and the wife's financial assistance towards the upkeep of the home, were not sufficient ground to vest in her an ownership right in the home.

[48][1969] 2 All E.R. 385 (H.L.).

Property Act", subsection 15(6) of that Act is framed in such a way that a judge may order the transfer of specific assets only where the spouse in possession is required to pay an equalizing claim to the other spouse. This will not be the case in every instance where a spouse desires return of his or her own property. Again, "*The Married Women's Property Act*" may provide a useful remedy.

(3) Where the spouses have contracted out of "*The Marital Property Act*", and there is a dispute about the ownership or possession of property.

3.29 The several practitioners we consulted about the continued relevance of section 8 said they have used the procedure infrequently since the enactment of "*The Marital Property Act*". The principal reason for this appears to be that section 8 is, as we have seen, procedural in nature, and other avenues generally exist for the resolution of property disputes. For example, a spouse who desires the return of his or her own property can use replevin;[49] spouses who separated prior to 1977, or who have contracted out of "*The Marital Property Act*", can seek redress by way of statement of claim.[50]

3.30 Although section 8 has limited practical application, the practitioners consulted were generally of the view that it should be retained in Manitoba law, at least in some form. We agree that as long as some scope for the procedure can be envisioned, it should be maintained. We note that most jurisdictions which have repealed their married women's property legislation have retained a summary procedure for the resolution of property disputes.[51]

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[49] "*The Replevin Act*", C.C.S.M. c. R100.

[50] It has, however, been held in Manitoba that proceedings as to property between husband and wife are properly commenced by way of originating notice of motion under "*The Married Women's Property Act*" and not by way of statement of claim: *Lawson* v. *Lawson*, *supra* n. 44; *Zuke* v. *Zuke*, [1962] 39 W.W.R. 480 (Man. Q.B.).

[51] This is the case in Ontario, *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 7; in P.E.I., *Family Law Reform Act*, R.S.P.E.I. 1974, c. F-2.1; and in New Brunswick, *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 42.

3.31 It remains to consider what form such a provision should take. In Ontario, a section of the *Family Law Reform Act*[52] replaced the summary procedure formerly located in the *Married Women's Property Act*.[53] Several other jurisdictions have adopted the Ontario approach. Section 7 of the *Family Law Reform Act* provides as follows:

> **Section 7 - Determination of questions of title between married persons**
>
> 7. Any person may apply to the court for the determination of any question between that person and his or her spouse or former spouse as to the ownership or right to possession of any particular property, except where an application or an order has been made respecting the property under section 4 or 6, and the court may,
>
> (a) declare the ownership or right to possession;
>
> (b) where the property has been disposed of, order payment in compensation for the interest of either party;
>
> (c) order that the property be partitioned or sold for the purpose of realizing the interests therein; and
>
> (d) order that either or both spouses give security for the performance of any obligation imposed by the order, including a charge on property,
>
> and may make such other orders or directions as are ancillary thereto.

Several factors about this provision are of note.

(1) The language has been modernized, and the antiquated has been deleted. For example, the right of corporations and other bodies to take proceedings, a right which appears never to have

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[52]R.S.O. 1980, c. 152, s. 7.

[53]R.S.O. 1970, c. 262 [repealed 1978, c. 2, s. 82].

been judicially considered,[54] has been taken away.

(2) The jurisdiction of the court is enlarged so as to permit an application by a former spouse. Such a right did not exist under married women's property legislation.[55]

(3) The orders which the court can make have been broadened and clearly delineated. The power that the courts have always had under married women's property legislation to declare the ownership or right to possession is maintained. The power to order a sale of property, a power which the Ontario courts did not have under the Ontario *Married Women's Property Act*[56] and which is uncertain in Manitoba,[57] is specifically set forth. The court may also order compensation if the property is disposed of. It may order, too, that either or both parties

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[54]There appear to be no reported cases interpreting this provision either in Canada or in England. The right of corporations and other bodies to apply was deleted from the English statute in 1969 by *The Statute Law (Repeals) Act 1969*, c. 52, s. 1 Sch. Part III (U.K.).

[55]*Fabian* v. *Fabian* (1974), 14 R.F.L. 159 (Ont. Div. Ct.); *Herman* v. *Herman* (1978), 5 R.F.L. (2d) 94 (B.C.S.C.).

[56]In *Re Maskewycz and Maskewycz* (1973), 44 D.L.R. (3d) 180 at 199, 206 (Ont. C.A.), Arnup J.A. stated that applications for partition or sale of property jointly owned by a husband and wife should be made pursuant to s. 12 of the *Married Women's Property Act*, R.S.O. 1970, c. 262, rather than the *Partition Act*, R.S.O. 1970, c. 338. However, he stated that the Ontario law was unclear as to whether an order for partition or sale could be made pursuant to s. 12, alone. He recommended therefore that, in practice, application by a husband or wife for partition or sale should be made pursuant to both the *Married Women's Property Act* and the *Partition Act*.

[57]In two cases, sale has been ordered in an application made pursuant to *"The Married Women's Property Act"* (*Mass* v. *Mass*, Man. Q.B. unreported, April 9, 1975 and *Janiuk* v. *Janiuk*, Man. Q.B. unreported, October 28, 1980). However, in neither case did the Court discuss the power to order a sale pursuant to section 8 of the Act in its reasons for judgment.

give security for the performance of any obligation imposed by the order including the creation of a charge upon the property.

(4) It is clear that rights under section 7 are subordinate to the right to a division of marital property. That is, section 7 may be invoked only where the disputed property has not been the subject of an application for division of marital property. Even if a section 7 order has been made, it does not preclude the court from making an order with respect to the property in a marital property division.[58]

3.32 We think that section 7 of the Ontario *Family Law Reform Act* is an appropriate model for Manitoba. In our view, the right of corporations and other bodies to apply for an order should be deleted because it is not used. We also think that the court's jurisdiction should be extended to allow it to make orders with respect to the property of former spouses. In this regard, it is significant that many of the Ontario applications under section 7 have been brought by divorced spouses who did not completely divide their property at the time of divorce.[59] Although we envision this situation arising only rarely, we believe that it provides a useful safeguard.

3.33 The Commission also thinks that the powers of the court should be delineated in a manner similar to section 7 of the Ontario Act. Accordingly, the court's present power to make a declaration of ownership or right to possession should be affirmed, as should the court's power to order the property transferred to or vested in either spouse. We think, too, that clause 7(b) of the Ontario Act, which allows the court to order the payment of compensation where property has been disposed of, should be set forth in Manitoba legislation. It was formerly held that, in order for a court to determine questions of title and possession under married women's property legislation, there must exist specific property or an ascertainable fund with respect to which the order might be made; if the property or fund has ceased

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[58] *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 4(1).

[59] See, for example, *Van de Mark* v. *Van de Mark Walton* (1981), 25 R.F.L. (2d) 313 (Ont. S.C.); *Hill* v. *Hill* (1982), 27 R.F.L. (2d) 161 (Ont. U.F.C.); *DeFreitas* v. *DeFreitas* (1979), 10 R.F.L. (2d) 238 (Ont. C.A.).

to exist, there was no power to make an order.[60] In our view, the court should be able to so order. We also think that a power to order one or both spouses to give security for the performance of an order should be specifically set forth. Finally, we believe that it should be made clear that the court has the power to order a sale of property. We do not envision that such a power would be used with any frequency; however, we consider the provision a useful one and note that other jurisdictions which have enacted a revised summary procedure have included this power.[61] The Commission recommends:

RECOMMENDATION 5

That there be retained in Manitoba law a summary procedure for the resolution of marital property disputes.

RECOMMENDATION 6

That legislation to implement Recommendation 5 read substantially as follows:

> *Any person may apply to the Court of Queen's Bench for the determination of any question between that person and his or her spouse or former spouse as to the ownership or right to possession of property, and the court may,*
>
> *(a) declare the ownership or right to possession;*
>
> *(b) where the property has been disposed of, order payment in compensation for the interest of either party;*
>
> *(c) order that the property be sold for the purpose of realizing the interests therein;*

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[60] *Tunstall* v. *Tunstall*, [1953] 2 All E.R. 310 (C.A.); *D'Ambrosio* v. *D'Ambrosio* (1959), 20 D.L.R. (2d) 177 (Ont. C.A.).

[61] *Family Law Reform Act*, R.S.O. 1980, c. 152; *Family Law Reform Act*, R.S.P.E.I. 1974, c. F-2.1; *Marital Property Act*, S.N.B. 1980, c. M-1.1.

(d) order that the property be transferred to or vested in either spouse; and

(e) order that either or both spouses give security for the performance of any obligation imposed by the order including a charge on property,

and may make such other order or directions as are ancillary thereto.

3.34 A further consideration is the interrelation between section 8 of *"The Married Women's Property Act"* and the right to an accounting and division of marital property under *"The Marital Property Act"*. At present, *"The Married Women's Property Act"* is made specifically subject to *"The Marital Property Act"*:[62] the right to a division of marital property takes precedence over an ownership right or right to possession declared under *"The Married Women's Property Act"*. We think that the precedence of *"The Marital Property Act"* should continue to be made clear in Manitoba law. The Commission therefore recommends:

RECOMMENDATION 7

That legislation enacting Recommendation 5 be made subject to "The Marital Property Act".

3.35 Finally, at present section 9 of *"The Married Women's Property Act"* states that the Act is subject to *"The Dower Act"*, C.C.S.M. c. D100. We think that the precedence of *"The Dower Act"* should continue to be made clear. Accordingly, the Commission recommends:

RECOMMENDATION 8

That legislation enacting Recommendation 5 be made subject to "The Dower Act".

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62 *"The Married Women's Property Act"*, C.C.S.M. c. M70, s. 9.1.

3. The Presumptions of Advancement and Resulting Trust

(a) Historical background

3.36 The principle is well established that where a purchaser buys property and places it in the name of another, or in the names of himself and another jointly, it is presumed that the other holds the property on a resulting trust for the purchaser.[63] The rationale for the presumption of trust is said to be that equity assumes bargains, not gifts.[64] The presumption can be rebutted by evidence that establishes an intention by the purchaser to make an absolute gift; the burden of proof, however, is upon the donee.

3.37 Because the principle of resulting trust rests upon the presumed intention of the purchaser, it will not arise where the relationship between the purchaser and the donee is such that a gift is the more likely intention. One relationship which gives rise to the presumption of gift or advancement is that between husband and wife.[65] The presumption arises only where the husband purchases property in the wife's name; there is no corresponding presumption when the wife purchases property in the husband's name. The presumption is rebuttable, but the burden of proof is on the husband to show that he did not intend a gift.

3.38 The underlying rationale for the presumption of advancement between husband and wife has seldom been fully explored in case law. The original

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[63]See *Dyer* v. *Dyer*, (1788) 2 Cox Eq. Cas. 92, 30 E.R. 42. It is not entirely clear whether the presumption of resulting trust will apply, not only to a purchase in another's name, but also in the related situation of a voluntary transfer or gift to another. For a discussion of the resulting trust in such cases see D. W. M. Waters, *Law of Trust in Canada* (2nd ed. 1984) at 308-310.

[64]Waters, *id.*, at 300.

[65]A presumption of gift or advancement also arises between a father and a child; the mother and child relationship, on the other hand, does not give rise to the presumption. However, in *Main* v. *Main (No. 2)*, [1939] 1 D.L.R. 723, the Manitoba Court of Queen's Bench held that over and above the mother and child relationship little additional motive for the making of a gift would need to be proved.

basis likely had to do with the dominant legal position of the husband within marriage, at least prior to the *Married Women's Property Act, 1882*. Before that Act was passed, a married woman could not hold property on trust for her husband, and it therefore seemed appropriate that the courts presume a conveyance in her name to have been intended by the husband as a gift. This rationale is the most credible explanation of the occurrence of the presumption of advancement.[66] It does not, however, account for its continued application after 1882. Two other rationales which have been put forward are natural affection, and the husband's duty to maintain the wife. They are discussed by Lord Reid in the leading case of *Pettitt* v. *Pettitt*:

> I do not know how this presumption first arose, but it would seem that the judges who first gave effect to it must have thought either that husbands so commonly intended to make gifts in the circumstances in which the presumption arises that it was proper to assume this where there was no evidence, or that wives' economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption.[67]

3.39 Whatever its rationale, prior to the enactment of family property legislation in Canada in the late 1970s, the presumption of advancement had an important role to play in protecting the property rights of wives who had made no financial contribution to the acquisition of family assets. The most common situation was the purchase of the family home by the husband in his wife's name or in the joint names of himself and his wife. Through the presumption of advancement the law provided, in the absence of cogent evidence to the contrary, that the wife was entitled to beneficial ownership.[68]

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[66]For an extensive discussion of the possible rationales for the presumption of advancement, see D. R. Klinck, "The Unsung Demise of the Presumption of Spousal Advancement" (1985), 7 E.T.Q. 6; N.V. Lowe, "The Advancement of an Intended Wife: A Reply" (1976), 120 Sol. J. 41.

[67]*Pettitt* v. *Pettitt*, *supra* n. 48, at 388-389.

[68]*Hyman* v. *Hyman*, [1934] 4 D.L.R. 532 (S.C.C.). In Manitoba, see *Fetterly* v. *Fetterly* (1965), 54 W.W.R. 218 (Q.B.); *Klemkowich* v. *Klemkowich* (1955), 63 Man. R. 28 (Q.B.); *Vermette* v. *Vermette*, [1974] 4 W.W.R. 320 (Man. C.A.).

3.40 This protection for the wife must be seen in its proper historical context. Prior to the 1970s, the presumption of advancement was the only exception to the courts' strict application of the doctrine of separate property to married couples. In all other respects, the courts had felt obliged to apply the same rules to property disputes between husbands and wives as were applied between strangers, a situation which caused considerable hardship, and which conflicted with the expectations of many spouses that "family assets" should be equally shared. The presumption of advancement alone was incapable of ameliorating the hardships of a separate property regime: it produced arbitrary results because its operation depended entirely on who held title to the property,[69] and its application where both spouses had contributed was problematic.[70] In short, the presumption was part and parcel of a separate property regime which was increasingly being viewed by the public and the courts as an inadequate vehicle for the resolution of marital property disputes.

3.41 An important turning point came with the 1969 decision of the House of Lords in *Pettitt* v. *Pettitt*.[71] We have already seen that it was this case which finally determined that the English courts had no broad

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[69]For example, if the husband paid the purchase price of the family home and put it into his wife's name alone, or into their joint names, the court's application of the presumption would give her a beneficial interest. If, however, title was taken in the husband's name alone, she would get no interest at all.

[70]It is difficult for a court to apply the presumptive rules where husband and wife make unequal financial contributions to the purchase of property. The Law Commission England, in its *First Report on Family Property: A New Approach*, (Report #52, 1973) at 4, notes that the difficulty arises "because of the need to disentangle the transactions of the spouses, which may extend over many years, to calculate the exact proportions of their contributions".

[71]*Supra* n. 48.

discretionary power under *The Married Women's Property Act, 1882* to make an equitable division of marital property. They were instead to rely on the traditional principles of separate property and leave substantive reform to Parliament. The House of Lords, although unwilling to effect a fundamental reform of traditional property rules, did in *Pettitt* suggest that the arbitrary results produced by the presumptive rules were no longer desirable. Lord Hodson was one of three law lords who questioned the continued importance of the presumption under present social conditions, saying that

> In old days when a wife's right to property was limited, the presumption no doubt had great importance and today, when there are no living witnesses to a transaction and inferences have to be drawn, there may be no other guide to a decision as to property rights than by resort to the presumption of advancement. I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect.[72]

His opinion was echoed by Lords Diplock and Reid, the latter being of the view that the reasons for the presumptive rule had "largely lost their force under present conditions".[73] Only Lord Upjohn believed the presumption had continued validity, although he acknowledged that it was "readily rebutted by comparatively slight evidence".[74]

3.42 *Pettitt* v. *Pettitt* represents a shift in emphasis away from the rigid application of the presumptive rules to a consideration of the spouses' express or implied intention as to ownership. A similar shift can be seen in Canada. Until 1978, Canadian courts were still saying that the presumption of advancement could only be rebutted by clear and cogent evidence,[75] but in that year Dickson J., (as he then was), in an *obiter* comment in the Supreme

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[72] *Id.*, at 404.

[73] *Id.*, at 389.

[74] *Id.*, at 406.

[75] See, for example, *Geisser* v. *Geisser*, [1976] 6 W.W.R. 305 (B.C.S.C.); *Hebert* v. *Foulston* (1978), 90 D.L.R. (3d) 403 (Alta. C.A.); *Juresic* v. *Juresic* (1977), 81 D.L.R. (3d) 446 (Ont. C.A.).

Court of Canada,[76] cited the reasoning of the *Pettitt* case with approval. His comments have in turn been adopted in Manitoba.[77]

3.43 In summary, apart from statutory modification, it can now be said that the presumptive rules will rarely have a decisive effect where there is any evidence of the spouses' intentions. Such evidence is usually available from the parties themselves. One instance where it is not, however, is where one or both of the spouses is dead. Accordingly, case law suggests that the presumptive rules have a continuing role to play in this particular situation.[78]

(b) The present application of the presumptive rules in Manitoba

3.44 While the courts were expressing dissatisfaction with the doctrine of separate property and the presumptive rules which were a part of it, Canadian legislatures undertook a more direct attack: since 1980 each of the common law provinces has had in place marital property legislation establishing a deferred sharing regime.[79] As part of the new regime in seven of the

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[76]*Rathwell* v. *Rathwell* (1978), 83 D.L.R. (3d) 289 at 304 (S.C.C.).

[77]*Barker* v. *Duczek*, [1981] 2 W.W.R. 481 (Man. Q.B.). A marital home had been purchased in the wife's name when the husband was verging on bankruptcy. Morse J. found that both parties had contributed to the purchase of the home and their actual intention was that there be joint ownership. He refused to apply the presumption of advancement saying that he was "of the opinion that the archaic presumption of advancement has little place in the resolution of property disputes between husband and wife so far as evidence of intention is concerned" (at 485).

[78]See, for instance, *Juresic* v. *Juresic*, *supra* n. 75, where both husband and wife were deceased and the contest was between their respective estates as to the ownership of a bank account.

[79]For a discussion of these regimes, see generally, A. Bissett-Johnson and W. Holland (ed.), *Matrimonial Property Law in Canada* (1980); A.J. McClean, "Matrimonial Property - Canadian Common Law Style" (1981), 31 U.T.L.J. 363.

provinces,[80] the presumption of advancement has been abolished and replaced by the presumption of resulting trust. No such abolition has taken place in Manitoba. What, then, is the present status of the presumption of advancement in Manitoba, given that a deferred sharing regime[81] now governs disputes as to the entitlement to marital property?

3.45 The short answer to this question is that the scope for the presumption is now extremely limited. This is because *"The Marital Property Act"* will determine the vast majority of cases in which there is a dispute about the entitlement to marital property. When property is subject to the provisions of the Act, it is not relevant in whose name title is held. Thus, if the only marital asset is the family home and title is in the husband's name, it is a shareable asset under the Act and the wife is entitled to one-half of its value. The same result is obtained where the wife holds title. The presumptions of advancement and resulting trust, while they might still be used to determine ownership, cannot affect the shareability of an asset under *"The Marital Property Act"*. Accordingly, they are of no relevance in most spousal property disputes.[82]

3.46 However, they will still be relevant in cases where *"The Marital Property Act"* does not apply. For example:

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[80] *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 11; *Family Law Reform Act*, S.P.E.I. 1978, c. 6, s. 12(1); *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 15; *Matrimonial Property Act*, S.Nfld. 1979, c. 32, s. 29; *Matrimonial Property Act*, S.N.S. 1980, c. 9, s. 21; *Matrimonial Property Act*, S.S. 1979, c. M-6.1, s. 50; *Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 36. Unlike other provinces, the Alberta provision abolishes the presumption of advancement only for purposes of "a decision under this Act"; presumably, the presumption of advancement is retained for purposes other than applications brought under the Act.

[81] *"The Marital Property Act"*, C.C.S.M. c. M45.

[82] The enactment of marital property legislation has severely limited the scope for common law property principles. This subject is discussed in the context of *"The Marital Property Act"* in *Maruda* v. *Maruda* (1981), 24 R.F.L. (2d) 389 (Man. Q.B.). See also A.J. McClean, "Constructive and Resulting Trust - Unjust Enrichment in a Common Law Relationship - Pettkus v. Becker" (1982), 16 U.B.C. L. Rev. 155 at 178-183.

(1) Where the parties were separated prior to May 6, 1977. In this circumstance, which now occurs very rarely, common law property principles will be applicable.

(2) Where an asset is exempt from the operation of *"The Marital Property Act"*. The Act provides, for example, that its provisions do not apply to inherited[83] and pre-acquired[84] property. If, for example, a wife inherits securities from her father during her marriage and then transfers them to the husband, the presumption of resulting trust will apply in the absence of any evidence that a gift was intended. Where the husband has transferred securities to his wife, the presumption of advancement would be relevant.[85]

(3) Where one or both of the spouses has died. If, for example, a husband transfers securities to his wife and on her death he seeks to recover them from her estate, the presumption of advancement would apply to prevent him from doing so in the absence of any evidence of trust.[86]

3.47 Such disputes will arise infrequently. Even where they do, the courts will apply the presumptive rules reluctantly, preferring instead to

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[83]*"The Marital Property Act"*, C.C.S.M. c. M45, s. 7(3).

[84]*"The Marital Property Act"*, C.C.S.M. c. M45, s. 4(1)(b)(c).

[85]If the husband transfers exempt property to his wife, the presumption of advancement would operate to characterize it as a gift. The wife, however, would nevertheless have to include the property in her inventory under *"The Marital Property Act"* and, as such, it would be shareable.

[86]With respect to the situation where one of the spouses is deceased and a claim is being made by the other, A.J. McClean in "Constructive and Resulting Trust - Unjust Enrichment in a Common Law Relationship - Pettkus v. Becker", *supra* n. 82, at 182, has said: "Claimants against an estate may . . . find there is considerable advantage in relying on the law of trusts in lieu of or in addition to any rights that they otherwise may have under a will, intestate

(Footnote continued to page 46)

consider all of the factors relevant to the parties' intention. However, because we can envision some scope for the operation of the presumptive rules, albeit a limited one, we intend to consider to what extent they produce a desirable result and, where appropriate, to recommend reform.

(c) The need for reform

(i) The general rule

3.48 The most noteworthy feature of the operation of the presumptive rules is that they act to the disadvantage of the husband as compared to the wife. It is the Commission's view that husband and wife must now be put on the same footing. This can be accomplished in one of two ways: either (i) the presumption of advancement can be abolished and in its place the principle of resulting trust substituted; or (ii) the presumption of advancement can be made reciprocal so that it operates in the husband's favour in the same way that it operates in the wife's.

3.49 The first of these options is the one favoured by the seven other Canadian jurisdictions where statutory reform has taken place. The Ontario provision is the one on which those of the other jurisdictions are based. Subsection 11(1) of the Ontario *Family Law Reform Act*[87] provides:

> Section 11
>
> 11(1) The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that,

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(Footnote continued from page 45)
succession or dependent's relief legislation. . . . There is the added advantage that . . . he or she would obtain a priority over creditors . . . ."

[87]R.S.O. 1980, c. 152. It is not intended in this discussion to analyze the technical difficulties inherent in the drafting of the Ontario provision. For a complete discussion of these problems, see Waters, *supra* n. 63, at 361-363; M.C. Cullity, "Case Comment: *Re Levy*" (1982), 12 E.T.R. 157.

(a) the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property; and

(b) money on deposit in a chartered bank, savings office, credit union or trust company in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

This section states that the presumption of advancement is abolished and replaced by a presumption of resulting trust. Accordingly, where one spouse places property in the name of the other there is a presumption that the title holding spouse holds the property in trust for the other. In other words, the spouses are to be treated as strangers to one another. The section does not alter the rule that it is the intention of the purchaser or transferor which governs. Only the burden of proof has changed.

3.50 The Ontario legislature did identify one important area where it did not wish the presumption of resulting trust to operate. Thus, as an exception to the general rule, the legislation states that where property is placed in the spouses' joint names, it will be presumed that the spouses are intended to have joint beneficial ownership. The same rule is made specifically applicable to joint bank accounts.

3.51 Section 11 has been applied in a number of Ontario cases. Where jointly held property or bank accounts are involved, paragraph 11(1)(a) or (b) is invariably invoked so as to divide beneficial ownership equally between the spouses;[88] rarely is it found that the parties intended anything other than joint ownership.[89] The Ontario provisions respecting jointly held property

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[88]See, for example, *Mezaros* v. *Mezaros* (1978), 22 O.R. (2d) 675 (S.C.); *Calvert* v. *Calvert* (1979), 9 R.F.L. (2d) 162 (H.C.J.); *Badley* v. *Badley* (1980), 14 R.F.L. (2d) 345 (Co. Ct.); *Sinclair* v. *Sinclair* (1981), 22 R.F.L. (2d) 268 (U.F.C.).

[89]The typical case where joint ownership is found not to have been intended
(Footnote continued to page 48)

are thus applied in a straightforward manner and produce the expected effect. Where, however, property stands in the name of only one spouse and the presumption of resulting trust applies, the cases manifest an interesting and unexpected result. That is, in the majority of reported Ontario cases, the presumption of resulting trust is found to be rebutted by evidence of gift.[90]

3.52 Is the Ontario solution appropriate in Manitoba? To answer this question we must consider the function that an evidentiary presumption is intended to serve in law. Lord Diplock said this in *Pettitt* v. *Pettitt*:

> A presumption of fact is no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact

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(Footnote continued from page 47)
is with respect to a bank account established for convenience only. See *Byzruki* v. *Byzruki* (1981), 131 D.L.R. (3d) 82 (H.C.J.); *Howey* v. *Howey* (1984), 42 R.F.L. (2d) 23 (S.C.).

[90] *Taylor* v. *Taylor* (1978), 6 R.F.L. (2d) 341 (U.F. Ct.) (where a wife transferred corporate shares to her husband, the presumption of resulting trust was rebutted by evidence that she did so to rid herself of any corporate responsibility); *Meszaros* v. *Meszaros*, *supra* n. 88 (where the husband purchased an income producing property and placed it in his wife's name, the presumption of resulting trust was rebutted by evidence that the wife had insisted on title at a time when difficulties had occurred in the marriage, that the husband failed to include the property in his statement of property, and that after separation the wife received the rents and managed the property); *Forbes* v. *Forbes* (1979), 94 D.L.R. (3d) 715 (H.C.J.) (presumption of resulting trust rebutted when the wife transferred home to the husband because she wanted to part wholly with both the husband and the property); *Emmett* v. *Emmett* (1981), 21 R.F.L. (2d) 285 (H.C.J.) (where the husband transferred property to the wife for consideration the presumption of resulting trust was rebutted); *Re Miller and Miller* (1982), 139 D.L.R. (3d) 128 (C.A.) (where the husband placed corporate shares in the wife's name for tax planning purposes, the presumption of resulting trust was held to be rebutted). But see, *Swick* v. *Swick* (1979), 12 R.F.L. (2d) 252 (U.F.C.) where it was held that a resulting trust was not rebutted by evidence that a former wife had conveyed property to her former husband in order to protect the property from welfare authorities.

to be drawn in the absence of any evidence to the contrary.[91]

With little or no discussion as to the reason for doing so, Ontario and six other jurisdictions decided that a presumption of resulting trust between spouses was "the most likely inference of fact to be drawn". We are not persuaded that this is the correct approach. It is our view that, given the special nature of the marital relationship, where one spouse purchases or transfers property into the other's name "the most likely inference" is one of gift.

3.53 Consider the following example. Suppose a husband purchases an expensive car in his wife's name. In the jurisdictions which have abolished the presumption of advancement, the wife *prima facie* holds the car in trust for the husband.[92] To take the example a step further, suppose the wife dies after the car is purchased: in the abolition jurisdictions, the husband can claim the car against the wife's estate. In our view, "the most likely inference" of the husband's intention is that he intended a gift, not that he intended the wife, or her estate, to hold the property on a resulting trust for him. We believe that the same inference of gift should be drawn where it is the wife who transfers or purchases property in the husband's name.

3.54 Our conclusion is based upon our view that the law should treat a husband and wife relationship differently than it treats strangers. The affection that spouses normally have for one another, and their mutual obligation of support, make it more likely in our view that the appropriate legal inference is one of gift. In other words, we are not persuaded that all of the rationales for the historical development of the presumption of advancement have lost their force.[93] The fact that Ontario courts have

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[91] *Supra* n. 48, at 414.

[92] Although the car would be shareable by virtue of marital property legislation, unless it falls within a category of excluded assets.

[93] This view is taken, and well argued, by D.R. Klinck in "The Unsung Demise of the Presumption of Spousal Advancement", *supra* n. 66; and by M.C. Cullity, in "Case Comment: *Re Levy*", *supra* n. 87, at 157. It is also of note that the Ontario Law Reform Commission in *Report on Family Law, Part*

(Footnote continued to page 50)

generally found the presumption of resulting trust to be rebutted reinforces our view.[94]

3.55 It should be noted that any legislation in Manitoba respecting the presumption of advancement (whether for abolition or reciprocity) will not effect significant reform. There are two reasons for this, both of which have been previously referred to. First, the scope for the presumptive rules in Manitoba has been severely curtailed by *"The Marital Property Act"*. Secondly, the courts have now determined that the presumptions can be easily rebutted by evidence of the parties' actual intentions. This means that placing the onus on either one of the parties has lost much of its importance. Nevertheless, the Commission believes that care should be taken to ensure that in those limited situations where the presumptive rules apply, the law should provide a starting point most in accord with the likely intention of the parties. Accordingly we recommend:

RECOMMENDATION 9

That the spousal presumption of advancement be retained in Manitoba law, and that it be extended to transfers from wife to husband and to purchases by the wife in the husband's name.

(ii) Jointly held property

3.56 We turn now to a consideration of jointly held property. In all of the jurisdictions which replaced the presumption of advancement with a presumption of resulting trust, a specific exception was made for jointly held property. The reason for the exception is clear if one considers the use that was made of the presumption of advancement prior to its repeal. Historically, the presumption was used to give the wife a one-half beneficial interest when

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(Footnote continued from page 49)
IV: Family Property Law (1974) at 176-177, recommended a reciprocal presumption of advancement. The recommendation was, however, not acted upon; instead the presumption of advancement was repealed.

[94]See the cases cited at *supra* n. 90, and accompanying text.

a husband purchased property in the spouses' joint names.[95] Similarly, a presumption of advancement had been used to give the wife a beneficial interest in a joint bank account to which only the husband had contributed.[96] Simple repeal of the presumption of advancement could have left a gap in the law if specific provisions had not been enacted to ensure a beneficial interest for both spouses where property is held jointly.[97]

3.57 This Commission has recommended a presumption of advancement that is reciprocal between husband and wife rather than repeal. Given this, is there a need for Manitoba law to make specific provision for joint property? We have concluded that there is not.

3.58 With respect to real property in the spouses' joint names, Manitoba law already effects joint beneficial ownership. The law must be seen in the context of the Court of Appeal decision in *Isbister* v. *Isbister*,[98] where the Court considered s. 9 of *"The Marital Property Act"*. That section states that the Act does not apply to assets which have already been equally shared between the spouses. Monnin, J.A. (as he then was) determined that jointly held real property should not be brought into an accounting under the Act, saying that "[i]n the absence of any claim that the shares are unequal, a title to real property in the joint names of the spouses means what it says; namely, that the property is shared by them".[99] This statement reflects the fact that in Manitoba title to real property in the spouses' joint names is generally viewed as conclusive that a joint beneficial ownership is

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[95]See cases cited at *supra* n. 68.

[96]See, for example, *Re Figgis*, [1968] 1 All E.R. 999 (Ch. D.); *Murray* v. *Murray* (1979), 11 B.C.L.R. 338 (S.C.).

[97]This is the case only where marital property legislation does not effect a sharing of the property.

[98](1981), 11 Man. R. (2d) 353 (C.A.).

[99]*Id.*, at 356.

intended.[100] We conclude that there is no necessity for a statutory provision in Manitoba to ensure joint beneficial ownership where spouses hold joint title to property.

3.59 We turn now to consider joint bank accounts.[101] In each of the jurisdictions which replaced the presumption of advancement with a presumption of resulting trust, specific provisions were enacted to deem money in a spousal joint account to be *prima facie* joint property. Is such a provision necessary in Manitoba? To answer this question we shall look briefly at the common law rules, and the extent to which *"The Marital Property Act"* now governs joint accounts. We shall then consider whether reform of Manitoba law is required.

3.60 At common law, the effect of a joint account is to give each of the account holders a *legal* interest in the monies in the account at any given time, as well as a right of survivorship which arises by operation of law as part of the concept of joint tenancy. *Beneficial* ownership, however, depends upon the parties' intentions. Where, for example, the husband's money alone is paid into a joint account with his wife, she will be entitled to joint beneficial ownership if there is evidence that the husband intended a gift to her. If, however, the account is opened only for the husband's convenience, as for example because he is ill and cannot attend at the bank, the wife will have no beneficial interest.[102] In situations where there is insufficient evidence of intention, there will be a rebuttable presumption

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[100] *Germain* v. *Germain*, [1969] 70 W.W.R. 120 (Man. Q.B.); *Sidorski* v. *Sidorski* (1984), 30 Man. R. (2d) 4 (Q.B.); *McCrea* v. *Berman* (1984), 30 Man. R. (2d) 41 (Q.B.). In the *McCrea* case, Helper J. was asked to apply the presumptive rules and declined to do so; the property was ordered simply divided equally between the spouses.

[101] It is not intended here to thoroughly analyze the law with respect to joint bank accounts. For a more detailed discussion see M.C. Cullity, "Joint Bank Accounts with Volunteers" (1969), 85 L.Q.R. 530; Waters, *supra* n. 63, at 331-340.

[102] *Marshall* v. *Crutwell* (1875), L.R. 20 Eq. 328; *Bruce* v. *Bruce* (1976), 28 R.F.L. 190 (N.B.S.C., App. Div.); *Dobson* v. *Dobson* (1981), 26 R.F.L. (2d) 49 (Sask. Q.B.).

that the husband intended the wife to have a beneficial interest in one-half of the monies in a joint account, as well as the balance on his death. A husband, on the other hand, has been presumed to hold the monies on a resulting trust for the wife where all deposits to an account were made by her.[103]

3.61 Perhaps the most common marital situation is where both spouses contribute to a joint bank account. Where they intend such an account to be a pool of their resources, the "common fund" so created has been held to be their joint property.[104] This is so regardless of whether or not the spouses contributed equal amounts. However, if no "common fund" was intended, and each spouse has paid in an ascertainable share, each will be entitled to a proportional share on a winding up of the account.[105] If one spouse dies, whether or not the other spouse takes the remainder by way of survivorship, will depend upon evidence of the deceased's intention. Where such evidence is lacking, the presumptions of advancement and resulting trust may be applicable.[106]

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[103] *Hesseltine* v. *Hesseltine*, [1971] 1 All E.R. 952 (C.A.); *Re Stevenson and Stevenson* (1974), 17 R.F.L. 33 (B.C.S.C.).

[104] In *Rathwell* v. *Rathwell*, *supra* n. 76 at 309, Dickson J. (as he then was) adopted the reasoning of the English decision in in *Jones* v. *Maynard*, [1951] 1 All E.R. 802 (Ch. D.), saying that the latter case was "authority for the proposition that when the intention is that the account is to be a pool of their resources, or in the words of the trial Judge in the present proceedings, 'a common purse', the money in it will be treated as belonging to them jointly". See also *Wanlin* v. *Wanlin* (1980), 17 Man. R. (2d) 74 (Q.B.); *Tevine* v. *Tevine*, [1953] 2 D.L.R. 125 (B.C.S.C.).

[105] Waters, *supra* n. 63, at 332.

[106] It is to be noted that the application of the presumptive rules to spousal joint accounts is subject to the criticism made of such rules generally in *Pettitt* v. *Pettitt*, *supra* n. 48. In the case of *Re Figgis*, *supra* n. 96, at 149, for example, Megarry J. spoke of the particular difficulty in applying the presumptive rules to joint bank accounts:

(Footnote continued to page 54)

3.62 The common law rules now have an extremely limited application in Manitoba. In by far the majority of cases, money in a spousal joint account will be governed by the provisions of *"The Marital Property Act"* and will be equally shared between the spouses.[107] Although it is arguable that the *Isbister* reasoning can be extended to joint accounts so as to exclude them from *"The Marital Property Act"*, no case has determined this to be so. In our view, joint accounts will fall within *"The Marital Property Act"* unless the monies have already been equally divided between the spouses, or the parties have agreed to effect such a division.

3.63 We have concluded that a legislative provision which deems joint beneficial ownership of joint bank accounts is not required in Manitoba. First, unlike the abolition jurisdictions, we have recommended a mutual presumption of advancement rather than repeal. The joint bank account legislation in the abolition jurisdictions (like the legislation respecting joint property generally) is framed *as an exception* to the new rule that a

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(Footnote continued from page 53)

> It appears to me that there is some difficulty in defining the precise way in which the doctrine of advancement operates in the case of bank accounts. It seems quite unreal to regard each deposit in the account as an advancement, subject to diminution by the drawing of subsequent cheques.

He then went on to suggest that the correct analysis may be "that there is an immediate gift of a fluctuating and defeasible asset consisting of the chose in action for the time being constituting the balance in the bank account" (at 149).

[107] One example where *"The Marital Property Act"* has been held not to apply to a joint bank account is found in *Gutheil* v. *Gutheil* (1983), 34 R.F.L. (2d) 50 (Man. Q.B.). In that case the husband had placed inherited, and therefore exempt, funds into a joint account with his wife. Scollin J. held that the act of placing the funds into such an account did not of itself bring the account within the provisions of *"The Marital Property Act"*. In such a case, the only avenue open to the non-contributing spouse who wishes to allege a beneficial entitlement would be through common law property principles. In most cases, however, the court's finding that money in the account is exempt under *"The Marital Property Act"* will be determinative of the issue.

resulting trust is to be presumed in transfers between spouses. The exception is necessary primarily to alleviate injustice that might be caused were the presumption of resulting trust applied to joint accounts. We have not recommended a presumptive rule of resulting trust; *prima facie*, then, the legislative exception deemed necessary in the abolition jurisdictions is unnecessary in Manitoba. Secondly, we have seen that, in almost all cases, monies in a spousal joint account will be shareable under the provisions of *"The Marital Property Act"*. The scope for the operation of either the common law rules, or any legislative rule in substitution for them, is therefore very limited. Thirdly, there is no evidence that the common law rules themselves have produced unjust results in Manitoba, and we are reluctant to recommend legislative change in the absence of a demonstrated need. For these reasons, we conclude that no specific provision need be enacted in Manitoba law deeming monies in spousal joint accounts to be *prima facie* jointly owned.

4. Miscellaneous

3.64 We turn now to consider those miscellaneous provisions in other statutes which pertain to the legal status of married women. It may be recalled from Chapter 1 that the Commission was asked in a supplementary letter to address these matters.

(a) Subsection 55(2) of *"The Queen's Bench Act"*

3.65 This subsection reads as follows:

> **Examination of married women.**
>
> 55(2) The examination of a married woman, apart from her husband, as to her knowledge of the nature and facts of an application for the sale or leasing of any settled estate, or as to her consent thereto, is in no case necessary.

The subsection was enacted in 1895.[108] It was passed to abrogate earlier English legislation which was received into Manitoba law as of July 15, 1870. That legislation required a married woman to be examined apart from her

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108 *"The Queen's Bench Act, 1895"*, S.M. 1895, c. 6, s. 33.

husband by the court, or by a lawyer appointed by the court, when she applied to the court or consented to an application to the court in regard to leases and sales of settled estates.[109]

3.66 The Commission intends in the future to prepare a report dealing with the powers of disposition affecting settled lands. In the meantime, however, there is no need to continue subsection 55(2). The general equality provisions we recommended be implemented earlier in this Chapter (Recommendation 1) would render this subsection unnecessary. We recommend:

RECOMMENDATION 10

That subsection 55(2) of "The Queen's Bench Act" be repealed.

(b) Sections 9 and 10 of *"The Law of Property Act"*

3.67 These sections provide respectively for the abolition of the common law principles of dower and courtesy. These common law principles were described in detail in our earlier report on *"The Dower Act"*.[110] There is no need to repeat that detail here. Suffice it to state that both principles were eventually replaced by statutory dower which provides generally identical benefits to both husband and wife with respect to the homestead and to a fixed share on death.[111]

3.68 We do not think that these sections in *"The Law of Property Act"* should be repealed. There is no comparable legislation elsewhere in our legislation which clarifies that these property doctrines are abolished. Moreover, we do not think that the general equality provision we recommended earlier in the Chapter adequately resolves the status of these common law

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[109]See *An Act to facilitate Leases and Sales of Settled Estates, 1857*, 19 & 20 Vict., c. 120, ss. 37, 38, 39 (U.K.).

[110]The Manitoba Law Reform Commission, *Report on An Examination of "The Dower Act"* (Report #60, 1984) at 1-5.

[111]*Ibid.*

principles (Recommendation 1).[112] We also think that these sections should continue in their present wording despite the fact that gender neutral language has not been used. Otherwise these sections would fail to clarify the historical application of these doctrines. Accordingly, we do not recommend any change with respect to these sections.

(c) Subsection 30(2) of *"The Law of Property Act"*

3.69 In 1833, *The Fines and Recoveries Act, 1833* was enacted in England.[113] This Act provided, amongst other provisions, that a married woman could dispose of land or an interest in land by deed as if a *feme sole*, if she had the concurrence of her husband in the deed, and if the deed was acknowledged by her as her Act and Deed before a Judge of one of the Superior Courts, a Master in Chancery or two Commissioners. The Act further stated that upon providing her acknowledgment, the judge, master or commissioners were to examine the married woman apart from her husband with respect to her knowledge of the Deed and whether she freely and voluntarily consented to the Deed.[114] In 1870, the provisions of this Act were received into Manitoba law, along with other English statutes and the common law.

3.70 In 1883, Manitoba enacted legislation which modified the English Act of 1833, so that it would not be necessary for the validity of any deed or assurance executed by a married woman that the deed or assurance be produced

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[112]Clause 3 of that principle - which sets forth a rule of construction to make the same law apply equally to each spouse and to abolish any differences which existed under the common law - is restricted by clauses (1) and (2), the provisions to which it applies. Clauses (1) and (2) pertain to legal personality and capacity and would probably not affect property rights such as dower and courtesy which arise from the marital status. See *Kendall* v. *Kendall* (1978) 82 D.L.R. (3d) 278 (H.C.J.) which interprets the principle set forth in Recommendation 1. We note too that the Ontario legislation contains an express abolition of common law dower. See s. 70 of the *Family Law Reform Act*, R.S.O. 1980, c. 152.

[113]*The Fines and Recoveries Act, 1833*, 3 & 4 Will. 4, c. 74 (U.K.).

[114]*The Fines and Recoveries Act, 1833*, 3 & 4 Will. 4, c. 74, ss. 77, 79, 80 (U.K.).

or acknowledged by her before a judge, master or commissioner; that she be examined apart from her husband; or that her husband concur in the deed or assurance. Instead, every deed or assurance could be executed by a married woman as if she were a *feme sole*.[115] This provision became part of *"The Law of Property Act"* in 1931[116] and is presently housed in s. 30(2) of *"The Law of Property Act"*.[117]

3.71 Subsection 30(2) was originally enacted to modify the statute law which existed in Manitoba in 1883, to make the statute law more appropriate to the circumstances within the Province of Manitoba.[118] The provision was

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[115] *An Act respecting Estates Tail*, S.M. 1883, c. 27, s. 2, later cited as *The Estates Tail Act*, R.S.M. 1913, c. 63, s. 3. See also similar legislation which was enacted in Manitoba in 1871 and which provided that a deed made by a married woman jointly with her husband of her lands shall have same effect as if made by a *feme sole*, if acknowledged before a Justice of the Peace that Deed made by her, of her own free will and provided acknowledgment certified in the Deed by the Justices. (*An Act relating to Deeds by Married Women*, S.M. 1871, c. 8, s. 1). This legislation was later amended (*An Act to amend the Act 34 Vic., cap. 8, intituled: An Act relating to Deeds by Married Women*, S.M. 1874, c. 18, ss. 1, 2) and was subsequently repealed (*An Act to amend an Act passed in the thirty-eighth year of Her Majesty's reign, intituled: An Act respecting separate rights of Property of Married Women*, S.M. 1878, c. 18, s. 2).

[116] *"The Law of Property Act"*, S.M. 1931, c. 38, s. 16.

[117] *"The Law of Property Act"*, C.C.S.M. c. L90, s. 30(2).

[118] The preamble of the 1883 Act (*An Act respecting Estates Tail*, S.M. 1883, c. 27) states:

> Whereas some of the provisions of the Act of the Parliament of Great Britain, passed in the third and fourth years of the reign of His late Majesty King William the Fourth, chaptered seventy-four, intituled "An Act for the abolition of Fines and Recoveries and for the substitution of more simple modes of Assurance", appear to require amendment in order to adapt them more fully to the circumstances of this Province, and it is expedient that they be so amended.

repealed in England in 1924.[119] The section would no longer be necessary in its present form if legislation were enacted giving effect to the general equality provisions we recommended earlier in this Chapter (Recommendation 1). We recommend:

RECOMMENDATION 11

That subsection 30(2) of "The Law of Property Act" be repealed.

(d) Section 36 of *"The Trustee Act"*

3.72 The text of this section is as follows:

Married woman trustee.

36 A married woman who is a trustee alone or jointly with any other person or persons of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such property, without her husband, as if she were a femme sole.

This section first appears in *"The Married Women's Property Act"* of 1900[120] and was later inserted in *"The Trustee Act"* of 1931.[121] The section was enacted to abrogate the common law restrictions regarding a married woman's ability to act as a trustee. As stated earlier in Chapter 2, a married woman could not acquire, hold or dispose of property at common law. As these are essential powers for a trustee, a married woman could not be a trustee at common law.

3.73 With the enactment of a general equality provision which we proposed earlier in this Chapter (Recommendation 1), there would be no need to retain this section. We recommend:

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[119] *Law of Property (Amendment) Act 1924*, 15 Geo. 5, c. 5, s. 10, sch. 10 (U.K.).

[120] *"The Married Women's Property Act"*, S.M. 1900, c. 27, s. 17.

[121] *"The Trustee Act"*, S.M. 1931, c. 52, s. 29.

RECOMMENDATION 12

That section 36 of "The Trustee Act" be repealed.

(e) Other

3.74 In addition to the foregoing sections which we were asked, via supplementary letter, to consider, the Commission through its research has become aware of two other provisions which require examination. These are alimony and guardian *ad litem*.

(i) Alimony

3.75 The term "alimony" refers to financial support payable by one spouse to another while the marriage subsists. It is to be contrasted with "maintenance" which refers to payments made subsequent to divorce. Although this technical distinction is not always strictly adhered to,[122] we shall consider alimony in its strict sense, that is, financial support payable during the continuance of marriage.

3.76 Alimony is available only to the wife; there is no corresponding right for the husband. It can be claimed either as an independent remedy[123]

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[122]For example, the term "maintenance" is used in *"The Family Maintenance Act"*, C.C.S.M. c. F20, to refer to financial support for spouses during the subsistence of marriage.

[123]The court's legislative jurisdiction to grant alimony as an independent remedy is not entirely clear in Manitoba. Prior to 1982, s. 52 of *"The Queen's Bench Act"*, R.S.M. 1970, c. C280, provided clear legislative authority for alimony as an independent remedy. That section was repealed and replaced by legislative provisions which do not expressly give the right to sue for alimony in an action for that object only: *"The Queen's Bench Act"*, C.C.S.M. c. C180, s. 52. It has, however, been suggested that an express provision is not required: *Wood* v. *Wood* (1884), 1 Man. R. 317 (Man. Q.B.). See also, 2 *Power on Divorce and Other Matrimonial Causes*, (Davies ed. 1980) at 208-9.

or as ancillary to other relief, for example, judicial separation[124] or divorce.[125] When claimed as a separate remedy, a wife can bring action against the husband only if he is at fault, as for example where he has deserted her, or been guilty of cruelty or adultery.[126] She herself is disentitled if she is guilty of any of these matrimonial offences.[127] Such offences will also disentitle her where alimony is sought ancillary to an order of judicial separation.[128]

3.77 It is the Commission's view that a married woman's right to alimony is out of keeping with the legislative scheme which now generally governs the support and maintenance of spouses in Manitoba, that is, *"The Family Maintenance Act"*, C.C.S.M. c. 20. The provisions of that Act differ from the right to alimony in two fundamental respects. First, the obligation of support established by the Act is mutual in that the spouses must "contribute reasonably to each other's support and maintenance".[129] Secondly, the entitlement or disentitlement to support is not founded upon the concept of matrimonial fault but upon the means and needs of the parties.[130] We consider the law respecting alimony to be objectionable because it is discriminatory and fault-based. In our view, *"The Family Maintenance Act"* is the more appropriate vehicle for the determination of support rights and obligations.

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[124]The court's jurisdiction to grant alimony in actions for judicial separation is authorized by the *Divorce and Matrimonial Causes Act, 1857* (20 & 21 Vict., c. 85), s. 17 (U.K.).

[125]We will not consider alimony as ancillary to divorce proceedings because of the exclusive jurisdiction of Parliament with respect to marriage and divorce.

[126]For a full discussion of the grounds on which alimony can be sought, see *Power on Divorce and Other Matrimonial Causes*, *supra* n. 123, at 212-214.

[127]*Id.*, at 214-216.

[128]*Id.*, at 168-182.

[129]*"The Family Maintenance Act"*, C.C.S.M. c. F20, ss. 2(1).

[130]*"The Family Maintenance Act"*, C.C.S.M. c. F20, ss. 5(1).

3.78 The question then becomes to what extent Manitoba law can simply abolish the right to alimony. In this regard we must consider alimony in two distinct aspects, that is, as an independent remedy, and as ancillary to an order of judicial separation. It seems clear that alimony as an independent remedy is within the legislative competence of the Province: it falls within provincial jurisdiction under the *Constitution Act 1867* as "Property and Civil Rights". Accordingly, provincial legislation can be enacted so as to abolish alimony as an independent remedy.[131]

3.79 The situation is less clear when we consider alimony as ancillary relief in an action for judicial separation. Judicial separations are governed by the *Divorce and Matrimonial Causes Act, 1857* and it is arguable that they fall within the meaning of "Marriage and Divorce" in the *Constitution Act 1867* and are therefore exclusively within the legislative competence of Parliament.[132] Indeed, the British Columbia Supreme Court has held that provincial legislation purporting to reform the law with respect to the grounds for judicial separation is *ultra vires*.[133] Because of the uncertainty respecting provincial competence to legislate in the area of judicial separation, we think that no attempt should be made to abolish the right to alimony as ancillary to an order of judicial separation. Instead, it is our view that Manitoba law should provide that, where an order for judicial separation is requested, the court should have the power to award maintenance and support for either spouse in accordance with the provisions of *"The Family Maintenance Act"*.[134]

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[131]This has been done in Ontario: *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 71. Because judicial separation was not available in the Ontario courts, the legislation abolished only the independent action for alimony. See *Power on Divorce and other Matrimonial Causes*, *supra* n. 123 at 158-159 for a discussion of the effect of the Ontario legislation and the Prince Edward Island legislation, (*Family Law Reform Act*, 1978 (P.E.I.), c. 6, s. 63) which was modelled after it.

[132]See *Power on Divorce and other Matrimonial Causes*, *id.* at 153-55.

[133]*Salloum* v. *Salloum*, [1976] 5 W.W.R. 603 (B.C.S.C.); *Siebert* v. *Siebert* (1978), 82 D.L.R. (3d) 70 (B.C.S.C.).

[134]This conclusion is similar to the Commission's recommendation in its *Report on an Examination of "The Testators Family Maintenance Act"* (Report #63, 1985) at 64, that in nullity proceedings the court should have the power to award maintenance and support in accordance with *"The Family Maintenance Act"*.

3.80 The Commission recommends:

RECOMMENDATION 13

That the right of a married woman to alimony as an independent remedy be abolished.

RECOMMENDATION 14

That where an order of judicial separation is sought, the court have the power to award maintenance and support to either spouse in accordance with the criteria set out in subsection 5(1) of "The Family Maintenance Act".

(ii) Guardian *ad litem*

3.81 At common law, a married woman could neither act as a guardian *ad litem* or as a next friend.[135] Three reasons have been cited for the development of this common law rule: first, a married woman could not sue or be sued; second, a married woman could not be held liable for the costs of an improper action or defence (except to the extent of her separate property);

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[135]Black's Law Dictionary defines guardian ad litem and next friend as follows:

> A *guardian ad litem* is special guardian appointed by the court to prosecute or defend, in behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered a officer of the court to represent the interests of the infant or incompetent in the litigation.
>
> Next friend. One acting for benefit of infant, married woman, or other person not sui juris, without being regularily appointed guardian . . . . A "next friend" is not a party to an action, but is an officer of the court, especially appearing to look after the interests of the minor whom he represents.

Black's Law Dictionary (5th ed. 1979) at 635, 941.

and third, a married woman might be influenced by her husband with respect to any duties that she might have, as a guardian *ad litem* or next friend.[136]

3.82 This common law rule was accepted into Manitoba law as of July 15, 1870. Subsequently, Queen's Bench Rule 84 was passed, the text of which is as follows:

> A married woman may sue, or defend, or be a next friend, or become a party to any action or matter in the court in all cases, as if she were not married.

Rule 84 clearly purports to authorize a married woman to act as a next friend. The term "guardian *ad litem*", however, is not used in the Rule; the fact that it is omitted in Rule 84, but specifically included in other Queen's Bench Rules in a distinctive manner from the term "next friend",[137] suggests that Rule 84 may not authorize a married woman to act as a guardian *ad litem*.[138] Regardless of the ostensible scope of the Rule, it is arguable that the Rule is ineffective to abrogate the married woman's incapacity to act as a next friend or as a guardian *ad litem*: reform of this common law rule is arguably substantive, not procedural, and accordingly beyond the authority of the Queen's Bench Rules.[139]

3.83 Irrespective of the present status of a married woman to act as a next friend or guardian *ad litem*, it is clear that a married woman should be

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[136] *In re The Duke of Somerset, deceased; Thynne* v. *St. Maur* (1887), 56 L.J. Ch. 733. For a more recent Canadian case which enunciated this rule see *Gagnon* v. *Stortini* (1974), 47 D.L.R. (3d) 650 (Ont. Dist. Ct.).

[137] See, e.g., Queen's Bench Rules 74 and 77.

[138] In particular, it is not clear whether the phrase "or become a party to any action" in line 2 thereof is intended to encompass the right of a married woman to act in a representative capacity as guardian *ad litem*.

[139] For Manitoba cases concerning the scope of the Queen's Bench Rules, see, e.g., *MacCharles* v. *Jones*, [1939] 1 W.W.R. 133 (Man. C.A.); *Montreal Trust Company* v. *Pelkey* (1970), 73 W.W.R. 7 (Man. C.A.); and *Osachuk* v. *Osachuk*, [1971] 2 W.W.R. 481 (Man. C.A.).

able to act in either capacity. If legislation were enacted to give effect to the general equality provision we recommended earlier in this Report (Recommendation 1), the married woman's status to act in either capacity would be clarified. With its enactment, there would be no need to continue Queen's Bench Rule 84. We suggest, instead, that the Queen's Bench Rules and Practice Committee (which is presently reviewing the Rules with a view to their reform) consider replacing Queen's Bench Rule 84 with a general set of rules regulating the power to act as a next friend or guardian *ad litem*. This approach has been adopted in the Ontario Rules of Practice.[140] We recommend:

RECOMMENDATION 15

That the Queen's Bench Rules and Practice Committee consider the repeal of Queen's Bench Rule 84 and its replacement with a general set of rules regulating the right of a person to act as a next friend or guardian ad litem.

C. MECHANICS OF REFORM

3.84 There is one final area remaining to consider. This pertains to the implementation of the recommendations in this Report. In particular, it should be determined which statutes should house the changes we have proposed, as well as whether any transitional provisions for these changes will be necessary. We should also consider what legislation should be repealed in light of the proposed reforms.

3.85 It is our view that *"The Married Women's Property Act"* should be repealed. The thrust of the recommendations we have proposed is to effect equality in respect of the legal status of married persons. As the focus of

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[140]Rules of Civil Procedure, O. Reg. 560/84, Rules 7.01, 7.02, 7.03. The thrust of these provisions is to provide that any person who is not under a disability may act as a "litigation guardian" without being appointed by the court. A "person under disability" is defined in the Rules and does not include a married woman.

"The Married Women's Property Act" is confined to the position of only married women, it is not a suitable statute in which to equate the legal position of husbands and wives. We think, instead, that most of the reforms we have proposed should be implemented in *"The Equality of Status Act"*, C.C.S.M. c. E130, since the general purpose of that statute parallels the broad objective of our proposed reforms.

3.86 It will not be necessary generally to continue any of the sections of *"The Married Women's Property Act"*, at least in their present form. In particular, the implementation of Recommendation 1 of this Report would obviate the need for sections 3 and 5 as well as subsections 7(1) and (3) of the Act; these are enabling sections which could be covered by the general equality principle.[141] Subsection 7(2), which abolishes interspousal immunity in tort, should continue because the enactment of the general equality provision may not clarify the abolition of this immunity. That is, the immunity applies equally to husbands and wives and, by virtue of clause 3 of Recommendation 1, its abolition might not be clear.[142] We note on this point that both Saskatchewan and Ontario, for example, have an express provision abolishing interspousal immunity despite the fact that both jurisdictions have a general equality provision similar to Recommendation 1 in their legislation.

3.87 To the extent that section 4 is enabling, it too is rendered unnecessary by the general equality principle. The transitional rules established by section 4 need not be continued in new legislation. With the exception of section 8 (which we shall deal with shortly), the remainder of the Act is declaratory of the statute's ambit and relationship with other statutes and would be consequently unnecessary with the statute's repeal.

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[141]We note as well that subsection 5(2) of the Act, which makes the abolition of the husband's liability for his wife's torts, *qua* husband, subject to *"The Highway Traffic Act"* would no longer be necessary since subsection (3) of the general equality provision (Recommendation 1) confines that provision to non-statutory matters.

[142]The same reasoning applies to tenancy by the entireties. See J.M. Glenn, "Tenancy by the Entireties: A Matrimonial Regime Ignored" (1980), 58 Can. Bar Rev. 711. In our *Report on The Survivorship Act* (Report #51, 1982) we recommended the express abolition of this common law doctrine. This recommendation has not as yet been implemented.

3.88 We recommend:

RECOMMENDATION 16

That "The Married Women's Property Act" be repealed.

RECOMMENDATION 17

That subsection 7(2) of "The Married Women's Property Act" be continued in the reform legislation.

3.89 We now set forth the particulars regarding the implementation of the reform legislation. Specifically, we are of the view that recommendations 1 to 4 should be legislated within *"The Equality of Status Act"*. (It will be recalled that these recommendations deal with the general equality principle as well as the abolition of the two special agency principles.) So too should Recommendation 9, which pertains to the reform of the presumption of advancement. The express abolition of the principle of interspousal immunity in tort should also be continued in this statute. The repeal of those miscellaneous sections covered by Recommendations 10 to 13 can be set forth in *"The Equality of Status Act"* or by general statute law amendment legislation.

3.90 The recommendations respecting section 8 of *"The Married Women's Property Act"* (Recommendations 5 to 8 in this Report) should not be housed in *"The Equality of Status Act"*. We think instead that it would be preferable for these to be inserted in *"The Marital Property Act"*, C.C.S.M. c. M45. The family law practitioners we consulted also expressed this view. In the event that this is not possible,[143] an alternative statute would be *"The Law of Property Act"*, C.C.S.M. c. L90.

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[143]It may be difficult to implement Recommendations 5 to 8 in *"The Marital Property Act"* given that many of the sections in that Act expressly state that the Act has no application to property which falls outside of the accounting and equalization procedure. The implementation of Recommendations 5 to 8 would apply to property which falls both inside and outside the accounting and equalization procedure. See para. 3.28 ff. The practitioners we consulted also shared the view that it would be difficult to "house" these Recommendations in *"The Marital Property Act"* for this reason.

3.91 We are of the view that Recommendation 14, which pertains to an award of maintenance and support in proceedings for judicial separation, should be implemented by amendment to *"The Family Maintenance Act"*. We recommend:

RECOMMENDATION 18

That, subject to Recommendations 19 and 20, the reform legislation be implemented in "The Equality of Status Act".

RECOMMENDATION 19

That consideration be given to implementing Recommendations 5 to 8 of this Report in "The Marital Property Act".

RECOMMENDATION 20

That Recommendation 14 of this Report be implemented in "The Family Maintenance Act".

3.92 We now turn to look at the final issue in this Report: the transitional provisions for the reform legislation. We think there is a need for three transitional provisions. The first is with respect to the abolition of the special agency principles (Recommendations 2 to 4 in this Report). We think there should be a provision clarifying that their abolition does not affect existing causes of action. The second transitional principle arises from the reform of the presumption of advancement. Here, we recommend that there be a specific rule to the effect that the reform applies notwithstanding that the event giving rise to the presumption occurred before the effective date of the legislation. The third transitional provision is with respect to the abolition of alimony as an independent remedy. We think that there should be a provision to the effect that where an action for alimony is commenced before abolition, the action shall be deemed to be an action under Part I of *"The Family Maintenance Act"* subject to such considerations as the court considers appropriate. We recommend:

RECOMMENDATION 21

That there be a transitional provision to the effect that the abolition of the special agency principles (Recommendations 2 to 4 of this Report) not apply to existing causes of action.

RECOMMENDATION 22

That there be a transitional provision to the effect that the legislation reforming the presumption of advancement (Recommendation 9 of this Report) applies notwithstanding the event giving rise to the presumption occurred before the effective date of the legislation.

RECOMMENDATION 23

That there be a transitional provision to the effect that where an action for alimony is commenced before the abolition of alimony as an independent remedy, the action shall be deemed to be an application under Part I of "The Family Maintenance Act" subject to such directions as the court considers appropriate.

CHAPTER 4

LIST OF RECOMMENDATIONS

The recommendations contained in this Report are as follows:

1. That sections 3 and 5 and subsections 7(1) and (3) of *"The Married Women's Property Act"* be repealed and replaced by legislation which reads as follows:

   (1) For all purposes of the law of Manitoba, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.

   (2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person.

   (3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law or equitable rule or doctrine, and subsections (1) and (2) shall be so construed.

2. That the common law principle which presumes that a married woman is entitled to pledge her husband's credit for necessaries during cohabitation be abolished.

3. That the common law principle which presumes that a deserted wife is entitled to pledge her husband's credit for necessaries be abolished.

4. That legislation to implement Recommendations 2 and 3 be similar to the Saskatchewan provision which is as follows:

   Spouse as agent. - A husband or wife does not, merely because of his or her status as a spouse, have authority to pledge the credit of the other spouse for necessaries or to act as agent for the other spouse for the purchase of necessaries.

5. That there be retained in Manitoba law a summary procedure for the resolution of marital property disputes.

6. That legislation to implement Recommendation 5 read substantially as follows:

   Any person may apply to the Court of Queen's Bench for the determination of any question between that person and his or her spouse or former spouse as to the ownership or right to possession of property, and the court may,

   (a) declare the ownership or right to possession;

(b) where the property has been disposed of, order payment in compensation for the interest of either party;

(c) order that the property be sold for the purpose of realizing the interests therein;

(d) order that the property be transferred to or vested in either spouse; and

(e) order that either or both spouses give security for the performance of any obligation imposed by the order including a charge on property,

and may make such other order or directions as are ancillary thereto.

7. That legislation enacting Recommendation 5 be made subject to *"The Marital Property Act"*.

8. That legislation enacting Recommendation 5 be made subject to *"The Dower Act"*.

9. That the spousal presumption of advancement be retained in Manitoba law, and that it be extended to transfers from wife to husband and to purchases by the wife in the husband's name.

10. That subsection 55(2) of *"The Queen's Bench Act"* be repealed.

11. That subsection 30(2) of *"The Law of Property Act"* be repealed.

12. That section 36 of *"The Trustee Act"* be repealed.

13. That the right of a married woman to alimony as an independent remedy be abolished.

14. That where an order of judicial separation is sought, the court have the power to award maintenance and support to either spouse in accordance with the criteria set out in subsection 5(1) of *"The Family Maintenance Act"*.

15. That the Queen's Bench Rules and Practice Committee consider the repeal of Queen's Bench Rule 84 and its replacement with a general set of rules regulating the right of a person to act as a next friend or guardian *ad litem*.

16. That *"The Married Women's Property Act"* be repealed.

17. That subsection 7(2) of *"The Married Women's Property Act"* be continued in the reform legislation.

18. That, subject to Recommendations 19 and 20, the reform legislation be implemented in *"The Equality of Status Act"*.

19. That consideration be given to implementing Recommendations 5 to 8 of this Report in *"The Marital Property Act"*.

20. That Recommendation 14 of this Report be implemented in *"The Family Maintenance Act"*.

21. That there be a transitional provision to the effect that the abolition of the special agency principles (Recommendations 2 to 4 of this Report) not apply to existing causes of action.

22. That there be a transitional provision to the effect that the legislation reforming the presumption of advancement (Recommendation 9 of this Report) applies notwithstanding the event giving rise to the presumption occurred before the effective date of the legislation.

23. That there be a transitional provision to the effect that where an action for alimony is commenced before the abolition of alimony as an independent remedy, the action shall be deemed to be an application under Part I of *"The Family Maintenance Act"* subject to such directions as the court considers appropriate.

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"*, signed this 16th day of December, 1985.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

Lee Gibson, Commissioner

John J. Irvine, Commissioner

Gerald O. Jewers, Commissioner

APPENDIX A

AN ACT RESPECTING THE CAPACITY, PROPERTY, AND LIABILITIES, OF MARRIED WOMEN.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Short title.

1 This Act may be cited as: "The Married Women's Property Act".

Definition of "property".

2 In this Act "property" includes a thing in action and any interest in real or personal property.

Rights and obligations of a married woman.

3 Subject to this Act, a married woman shall

(a) continue to be liable in respect of any tort committed, contract entered into, or debt or obligation incurred, by her before her marriage;
(b) be capable of making herself, and being made, liable in respect of any contract, debt, or obligation;
(c) be capable of acquiring, holding, and disposing of, any property;
(d) be capable of suing and being sued, either in tort, contract, or otherwise;
(e) be subject to the enforcement of judgments and orders; and
(f) be capable of acting in any fiduciary or representative capacity;

in all respects as if she were unmarried.

Rights of married woman in property after coming into force of Act.

4(1) All property that

(a) immediately before the first day of January, 1946, was the property of a married woman;
(b) belongs at the time of her marriage to a woman married after the thirty-first day of December, 1945; or
(c) after the thirty-first day of December, 1945, is acquired by, or devolves upon, a married woman;

belongs to her in all respects as if she were unmarried and may be dealt with accordingly.

Exception.

4(2) Nothing in subsection (1) interferes with or renders inoperative a restriction upon anticipation or alienation attached to the enjoyment of any property by virtue of a provision attaching such restriction contained in an instrument executed before the first day of January, 1946.

Abolition of restraint upon anticipation.

4(3) An instrument executed on or after the first day of January, 1946, in so far as it purports to attach to the enjoyment of property by a married woman a restriction upon anticipation or alienation that could not have been attached to the enjoyment of that property by a man, is void.

When restraint deemed to have been imposed.

4(4) For the purpose of the provisions of this section relating to restrictions upon anticipation or alienation,

(a) an instrument attaching such a restriction executed on or after the first day of January, 1946, in pursuance of an obligation imposed before that date to attach such a restriction shall be deemed to have been executed before the said first day of January;
(b) a provision contained in an instrument made in exercise of a special power of appointment shall be deemed to be contained in that instrument only and not in the instrument by which the power was created; and
(c) the will of a testator who dies after the thirty-first day of December, 1955 [sic], notwithstanding the actual date of execution thereof, shall be deemed to have been executed after the first day of January, 1946.

Restrictions of husband's liability.

5(1) The husband of a married woman is not, by reason only of his being her husband, liable

(a) in respect of a tort committed by her before or after marriage; or
(b) in respect of a contract entered into, or debt or obligation incurred, by her before marriage.

Application of Highway Traffic Act.

5(2) Subsection (1) is subject to The Highway Traffic Act.

Saving provision.

6 Nothing in this Act

(a) exempts a husband from liability in respect of a contract entered into, or debt or obligation incurred, by his wife after marriage in respect of which he would be liable if this Act had not been passed; or

(b) prevents a husband and wife from acquiring, holding, and dealing with, property jointly or as tenants in common, or from making themselves, or being made, jointly liable in respect of any tort, contract, debt, or obligation, and from suing or being sued either in tort, contract, or otherwise, in like manner as if they were not married; or

(c) prevents the exercise of any joint power given to a husband and wife.

Remedies of married woman for protection of property.

7(1) A married woman has, in her own name, against all persons, including her husband, the same remedies for the protection and security of her property, as if she were unmarried.

Actions in tort between spouses.

7(2) A husband and wife have the same right to sue the other for tort as if they were not married.

Remedies of married man for protection of property.

7(3) A married man has against his wife the same remedies for the protection and security of his property as his wife has against him for the protection and security of her property.

Summary disposal of questions between husband and wife as to property.

8(1) In any question between husband and wife as to the title to or possession of property, either party, or any corporation, company, public body, or society, in whose books any stocks, funds, or shares, of either party are standing, may apply in a summary way to a judge of the Court of Queen's Bench, or, at the option of the applicant irrespective of the value of the property in dispute, to the judge of the County Court of the district in which either party resides; and the judge may make such order with respect to the property in dispute and as to the costs of, and consequent on, the application as he thinks fit, or may direct the application to stand over from time to time and any inquiry or issue touching the matters in question to be made or tried in such manner as he thinks fit.

Removal of proceedings from County Court into Court of Queen's Bench.

8(2) All proceedings in a County Court under this section, in which, by reason of the character or value of the property in dispute, the court would not have had jurisdiction if this section had not been passed, may, at the

option of the defendant or respondent, be removed as of right into the Court of Queen's Bench; but any order made or act done in the course of the proceedings prior to the removal is valid unless an order is made to the contrary by the Court of Queen's bench.

Hearing.

8(3) The judge, if either party so requests, may hear the application in private.

Corporation's costs.

8(4) In an application under this section any such corporation, company, public body, or society, shall, for the purposes of costs or otherwise, be treated as a stakeholder only.

Appeal.

8(5) Where the value of the property in dispute in an application under this section exceeds two hundred dollars an appeal lies to The Court of Appeal from any order made by the judge.

Dower Act to apply.

9 This Act is subject to The Dower Act.

Marital Property Act to apply.

9.1 This Act is subject to The Marital Property Act.

Uniform construction.

10 This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of the provinces that enact it.