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CHOICE OF LAW—MATRIMONIAL REGIMES—RECOGNITION IN ONTARIO OF FOREIGN EXPRESS OR IMPLIED MARRIAGE CONTRACT OR SETTLEMENT—DOMESTIC CONTRACT—NARROW CONSTRUCTION—OWNERSHIP AND DIVISION OF FAMILY ASSETS ON MARRIAGE BREAKDOWN.—In the common law provinces, the legislatures have now adopted provisions dealing with the ownership and division of family assets in the case of a marriage breakdown. This legislation may be invoked where a decree nisi of divorce is pronounced or a marriage is declared a nullity or where the spouses are separated and there is no reasonable prospect of the resumption of cohabitation.¹ The ownership and division of *family* assets provisions apply, *inter alia*, to the matrimonial home and property owned by one spouse or by both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.² In the absence of a marriage breakdown, ordinary rules of matrimonial property continue to prevail and in most common law provinces the spouses are separate as to property.

In general, the division of family assets and the ownership as between spouses of movable property wherever situated are governed by the internal law of the place where both spouses had their last common habitual residence or, where there is no place where the spouses had a common habitual residence, by the *lex fori*.³ With

¹ Family Law Reform Act, 1978, R.S.O., 1980, c. 152; The Matrimonial Property Act, S.A., 1978, c. 22; The Family Law Reform Act, S.P.E.I., 1978, c. 6; The Marital Property Act, S.M., 1978, c. 24, as am.; The Family Relations Act, R.S.B.C., 1979, c. 121, ss 43-55; The Matrimonial Property Act, S. Nfld, 1979, c. 32, as am; The Matrimonial Property Act, S.N.S., 1980, c. 9; The Marital Property Act, S.N.B., 1980, c. M-1-1. Comp. The Matrimonial Property Act, S.S., 1979, c. M-6.1 which does not require marriage breakdown.

² *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 3(b).

³ *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 13(1). The choice of law provisions often vary from province to province. For instance in Manitoba the legislation applies retroactively to all spouses whether married within Manitoba or a jurisdiction outside of Manitoba, if the habitual residence of both spouses is in Manitoba; or where each of the spouses have a different habitual residence if the last common habitual residence of the spouses was in Manitoba; or where each of the spouses has a different habitual residence and the spouses have not established a common habitual residence since the solemnization of their marriage, if the habitual residence of both at the time of the solemnization was in Manitoba. The Marital Property Act, *supra*, footnote 1, s. 2(1). *Wolch v. Wolch* (1980), 19 R.F.L. (2d) 307 (Man. Q.B.). In Alberta, a spouse may apply to the court for a matrimonial property order only if the habitual residence of both spouses is in Alberta, whether or not the spouses are living together, the last joint habitual residence of the spouses was in Alberta, or the spouses have not established a joint habitual residence since the time of marriage but the habitual residence of each of them at the time of marriage was in Alberta. The Matrimonial Property Act, *supra*, footnote 1, s. 3(1). The matters to be taken into consideration in making a distribution include the terms of an oral or written agreement between the spouses: *ibid.*, s. 8(g). If a

respect to the ownership of immovable property the internal *lex situs* applies, but where the *lex fori* is applicable respecting the division of family assets, the value of the foreign property may be taken into consideration for this purpose.⁴

The ownership and the division of family assets may be affected by a "domestic contract" which includes a marriage contract in which the spouses agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage or upon death including ownership in or division of property, support obligations, the right to direct the education and moral training of their children but not the right of custody of or access to their children, and any other matter in the settlement of their affairs.⁵ However, any provision in a marriage contract purporting to limit the right of a spouse with respect to possession of the matrimonial home is void.⁶ This limitation applies to a contract made outside the enacting province which is valid by its proper law or by the law of the enacting province.⁷ The legislation also recognizes marriage contracts validly made before it came into force.⁸

The new legislation raises a number of very interesting choice of law issues when the spouses were married in a foreign country where they were then domiciled and resident and subsequently became domiciled and resident in the enacting province. However, this comment will be limited to the case where the spouses, now domiciled and resident in the enacting province, had entered into an express or implied marriage contract valid by its proper law as determined by the

petition is issued under the Divorce Act, R.S.C., 1970, c. D-8, as am., the petitioner or the respondent may apply for a matrimonial property order: *ibid.*, s. 3(2). The New Brunswick Act, *supra*, footnote 1, s. 44(1)(b) also applies where one of the spouses has maintained his or her last residence in the province. Note that The Family Relations Act of B.C., *supra*, footnote 1, as well as the Matrimonial Property Act of Saskatchewan, *supra*, footnote 1, do not contain statutory choice of law rules. Thus, the courts must determine the scope of the Acts. In *McKinney v. McKinney* (1980), 17 R.F.L. (2d) 208 (B.C.S.C.), Spencer L.J.S.C. applied B.C. law as the *lex fori* because the wife resided in B.C., the last matrimonial home was B.C., the house and some of the personal assets were in B.C., the husband deserted the wife in B.C. and he had submitted to the jurisdiction of the courts of B.C. Also *Sinclair v. Sinclair*, Cranbrook S.C., Registry No. 5907-00985, June 26th, 1979. It could be argued that since s. 13(1) and (2) of the Ontario Act covers both *ownership* and *division* of family assets, it replaces the common law rules. However, this does not appear to have been the legislature's intent as the Act does not deal with matrimonial property or family assets in the absence of marriage breakdown. Some Acts do not refer to ownership as between spouses.

⁴ *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 13(2). Not all the provinces use the word "internal". Thus "renvoi" may be used.

⁵ *E.g.*, Family Law Reform Act, 1978, *ibid.*, ss 2(9) and 50-59.

⁶ *E.g.*, Family Law Reform Act, 1978, *ibid.*, ss 51(2) and 49(1).

⁷ *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 57(b). See also s. 55.

⁸ *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 59.

choice of law rules of the enacting province, and a petition for the division of family assets has been made.

Will the court give effect to the foreign express or implied marriage contract? It will be recalled that under traditional choice of law rules in force in the common law provinces, where there is a marriage contract or settlement, the rights of the husband and wife to all movables and immovables within its terms, whether possessed at the date of the marriage or acquired afterwards, are governed by the proper law of the contract or settlement, even if there is a change of domicile or residence after the marriage.⁹

Thus, it has been held that where the spouses were married while domiciled in a country the law of which provides that, in the absence of an express marriage contract, they are subject to a matrimonial regime which gives the respective spouses certain proprietary rights, such rights will be recognized and enforced.¹⁰

This situation is the most usual. The husband and wife by intermarrying without having entered into a marriage contract in writing are placed by their *lex domicilii* at the time of marriage and by the sole fact of the marriage precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract and thereby adopted as special and express covenants all and every one of the provisions of the domiciliary law relating to property rights between spouses including the distribution of their assets upon dissolution of the marriage. The implied contract is formed by operation of the law of their domicile, if by the husband's domicile at the time of the marriage, the imposition of the matrimonial regime is characterized as contractual in nature. The proper law of the contract is that of the husband's domicile.

The first questions which arises is whether such an implied contract is a "domestic contract". It is submitted that the answer should be in the affirmative notwithstanding the provision that requires that a "domestic contract and any agreement to amend or rescind a domestic contract are void unless made in writing and signed by the persons to be bound and witnessed".¹¹ This provision deals with locally entered domestic contracts not those entered abroad. It is made clear by the provision which states that the manner and formalities of making a "domestic contract" and its essential validity

⁹ *De Nicols v. Curlier*, [1900] A.C. 21 (H.L.); *Re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410; *Devos v. Devos*, [1970] 2 O.R. 323, 10 D.L.R. (3d) 603; *Taillifer v. Taillifer* (1892), 21 O.R. 337, 11 C.L.T. 274 (C.A.); *Re McCarthy* (1970), 16 D.L.R. (3d) 72 (N.S. Prob. Ct); *Re Jutras Estate*, [1932] 2 W.W.R. 533 (Sask. C.A.); *Beaudoin v. Trudel*, [1937] O.R. 1, [1937] 1 D.L.R. 216 (C.A.).

¹⁰ *De Nicols v. Curlier*, *ibid.*

¹¹ Family Law Reform Act, 1978, *supra*, footnote 1, s. 54(1).

and effect are governed by the proper law of the contract.¹² If the law of the husband's domicile at the time of the marriage implies the creation of a valid contract between the parties as to their property, that law should be regarded as the proper law of the contract, and the contract should be recognized in the common law provinces that have adopted legislation dealing with the ownership and division of family assets. This seems to be the only sensible construction to be given to the provisions with respect to the form of domestic contracts.

Having argued that an implied contract created by operation of law is a "domestic contract" within the letter and the spirit of the new legislation, the next question is whether an express or implied marriage contract or settlement validly entered before or after the coming into force of the new legislation governs the ownership and division of the property of the spouses so as to supersede the division of family assets by virtue of that legislation, provided the contract does not deal with matters that are excepted from its scope as a matter of public policy. It is submitted that such an express or implied marriage contract must be given effect by the court at the time of the dissolution of the marriage. It all depends upon the contents of the proper law. If the express or implied marriage contract or settlement is governed by the law of say the province of Quebec, an Ontario court must examine that part of the law of Quebec dealing with the matrimonial regime adopted by the express or implied marriage contract. The relevant Quebec domestic law will determine the cases in which the regime comes to an end and the method of ownership and division of the assets belonging to the spouses.¹³ It is not necessary for the spouses to have specifically dealt with the division of their assets in their marriage contract or settlement. The law governing their regime deals with this question. Unfortunately, the courts that have interpreted express marriage contracts or settlements do not seem to have considered the question of ownership and division of spousal assets from this particular vantage point.

In *Sinnet v. Sinnett*,¹⁴ the spouses had entered into a marriage contract valid according to Quebec law which was its proper law, as the contract was made in that province while the parties were domiciled and resident there. Subsequently the spouses moved to Ontario. The court held that the marriage contract did not preclude the husband from making a claim to family assets and non-family assets held by the wife assuming that both had contributed to the property.

¹² Family Law Reform Act, 1978, *ibid.*, s. 57.

¹³ See Quebec Civil Code of Lower Canada (1866), arts 1257 to 1425 and Civil Code of Quebec (1980), arts 463 to 524. Note that the regime may not come to an end by a mere marriage breakdown such as a *de facto* separation.

¹⁴ (1980), 15 R.F.L. (2d) 115 (Ont. Co. Ct.).

The court expressed the view that since the marriage contract dealt with both possessory and proprietary rights it was void and unenforceable as it was contrary to the provisions of the Ontario legislation dealing with the possession of the matrimonial home. Actually, it seems difficult to maintain that a marriage contract in which the spouses merely declared that they are separate as to property limits the rights of a spouse to *possession* of the matrimonial home.

The court was also of the opinion that since the spouses had not expressly excluded the relevant provisions of the Family Law Reform Act, it could apply them. In other words, a contract dealing with ownership could not govern a division of property made on a basis other than ownership. Of course, at the time of making the contract, the future spouses could not have foreseen their move to Ontario nor the adoption of the Family Law Reform Act by the legislature of that province. However, it is submitted that by adopting the regime of separation of property in their contract, by necessary implication they excluded the application of the Ontario provisions dealing with the division of family assets. The proper law of the contract was the law of Quebec and according to that law the parties were entitled to their respective assets.¹⁵ It would have been sufficient to hold that the Quebec marriage contract was a valid "domestic contract"¹⁶ which the court would enforce except, on the ground of public policy,¹⁷ with respect to the possession of the matrimonial home.

The question whether effect should be given to a Quebec marriage contract providing for separation of property which is valid by its proper law was also considered by the Ontario High Court in *Kerr v. Kerr*.¹⁸ The future spouses were domiciled in the Province of Quebec at the time they entered into the marriage contract. More than ten years later they moved to Ontario where a matrimonial home was purchased in the name of the husband alone. When the husband petitioned for divorce, the wife counter-petitioned for divorce and joined a claim pursuant to the Family Law Reform Act 1978 for a share in the matrimonial home. The court accepted the wife's claim and held that she was entitled to an equal share in the matrimonial home notwithstanding the Quebec marriage contract. The approach

¹⁵ Note that the contract specifically stated that the parties "shall be and remain separate as to property as permitted by the Civil Code of Lower Canada". This refers to arts 1436 and 1450 now repealed and replaced by L.Q., 1980, c. 39, arts 518-520.

¹⁶ The court did not decide whether the Quebec marriage contract was a domestic contract as envisaged by ss 2(9) and 50-59 of the Act (at p. 138). However, see *Kerr v. Kerr* (1981), 32 O.R. (2d) 146 (H.C.) and *Hansson v. Hansson*, [1981] 4 W.W.R. 88, 21 R.F.L. (2d) 252 (B.C.S.C.).

¹⁷ The court resisted the temptation of considering whether the marriage contract was void as contrary to public policy under the common law (at p. 137).

¹⁸ *Supra*, footnote 16.

taken was novel although the court declared that it was in complete agreement with the result implicit in the judgment in *Sinnett v. Sinnett*.¹⁹

The issues were circumscribed: firstly, to what extent, if any, has the Family Law Reform Act, 1978,²⁰ altered the existing law with regard to the effect of a marriage contract entered into by Quebec domiciliaries in the Province of Quebec prior to their marriage on their subsequently purchased matrimonial home situated in the Province of Ontario where they both now reside and are domiciled? Secondly, does a marriage contract that provides only that the spouses adopt a regime of separation as to property operate to defeat a claim brought by one spouse, the wife, under section 4 of the Act, for a division of family assets, namely, the sale of their matrimonial home which has always been registered solely in the name of the husband?

The court began its opinion by pointing out that section 13, the so-called "conflict of laws" section of the Act has no application in interpreting or determining the intrinsic validity of the marriage contract as such contract was a valid "domestic contract" made in accordance with the various provisions contained in part IV of the Act. Thus, it appears that a foreign marriage contract valid by its proper law as determined by Ontario choice of law rules is a domestic contract which by virtue of section 9(2) must prevail over the provisions contained in part I of the Act.²¹ However, the court expressed the view that where the marriage contract, as it was the case here, merely provides, simpliciter, that the spouses are to be separate as to property, it is not capable of constituting that type of agreement contemplated by the concluding words of section 3(b) of the Act.²² In other words, the marriage contract did not make provision in respect of a matter that is provided for in the Act. This view is regrettable as it automatically excludes the enforcement of marriage contracts or settlements except upon the dissolution of the marriage by death of one of the spouses.

Although the marriage contract may specifically provide for the ownership and division of the spouses' assets upon dissolution of the marriage, this is rarely the case especially if the marriage contract is implied by law. As already indicated, the proper law will apply to the ownership, division and distribution of the spouses' assets. This

¹⁹ *Supra*, footnote 14.

²⁰ *Supra*, footnote 1.

²¹ In *Hansson v. Hansson*, *supra*, footnote 16, the court also expressed the view that an antenuptial contract was a marriage agreement within the definition of s. 48 of the B.C. Family Relations Act, *supra*, footnote 1.

²² ". . . but does not include property that the spouses have agreed by a domestic contract is not to be included in the family assets".

means the domestic law applicable to the regime expressly or impliedly adopted by the spouses.

If, as the court did, one interprets a marriage contract narrowly, there is no doubt that as the right to a division of family assets based not on ownership but rather on equity is a new substantive right, any marriage contract entered long before the enactment of the Family Law Reform Act, 1978 will fail to specifically deal with this right. This reasoning forced the court to rephrase the issue: does a marriage contract which provides for some property rights prevail on all the property provisions of the Act or does it only prevail with respect to the particular property rights dealt with by the spouses in the contract? The answer given was that in each individual case, the court must determine from the contract itself whether the spouses can be said to have turned their minds to a consideration of the particular right or provision of the Act.

The application of this test is relatively easy when the contract specifically provides for the division of the assets belonging to the spouses. It is not in most cases, as foreign lawyers or notaries, even with respect to a marriage contract entered into after the enactment of the Family Law Reform Act 1978, may not be familiar with its provisions or the spouses may not have contemplated moving to a jurisdiction that has adopted this type of legislation. It is submitted that a wide interpretation of the marriage contract is much more realistic²³ especially in the case of a contract implied by law, provided it is valid by the proper law ascertained in accordance with the choice of law rules of the enforcing province. The court would apply to the ownership, division and distribution of property the relevant provisions of the foreign domestic law governing the regime expressly or impliedly selected by the parties.

²³ But not necessarily more equitable. As the court pointed out, *supra*, footnote 16, at p. 154, although since 1964 the spouses had been governed in their relationship by the terms of a marriage contract which they both had freely and knowingly entered into, their choice of a property regime had been quite limited. Furthermore the regime of separation as to property which they selected differed little from the law of Ontario prior to the enactment of the Family Law Reform Act. Thus they could not complain. This may be true in this case. However, the issue was whether effect should be given to their marriage contract. There is a policy argument to be made that an Ontario couple could always take legal advice and be told that they could make a new marriage contract, and determine for themselves how they wanted their property to be divided. A couple who had married under the law of Quebec might reasonably assume, on the other hand, that their marriage contract, express or implied, had always dealt with the division of property, and that the change in Ontario law did not affect them. On this account they would be less likely to get legal advice and make a new contract than an Ontario couple would, and the court should therefore not proceed on the assumption that the two couples' positions were in all respects the same.

However, on the ground of public policy, the court would refuse to set aside the right of any spouse to the possession of the matrimonial home located within the enforcing province. The approach presently adopted by the court reduces considerably the recognition which the legislation gives to marriage contracts that are valid by their proper law and appears to eliminate those that are implied by law. The words used by the court that in order to "have the domestic contract prevail by virtue of section 2(9), provision must be made expressly or by *necessary implication* in the domestic contract for the specific matter provided for in the section of the Act in question"²⁴ seem to give support to this interpretation. "By necessary implication" could mean by virtue of the domestic law applicable to the matrimonial regime chosen by the parties. Although some further clarification is needed, *Kerr v. Kerr* represents an important step in the development of this branch of the law.

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²⁴ *Ibid.*, at p. 153, italics added.

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