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"Whatever Happened to Exempt Property?" An Overview of the Matrimonial Property Act of Nova Scotia

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I. *Philosophy of the Act*

As it is five years since the introduction of the Matrimonial Property Act, it may be appropriate before turning to the title of my paper to outline the general philosophy of the Act. The philosophy is to allow either spouse to apply to the court on the occurrence of one of the four triggering events (death, divorce, nullity or separation) to seek an equal division of the matrimonial assets. Where a merely equal division of matrimonial assets would be unfair or unconscionable a court may divide the matrimonial assets up unequally or have recourse to the exempt property.

It is essential to realise that the time when the non-owning spouse's interest arises (apart from special provisions affecting the matrimonial home) is the time when the court makes its order pursuant to ss. 12 and 13. This emerges from the recent decision in *Maroukis v. Maroukis*.¹ In that case, a wife had sought division of a matrimonial home in 1978, but, before the case reached trial, a bank obtained a default judgment against the husband in 1979 and filed an execution with the judgment. The Ontario Court of Appeal held that the trial judge had no authority to vest an interest in the wife free of the execution creditor's claims. The wife's right required the making of a court order.

In other circumstances the courts have been wary of collusive actions between spouses in a “happy marriage” especially under ss. 16 and 18 which are independent of the triggering events in s. 12. The effect of such actions could be to prejudice creditors of the husband and therefore in *Bray v. Bray*² an execution creditor was permitted to be added as a party to an action between the spouses. However, creditors of a non-owning spouse

*Professor of Law, Dalhousie University. This article was first presented at the Family Law Conference organised by the Continuing Legal Education Society of Nova Scotia on April 27th 1985.

1. (1981), 24 R.F.L., (2d) 113 (Ont. C.A. affirmed by Supreme Court of Canada 54 N.R. 268.

2. (1979), 9 C.P.C. 241 (Ont. H.C.).

(usually a wife) cannot force a debtor spouse into a s. 12 application merely to divest the owning spouse (usually a husband) of assets for their benefit.³

It is also clear that s. 12(1)(d) can only be invoked by a surviving spouse to sue the estate of a deceased spouse and not by the estate of a deceased spouse suing the surviving spouse so as to obtain a fair share of the matrimonial assets.⁴

II. *Special Provisions Affecting the Matrimonial Home*

A non-owning spouse is not given a proprietary interest in the matrimonial home by the Act. Instead, s. 6 gives the non-owning spouse a personal right of occupation, the same right of occupation as the owning spouse. Thus, if the owning spouse's rights of occupation are lost to creditors, so are those of the non-owning spouse.⁵ The effect of s. 6 where the owning spouse loses his rights of occupation by death is obscure and shows the problems of copying the Ontario Act where death is not a triggering event.

The basic protection for a non-owning spouse's possessory rights in the home conferred by s. 6 is the restriction on the ability of the owning spouse to make a disposition affecting the home or to encumber it without the non-owning spouse's consent, release in a marriage contract or separation agreement, or a court order. Section 8 has a number of critical features. First, the rights of the spouse arise when the spouses marry and use the house as a matrimonial home. They cannot by marrying and moving into an already encumbered home give themselves retrospective priority over existing mortgagees as was sought to be done in *Sherwood v. Sherwood*.⁶ Second, a non-owning spouse may be overridden where the owning spouse gives a false affidavit to a purchaser or mortgages under s. 8(3). In *Stoimenov v. Stoimenov*⁷ the mortgagee took free of the wife's rights and was able to rely on the husband's false affidavit that he was unmarried because he had no *actual notice* to the contrary.⁸ The decision has recently been overturned on

3. See *Deloitte, Haskins & Sells v. Graham* (1983), 32 R.F.L. (2d) 356 (Alta. Q.B.).

4. *Sagar v. Bradley* (1984), 63 N.S.R. (2d) 386 (A.D.).

5. *Re Mauro*, (1983), 41 O.R. (2d) 157 (H.C.).

6. (1982), 29 R.F.L. (2d) 374 (T.D.).

7. (1982), 40 O.R. (2d) 69 (H.C.).

8. The Nova Scotia Act merely talks of notice.

appeal.⁹ Apparently the mortgagee, following its usual practice, had obtained a Toronto Credit Bureau check which showed a husband and wife living at the house, and the filing of a non-responsibility notice by Mr. Stoimenov in 1978. However, this information and the discrepancy between it and the husband's representing himself as being "single" on the mortgage application form was never passed on to its solicitor. Moreover, the solicitor had done a title search in 1976 which showed that there was a transfer from the Stoimenovs as joint tenants to the husband alone. All of this should have revealed the necessity for Mrs. Stoimenov to consent to the encumbrance. The effect of the decision on real estate practice is profound and requires mortgagees and others to take into account any information they may possess which conflicts with the affidavit's contents, and not merely to rely *pro forma* on the affidavit alone for their protection. Tarnopolsky, J.A. held that the words in s. 42(3) of the Ontario Act¹⁰ do not relate to whether the mortgagee had 'notice to the contrary that the property was a matrimonial home'. Rather the words 'to the contrary' relate to any of the items relevant to s. 43(a) to (d).¹¹

The practical effect of the decision may be to force the computerisation of Law Offices and Trust Companies so that they can cross reference all information coming to them in a series of apparently unrelated transactions. Also unresolved is the question of client confidentiality, e.g., when a solicitor learns of the husband's marital status when acting for him in on one transaction and then later acts for the mortgagee in another apparently non-contentious transaction and comes across an apparently inaccurate affidavit. Whilst the full import of this decision is still to emerge, at least one step may need to be taken by the Bar. Solicitor's certifying title to purchasers or mortgagees may wish to exempt themselves from responsibility for information in the personal knowledge of their clients which has not been passed on to them.

As to what constitutes a disposition of encumbrance we now

9. See *Ontario Lawyers Weekly*, March 15th, 1985 (O.L.W. full text 419-021.)

10. Ss. 8(2) & (3) in Nova Scotia.

11. Ss. 8(a) to (c) in Nova Scotia, i.e., (a) that the transferor is not a spouse, (b) that he is but the property has never been occupied as a matrimonial home or (c) that the other spouse's rights in the property have been released in separation agreement, marriage contract, etc.

know that a lease by a wife without her husband's permission is a disposition liable to be set aside.¹² More importantly the attempt in *Mills v. Andrewes*¹³ by a mother to sever a joint tenancy into a tenancy in common so that she could leave something to her child by a previous marriage was held to infringe s. 8. The result is sad in that the mother was unable to leave anything to her son despite having contributed to the purchase of the home and its furnishings. Nor could her estate sue as plaintiff for an equal share of the matrimonial assets. Actions for equal division under s. 12(1)(d) seem to be restricted to actions by a living plaintiff against the deceased spouse's estate.¹⁴ If the property had been in the husband's and wife's names as tenants in common it is uncertain whether the wife's leaving her share in the home to her son in her will might still not be a disposition within s. 8. That this is even arguable shows the problem of copying the Ontario legislation's wording in Nova Scotia whilst at the same time making death a triggering event.

Two final points are worth noting in connection with homes. Although s. 3(1) of the Act appears to exclude leasehold property from the definition of matrimonial home, this needs qualification in the light of *Beaman v. Beaman*.¹⁵ In that case Burchell J. held that the effect of a lease/purchase scheme operated by the Department of Housing was to create a property right taking the arrangement outside the range of ordinary leases. This holding that the lease/purchase home was a matrimonial asset was without prejudice to the contractual rights of the Department of Housing.

When drafting marriage or separation agreements between spouses relating to the home it may be important to make clear whether a spouse is merely putting legal title in the wife (e.g. putting it beyond the reach of his creditors)¹⁶ or whether he is relinquishing his s. 12 rights which are notwithstanding the ownership of the assets. Finally if a wife is taking a conveyance

12. *Flynn v. Graves* oral decision of MacIntosh J. not yet reported. The tenants have been given time to find suitable alternative accommodation.

13. (1982), 31 R.F.L. (2d) 47 (N.S.S.C., T.D.). This may be contrasted with the Ontario decision in *Lamanna v. Lamanna*, (1983), 32 R.F.L. (2d) 386 (Ont. H.C.) though that decision seems unlikely to have survived after *Kozub v. Timko*, (1984), 39 R.F.L. (2d) 146 (Ont. C.A.).

14. *Sagar v. Bradley* (1984), 63 N.S.R. (2d) 386 (A.D.).

15. 62 N.S.R. (2d) 351 (T.D.).

16. See, *supra*, note 3.

from her husband when she is currently a joint tenant with him but she wishes to retain the right to sue him on the deed (e.g. for a defect in title), it may be better for the wife not to join in the conveyance to herself under a warranty deed.¹⁷

III. *The Matrimonial Assets/Exempted Assets Boundary*

Central to the scheme of the Matrimonial Property Act is the distinction between matrimonial property and exempt property. Matrimonial property is *prima facie* shareable equally, exempt property is only available for sharing in a reserve capacity. Since the last Family Law Conference in 1980 a number of cases have continued the trend established in *Lawrence v. Lawrence*¹⁸ that matrimonial property is to be construed broadly and excluded property narrowly so that one may legitimately wonder what is left of the latter except as an “endangered species”. This may also put into perspective the decision in *MacGregor v. MacGregor*¹⁹ where Hallet J. pointed out that wives’ rights under the Matrimonial Property Acts were not necessarily greater than under the old practice of using the secured lump sum maintenance powers under the Divorce Act as a device for achieving divisions of matrimonial assets. The whole question of whether, since the decision in *Hemming v. Hemming*,²⁰ there has been reluctance to award lump sum maintenance to “top up” the division of assets under the Matrimonial Property Act was the subject of special attention by Walter Goodfellow in the Conference Proceedings in the 1985 CLE Update on Family Law Conference. However it is obvious that where matrimonial assets are broadly interpreted an equal (or unequal) division of such assets may leave less property in a husband’s hands out of which to pay lump sum maintenance.

1. Property Prima Facie Excluded From Equal Division

(a) *The leased matrimonial home* s. 3(1) (note that the lease/purchase home in *Beaman v. Beaman*²¹ was held to be a matrimonial asset).

17. *Thistle v. Thistle*, 42 N.S.R. (2d) 430 at 441 para. 30 (T.D.).

18. (1981), 25 R.F.L. (2d) 130 (N.S.S.C., A.D.).

19. 65 N.S.R. (2d) 113 (T.D.).

20. 58 N.S.R. (2d) 65 (A.D.).

21. See, *supra*, note 11.

(b) *Gifts*. Gifts from third parties are presumptively excluded from sharing under s. 4(1)(2) unless used for the benefit of both spouses or their children. In *Roquet v. Roquet*²² a husband was given a Guaranteed-Investment Certificate by his relations. The moneys for the gift in turn represented funds from the husband's grandmother's estate. The grandmother scarcely knew the wife but had designated the husband as her favourite grandson. At one stage the husband had indicated that the funds might be used as a down payment of a matrimonial home but they had not been so used. Glube C.J. held that the funds were a matrimonial asset. This seems to confuse the intention of the donee husband with the intention of the donor and ignores the fact that the necessary act to perfect the gift to the wife, namely putting the Guaranteed Investment Certificate into the joint names of the spouses, had never taken place.

(c) *Business assets*. Two recent cases confirm the view that business assets which are presumptively excluded from sharing under s. 4(1)(f) are being narrowly interpreted whilst matrimonial assets are being broadly interpreted. In *Best v. Best*²³ Hallett, J. treated a farm, which had never produced profits, although it had been granted certain tax benefits available to bona fide farms, as a matrimonial rather than a business asset. The lack of profits was not conclusive but it was a factor in the classification. There may be dangers in depicting a farm as operating at either a loss or minimum profit in order to obtain certain tax advantages should the spouses marriage ever fail. It may also be relevant that the farm had also been acquired as a good place in which to raise a family.

In *Gaetz v. Gaetz*²⁴ Glube C.J. treated a duplex property in joint names as a matrimonial asset. This seems strange in so far as the unit in which the parties did not live is concerned. This would probably best be regarded as a jointly owned business asset subject to the terms of the joint tenancy. A second property containing six units was owned in the wife's name but was managed and maintained by the husband. In view of

22. N.S.T.D. No. 1201-27504, 19th Dec. 1983, unreported.

23. 61 N.S.R. (2d) 400 (T.D.). On the relevance of the lack of profit compare the case with *Wilson v. Wilson* (1984), 66 N.S.R. (2d) 361 (T.D.) where Glube C. J. treated as a set of 4 flats which had never made a profit as a "business asset".

24. Unreported 10 N.S.L.N. 65 1201-27410.

the husband's signing a full release in respect of this property one might have expected this to have disposed of any argument made by him based on a resulting or constructive trust. However, Glube, C.J.T.D. seems to have felt that since this investment property was intended as a retirement investment for the parties it was a matrimonial asset by analogy with a pension. "Had the money not been used there it would have formed part of the household or matrimonial funds." With respect, this argument means that virtually no asset is ever likely to be held to be a business asset. Either it will become too onerous to manage, as with a family company, and will be sold and the proceeds used to live off, or it will be sold in any event to finance the parties retirement, since few people's pensions will support them at the standard of living to which they have become accustomed during their working life.

(dv) *Property acquired since separation.* The boundary line between an increase in existing matrimonial assets which are shareable even in respect of increases in value after separation and new property acquired for the first time which is presumptively exempt from sharing under s. 4(1)(g) is fuzzy. As the discussion of pensions later shows, a pension is difficult to value as it may have a value to the husband (as it usually is) greatly in excess of its after tax cash surrender value. Whilst a pension is usually a matrimonial asset, are increases in value arising after separation but due to the husband's and his employers contributions still matrimonial assets? The item concerned is not discrete and separate as would be payments into separate R.R.S.P.'s made before and after separation.

IV. Pensions and How to Value Them

1. *Treatment of Pensions in Other Provinces*

Except for Ontario, the approach either by statute²⁵ or by case law²⁶ has been to treat occupational pensions as shareable assets. Even in Ontario, the recent decision in *Laflamme v. Laflamme*²⁷ has indicated that an occupational pension can be taken into account by courts under their reserve powers relating

25. E.g. Manitoba Act, s. 8.1.

26. In B.C. see *Rutherford v. Rutherford*, (1981), 23 R.F.L. (2d) 337 (B.C.C.A.) and the cases in nn. 24 and 25 in Saskatchewan.

27. (1984), 40 R.F.L. (2d) 366 (Ont. H.C.).

to unequal division. When it comes to valuing pensions in other provinces the approach generally seems to be one of giving wives a share in their husband's pension but postponing the wife's right to collect her share until the earliest date at which the husband can retire. By this stage the various contingencies mentioned later will have resolved themselves. If the husband continues to work after he has a right to a pension he must compensate his wife. Alternatively if the husband wishes to buy out the wife's right to his pension earlier, he may be given this option. This desire by courts for a "clean break" is a feature of *Fisher v. Fisher*²⁸ and the Saskatchewan Court of Appeal's substitution in *Tataryn*²⁹ of a lump sum payment of \$25,000 in lieu of sharing the pension payments in the future between husband and wife. Before the appropriate lump sum can be calculated it is important that accurate evidence of the contingencies and assumptions made in the actuarial calculations be led.³⁰ Production of such evidence is likely to be expensive. In simple terms³¹ calculation of the respective interests in the pension is done by finding what was the proportion of the years payment to the pension made during cohabitation to the total years of payment to the plan to acquire the pension.

e.g. 20 years of marriage

He has 40 years of pension service = $\frac{1}{2}$ pension accrued
during marriage $\div 2$

Thus the wife gets a quarter of the pension. An alternative

28. (1983), 21 Sask. R. 235 (Q.B.).

29. (1984), 30 Sask. R. 282 (C.A.).

30. As the Court of Appeal observed in *Tataryn v. Tataryn*, *Ibid.* at p. 295,
[I]t is not enough to have the evidence, alone, of the administrator of the pension plan (or someone else fully conversant with the scheme); his evidence is critical, but there must be more. Several sub-issues have to be addressed: life expectancy; pensionable age expectancy; continued employment expectancy; the prospects for the employer, including the provisions, if any, which have been made for the protection of the employer's [sic] pension in the event of the insolvency of the employer; present value, of the principal pension, as well as any death benefits; the ramifications of any other options available under the plan; tax implications; and the like. Otherwise it is difficult, if not impossible, to make the distribution contemplated by the *Act*.

31. For more detail see Maclise and Stark's analysis of *Rutherford* in A. Bissett-Johnson & Holland, *Matrimonial Property Law in Canada* (Calgary: Burroughs, 1980) at 19 *et seq.*

approach is to value the employee contributions to the plan during cohabitation plus an estimated rate of interest.³² In many cases, however, there is no very direct relationship between the amount of contributions and the amount of benefits payable.³³ Equally, statutory provisions³⁴ may preclude the sale or pledge of pension rights so as to make a market value of such rights impossible and it may not be clear whether the spouse has enough years of pensionable employment to have a “vested” right to the pension at the time of marital breakdown.

In order to deal with contingencies such as (i) whether the husband’s right to his employers contributions will ‘vest’, (ii) whether he will survive to retirement age, the element of guesswork can be taken out of the calculation by conferring current rights on the wife in her husband’s pension but postponing the right to collection until the earliest date at which the husband can retire has been reached. By this time the various contingencies will have resolved themselves, though if the husband elected not to retire he has to compensate his wife.³⁵ This, however, as has been mentioned, is in some cases in conflict with the desire of the courts and, no doubt, the parties, to have a “clean break” at the time of divorce so that the parties can go their separate ways after divorce.

2. *In Nova Scotia*

Initially in *Ryan v. Ryan*,³⁶ Hallett, J. wondered whether contractual rights under a pension were within the definition of *property* as a matrimonial asset within the Act. However, this argument is no longer tenable after the decision in *Lawrence v. Lawrence* and the traditional definition of property rights may have been overtaken by the concept of the ‘new

32. See *Boychuk v. Boychuk* (1981), 9 Sask R. 82 (Q.B.); *Kaine v. Kaine* (1983), 30 Sask R. 23 (Q.B.).

33. See *Tentative Proposals for Reform of the Matrimonial Property Act* Saskatchewan Law Reform Commission Sept. 1984, p. 62.

34. E.g. see the *Saskatchewan Pension Benefits Act*, R.S.S. 1978, c. P-6 s. 19, though the rules would not catch a court order or an agreement made by the spouses under the Matrimonial Property Acts.

35. See for example *Rutherford v. Rutherford supra* at note 26, *Re Fisher* (1982), 31 R.F.L. (2d) 274 (Sask. Q.B.); *Tataryn v. Tataryn* (1982), 27 R.F.L. (2d) 283 (Sask. Q.B.); *Topliss v. Topliss* (1983), 23 Sask. R. 289 (Q.B.).

36. (1981), 43 N.S.R. (2d) 423 at 435.

property'.³⁷ *Lawrence* acknowledged the problem of valuing assets but shed no light on how to go about it. Several approaches are possible and each has underlying assumptions and has problems associated with it.

a) *Cash on the table*. Under this approach, usually only appropriate where both the employer's and employee's contributions have vested and can be withdrawn from the fund, the moneys can be divided between the husband and the wife. Of course, if the effect of the totality of the court's orders, including those for lump sum maintenance, is to force the withdrawal of pension funds then a tax obligation occurs. The failure of the Court of Appeal in *Lawrence v. Lawrence* to recognize this left the husband with a negative net worth.

b) *Capitalised value*. In some cases, e.g. *Bedgood v. Bedgood*³⁸ the argument has been made that the value to the husband of his future pension far exceeds its cash surrender value. Counsel will argue that in order to produce (on reducing fund basis) an income equal to 70% of the husband's best three or five years earnings a huge capital sum would be necessary.³⁹ Various assumptions have to go into such a calculation involving (i) that the employer will stay in business,⁴⁰ (ii) that the employee will remain in his present employment until retirement age, and (iii) that he will survive to retirement age. Given those assumptions, it will not be difficult to produce a capitalised value of the pension well in excess of \$250,000 and to make an agreement that the wife is entitled to the matrimonial home outright and perhaps other assets. Such a division would, however, leave the husband asset poor in terms of available current assets and the wife would be current asset rich. Moreover, it assumes a number of things which may not necessarily occur. Giving the wife a present right in her husband's pension, is complex, contrary to the 'clean break' theory and raises questions of how this can legally be done under the court's powers under s. 15.

37. Mary Ann Glendon, *The New Family and the New Property* (Toronto: Butterworths, 1981).

38. (1982), 28 R.F.L. (2d) 113 (N.S.S.C., A.D.).

39. Many of the best payments into the fund will result from contributions made after separation. Are these matrimonial assets within s. 4 (g)?

40. The risk is presumably lower in the public sector — see *Mosher v. Mosher* unreported, 1201-29048, judgment given December 27, 1984.

c) *A factor to be taken into account in making unequal division.* There is no denying that the security of the occupation pension leaves a husband in most cases with a better financial future than his wife. Another approach is to take the pension into account as a factor which might lead to an unequal division of the matrimonial assets,⁴¹ or, less convincingly, in making an award of maintenance.⁴² This may well have been in the mind of Hallett, J. when he stated in *Mosher v. Mosher*.⁴³

A pension is worth very much more in reality than any amount that could be obtained by a contributor withdrawing his contributions even if he could withdraw the whole amount. In a sense to talk of his having an asset that has a dollar figure the equivalent to what he could withdraw is rather illusory because it is fairly obvious in cases such as this it would be unthinkable for Mr. Mosher to withdraw his contributions even if he could withdraw all of them or to the extent that he could.

Before discussing this statement further it is important to place the comments in context. Mr. Mosher was in the Fire Service and was about 45. He had a senior position and seemed unlikely to change his job or to lose it. His pension contributions plus interest were worth \$24,250.00 and he could take those if he ever left the Fire Service except for those made after January 1, 1977, which were required to be held back under s. 22 of the Nova Scotia Pensions Benefits Act. The position with regard to the employee's contributions is not disclosed. Mr. Justice Hallett decided that although the pension was a matrimonial asset he ought not to put a firm value on the pension but it should be regarded as a factor to be looked at in the division of assets. One wonders, however, if a 'balance sheet approach' does not require some attempt (however speculative) to put a value on the pension. It is also true that in the *Mosher* case that the down payment on the home, a number of improvements and the car were paid by Mrs. Mosher from gifts and inheritances and that a case of unequal division was established. The unequal division ordered by Hallett J. left the wife with the equity in the home worth \$63,000 less

41. *Conrad v. Conrad* (1983), 34 R.F.L. (2d) 348 (N.S.S.C., T.D.).

42. This approach taken in some earlier Saskatchewan cases was criticised by the Saskatchewan Court of Appeal in *Tataryn v. Tataryn* (1984), 30 Sask. R. 282 (C.A.).

43. Unreported, 1201-29408, judgment given December 27, 1984.

an 8% mortgage in favour of the husband worth \$10,000 redeemable three years later, plus R.R.S.P.'s and furnishings, etc., worth approximately \$8,000. The husband kept the car subject to a loan (probably almost equal to its value), the mortgage and his pension and occupational life insurance. Hallett J. stated that while the division appeared very much in the wife's favour this was not so much so on closer scrutiny. In 11 years time at age 56 Mr. Mosher would have the chance of early retirement or, if he continued to work until mandatory retirement at 60, he would have his pension based on 70% of the average of his last 5 year's salary. Herein lies the problem. Even if the pension entitlement arising during marriage is a matrimonial asset, much of the husband's pension value will be attributable to his last 15 years service and contributions which are post separation. This is so even admitting that there is a very precise relationship between contributions into a pension scheme and entitlements. On the other hand the wife's loss of a spouse's entitlement in her husband's pension under s. 13(1) is a factor that the court can legitimately take into account in ordering an unequal division of assets. However, if a wife is able to build up any occupational pension entitlement as a result of contributions made after separation arising from the employment these would not be shareable.⁴⁴

Conclusions

It is submitted that an effort should be made to put some sort of present cash value on the pension entitlement. It may be more appropriate to follow the example of Hallett, J. in *MacGregor v. MacGregor*⁴⁵ and Nunn J. in *Tkach v. Tkach*⁴⁶ and value the amount as the cash surrender value less the tax payable on withdrawal. It does seem that something like a pension can only be properly taken into account under s. 13 if some attempt has been made to gauge its size. It is submitted

44. This factor was not likely in *Mosher* owing to Mrs. Mosher's health.

45. (1984), 65 N.S.R. (2d) 113.

46. *Tkach v. Tkach* (N.S.S.C.) unreported decision October 15th, 1984; see also *Devenney v. Devenney* f.n. 74 post where the after tax values attaching to the pension involved a discount of 35% as a contingent tax deduction. The respondent who benefitted from the discount did not dispute that approach. See also *Olexson v. Olexson* (1983), 32 R.F.L. (2d) 408 (Sask. U.F.C.).

that the present vesting in a wife of rights in her husband's pension but postponing her right to collect is both unduly complex and contrary to the 'clean break' principle. Moreover McLeod⁴⁷ cautions against courts (a) giving a wife a share in a pension and (b) making an order for a wife's maintenance extending beyond the husband's retirement date. Upon retirement the husband's income will be dependent on his pension and if the wife has already been awarded an interest in it as a capital asset, should she also be able to obtain an interest in it as an ongoing maintenance obligation?

Finally, in passing, it will be noted that although Canada Pension Plan payments can be split on divorce, a recent case suggests that this cannot be done if the parties have apparently reached a full settlement of matrimonial property matters which does not except the Canadian Pension rights from its application.⁴⁸ However, the C.P.P. rights really only operate well for a wife where the couple marry at 18 and divorce at age 65 less one day. The split only divides payments made during the marriage.⁴⁹

V. Occupation of the Family Home and the Husband's Equity in it

Prior to the Matrimonial Property Act, it was not uncommon for the husband to be deprived of all interest in the home by the device⁵⁰ of lump sum maintenance under the *Divorce Act*.⁵¹ More recently the Courts have shown a willingness to give the wife the matrimonial home in such a way as not to totally deprive the husband of his equity.⁵² The arithmetic in some of these cases shows that the generosity of the court's award is less apparent on close scrutiny. In *MacGregor v.*

47. See McLeod's annotation to (1980), 18 R.F.L. (2d).

48. See *Preece et al. v. Minister of National Health & Welfare* C.C.H. Employment & Benefits Guide, para. 8, 914.

49. For more detail see Patricia Horsford, *Division of Canada Pension Plan Credits on Termination of Marriage* (1980), 13 R.F.L. (2d) 257.

50. MacKeigan C.J.'s own words in *Connelly v. Connelly* (1974), 16 R.F.L. 171 (N.S.S.C., A.D.).

51. See for example *Swift v. Swift* 1201-17257 24th July 1979 unreported.

52. See for example *Currie v. Currie*, (1981), 21 R.F.L. (2d) 340 (N.S.S.C., T.D.); *Partridge v. Partridge* N.S.L.N. 7:568; *Ryan v. Ryan* (1980), 43 N.S.R. (2d) 423 (T.D.).

*MacGregor*⁵³ the husband was ordered to transfer his share in the matrimonial home to his wife (approximately \$55,000) in return for his wife giving him a mortgage on it in the sum of \$47,000. This mortgage was not to be redeemable until 1989 and to carry no interest. (The fact that any interest paid by the wife to the husband would be regarded as taxable income may explain the judge's decision) One might speculate that, assuming a 10% increase in property at compound rates, the wife's home in 1989 would be worth in excess of \$175,000. If the purchase power of the dollar goes down by 5% (a modest rate of inflation judged by recent years) the husband's purchasing power in 1989 would be about \$35,000 in 1984 dollars. Still, something is better than nothing!

On the question of the appropriate rate of interest where the wife is ordered to execute a mortgage on the matrimonial home, the Court of Appeal in *Nolet v. Nolet*⁵⁴ held that the trial judge's formula of the prime rate as set by the Bank of Canada plus 1% might be appropriate. In the instant case, the rate was changed to 7% p.a. simple interest with no payment of principal or interest to become due until the mortgage matured.

VI. Matrimonial Debts

Although the Act makes no distinction between matrimonial and other debts and although s. 13 does not provide expressly for the division, Hart J.A. had stated in *Lawrence v. Lawrence*⁵⁵ that:

If substantial debts were borne by one spouse for the benefit of the whole family it would be unfair to divide assets without providing for the obligations of the matrimonial unit.

It is presumably a combination of this philosophy and s. 13(b) "the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred" that leads to the use of the equity in the matrimonial home rather than market value as the basis of valuation.

Apart from *Lawrence*, the case which has given the most

53. (1985), 65 N.S.R. (2d) 113.

54. S.C.A. 01447 judgment given 3rd, July, 1985.

55. (1981), 47 N.S.R. (2d) 100 at 115.

attention to matrimonial debts is the recent decision of Hallett, J. in *Arthur v. Arthur*.⁵⁶ Hallett J. ordered an unequal division of the matrimonial assets (\$39,000 resulting from the sale of the matrimonial home) because the husband incurred a number of debts by taking money out of his business in an attempt to prevent a judgment being obtained against the husband's part of the joint interest in the matrimonial home. The reduced income of the family arising from the rearranged family and business financial affairs had led to a number of debts accumulating in respect of family expenses, oil bills, Chargex, etc. In addition after separation the wife incurred debts of \$3,600 in an attempt to provide for her children and her need to upgrade her education if she was to support them.

Hallett J.'s approach was not automatically to deduct matrimonial debts from the matrimonial assets on a dollar for dollar basis. Rather it was a factor that a court could take into consideration in the exercise of its discretion under s. 13. The husband's allowing debts to accumulate without cause or having taken over debts, e.g. mortgage repayments in lieu of maintenance would not necessarily warrant the court's discretion being exercised in his favour. Moreover as a general rule:

Ordinary household debts such as Chargex, Simpsons, Eatons, Canadian Tire, etc., incurred for necessities for the family are paid by the husband in the so-called "traditional marriage" where the husband works and the wife stays at home. It would not be unfair that he continue to be responsible for these debts after separation. Where both spouses work, as a general rule there should probably be a sharing of ordinary household bills outstanding at the date of separation. Each case must be decided on its own facts considering the circumstances that gave rise to the debts or liabilities of the respective spouses.

What of debts incurred *after* separation? Generally speaking, these debts should not be considered in determining if it would be unfair to simply divide assets equally. However, there are exceptions. For example, if the spouse having custody of the children while awaiting the hearing of the divorce proceedings (including an application for division of property under the *Matrimonial Property Act*) was not receiving adequate maintenance from the non-custodial

56. (1985), 67 N.S.R. (2d) 323 (T.D.).

spouse and had to borrow funds or incur debts to maintain the children, then it would seem obvious that it would be unfair to ignore this factor.

The underlying test is (a) fairness and (b) asking whether the debts were ordinary ones. This would enable a court to consider a possible difference between debts arising from the running expenses of the household, and debts arising from occasional expenditures to buy capital items, e.g. expensive appliances to be paid for over an extended period of time.⁵⁷

In the light of this approach to matrimonial and other debts Hallett J. deducted certain debts in the sum of \$10,000 from the \$39,000 proceeds of sale of the matrimonial home. The balance of \$29,000 was split equally between the parties.

VII. *Tracing*

The problem sometimes arises about assets that have changed their classification from business assets to matrimonial assets or vice versa. In *Bregman v. Bregman*,⁵⁸ the Ontario Courts were willing to treat as a family asset a Picasso painting brought home from the husband's office prior to the breakdown of the marriage. It is less clear what they would have done if the transfer had been from the home to the office, though logically the classification of an asset should be made at the time of proceedings. In *MacGregor v. MacGregor*,⁵⁹ Hallett, J. dealt with a situation in which the husband acquired a 25% interest in a company incorporated to acquire a few small apartment buildings. To fund his contribution of \$7,000, he used an inheritance of \$5,300 plus \$1,700 from a joint bank account. At a later date, he advanced a further \$600 from the spouses joint account. as matrimonial assets and traced it into the company giving the wife a 7.5% share in the company. The company was classified as a matrimonial asset. The result is not unreasonable but it is suggested a more reasonable approach would be to treat the company as a business asset and, as the wife's funds had been used to purchase a business asset, she should have a corresponding share in the company

57. This is an elaboration of Hallett J.'s reasoning but seems consistent both with his reasoning and that part of counsel's argument incorporated in his judgment.

58. (1979), 7 R.F.L. (2d) 201 affirmed on costs 25 O.R. (2d) 254n.

59. *Supra*, note 45.

as her business asset. In passing I should note that whether property purchased with funds drawn from a joint account belongs to the spouse in whose name legal title is taken or to both spouses depends on the intention of the spouses in relation to the joint account.⁶⁰ Even if, on this analysis, the husband were taken to be the sole legal owner of a business asset it would not preclude the court from invoking its discretion under s. 13 to redress any unfairness.

VIII. *Involving a Spouse in the Other Spouse's Business*

Equity presumed that if one person transferred property into the name of another person without there being other evidence that a gift was intended, the donor held the legal title only and the donee held the equitable title under the doctrine of the *resulting trust*. However, by way of exception to the general rule a gift was inferred if the donor was a husband or father and the donee was a wife or child. (Gifts were not presumed from wives to husbands!) However this presumption of advancement has been revoked in most provinces⁶¹ with the result that a husband may retain an interest in property in his wife's name. But this does not mean that giving a wife shares in her husband's business is necessarily desirable. Even putting qualification shares in the wife's name, a practice legally required in few provinces, may be risky. Putting shares in a wife's name (as it usually is) is best reserved for those cases where the non-owning spouse is actively contributing to the business. In such a case either an appropriately worded marriage contract or buy sell agreement should be signed at the time of making the allocation of shares.

The wife has no automatic right to share in her husband's business assets and by putting shares or other business assets in her name may limit the husband's rights to retain such assets. It is true that in most provinces the old presumption of advancement of gift from husband to a wife has been replaced by the presumption of a resulting trust *but this does not mean that other evidence of an intention to make a gift may not*

60. Compare *Jones v. Maynard*, [1951] 1 Ch. 572 with *Re Bishop*, [1965] 1 Ch. 450. For a fuller discussion see D. Waters *Law of Trusts in Canada* (2nd ed.) (Toronto, Carswells, 1984) p. 333 *et seq.*

61. Matrimonial Property Act, S.N.S. 1980, c.9, s.21.

be available. Such evidence may exist in terms of statements made at the time of transfer or even an admission during the course of discovery prior to trial. It may be extremely difficult for a husband to rely on the doctrine of the resulting trust. In *Miller v. Miller*⁶² a husband transferred property into his wife's name for purposes of tax planning but then sought to invoke the doctrine of the resulting trust under s. 11 of the Ontario Act. The Ontario Court of Appeal pointed out that the tax planning would have been ineffective if the wife were a mere trustee or nominee and there was, therefore, evidence that a gift to the wife was intended. This reasoning was also followed by the Nova Scotia Court of Appeal in *Mallia v. Mallia*.⁶³ The husband's explanation for transferring property into his wife's name ("I wanted my wife to have full enjoyment of the lands as my wife . . . I never though in my wildest imagination that she was going to walk out of the door") was clearly inconsistent with his having retained an interest in the property in his wife's name.

It is true that in *Moog v. Moog*⁶⁴ Cromarty J. held that a husband, who had registered all the shares in one of his companies in the wife's name to provide the family with security if the husband's other ventures failed, had only given it to her as a trustee. Thus when the marriage broke down the husband was entitled to require reconveyance of the shares by the wife subject to \$4,000,000 as compensation for the wife's contribution to the husband's \$61,000,000 of non-family assets. However the question must be asked what would the husband's intention in relation to the "wife's company" have been if the marriage had not broken down but his other businesses had gone bankrupt? If his wife was bare trustee for him, his trustee in bankruptcy could have claimed the assets. Would that have accorded with the husband's intention? Can he say "I intend to transfer my shares to my wife outright if I go bankrupt but only as trustee if the marriage goes wrong?"

Even if the wife has no shares in her husband's business and takes no part in its operation it cannot be assumed a wife has no claim on the business. Often in order to raise capital a

62. (1982), 29 R.F.L. (2d) 395 (Ont. C.A.).

63. (1983), 27 R.F.L. (2d) 318 (N.S.C.A.).

64. (1984), 37 R.F.L. (2d) 356 (Ont. H.C.).

mortgage or collateral security will have to be given. Does the fact of using a family asset as security for a husband's business give the wife a claim on the business? In *Dziedic v. Dziedic*⁶⁵ the Ontario High Court held that by permitting the residence to be mortgaged for business purposes, the wife contributed money or money's worth to the company and was thereby entitled to an interest in the company. Equally where a wife contributes to a business by answering the phone, etc., it cannot be assumed that the business has any value. *Arthur v. Arthur*⁶⁶ stated that the fruits of the wife's labours did not result in the creation of a business asset of any value that could be measured.

IX. *Time for Valuation*

In *Roquet v. Roquet*⁶⁷ Chief Justice Glube held that assets should be valued at the date of separation. Clearly it would be helpful if form 67.03 of the Civil Procedure Rules contained columns indicating the value of assets not merely at the time of filing but also at the time of separation. Indeed it might be convenient to have a blank column of values at trial so that if a case takes time to come to court the court may "pencil in" the current values at the stage to see whether recourse to the increased value is appropriate under s. 13 or the principle of disparity of net worth adverted to in *Archibald v. Archibald*.⁶⁸ It should be re-emphasized that the exempted property in s. 4 includes property acquired after separation but not necessarily an increase in the value of existing matrimonial assets after separation. The latter may, however, be relevant to the exercise of the courts discretion under s. 13.

X. *Conduct*

Ever since the Court of Appeal decision in *Brown v. Brown*⁶⁹ there has been an increased reliance on conduct as a factor under s. 13 notwithstanding that conduct was nowhere mentioned in the statute. In *Briggs v. Briggs*⁷⁰ Hallet J. said:

65. (1978), 6 R.F.L. (2d) 337 (Ont. H.C.).

66. (1985), 67 N.S.R. (2d) 323.

67. 1201-27504, Dec. 19th, 1983 unreported.

68. (1981), 48 N.S.R. (2d) 361 (T.D.). See also *Mason v. Mason* (1980), 42 N.S.R. (2d) 352 (T.D.) varied 47 N.S.R. (2d) 435 (A.D.).

69. (1983), 35 R.F.L. (2d) 390 (N.S.S.C., A.D.).

70. (1984), 64 N.S.R. (2d) 40 (T.D.).

With respect to subsection (i) which provides “the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent”, I am satisfied the contribution referred to in that subsection is more than just a financial contribution; I am satisfied this is implied from the preamble to the *Matrimonial Property Act*. In this case, the respondent walked away from his responsibility as a husband and a father in January, 1983, after a period of several years during which he was seeing his girl friend and, as a consequence, paying less and less attention to his family.

It is respectfully submitted that the conduct of which Hallett J. was talking was conduct that could be seen to have a casual relationship to the matrimonial assets. In the subsequent case of *MacGregor v. MacGregor*⁷¹ Hallett J. clarified the significance of *Briggs* when he said that in *Briggs* the husband’s affair prior to separation had resulted in his contribution to the family welfare being substantially below par. In *MacGregor* there was no evidence that

the respondent’s contribution to the welfare of the family and the marriage was any less than that of the petitioner as a result of the relationship with Mrs. Tyson. Therefore, the respondent’s conduct does not demand an unequal division pursuant to s. 13 of the *Matrimonial Property Act*.

The view that the *Matrimonial Property Act* was not intended to lead to long 3 day trials spent raking over the dirty linen of the marriage is supported by *Devenney v. Devenney*.⁷² Such irrelevant considerations may be relevant to the questions of costs which are dealt with later in this paper. Burchell J. stated:

My view is that Mr. Justice Cooper in *Brown v. Brown* did not intend to import into the *Matrimonial Property Act* an absolute concept of marital fault. Instead I think it must be taken from his reference to *Connelly v. Connelly* that any consideration of conduct under the *Matrimonial Property Act* must be in accordance with modern precepts concerning marital fault; that is to say, the precepts expounded by Chief Justice MacKeigan in the *Connelly* decision.

The present case is an example of the kind of abuse that will result from any other approach. Seeking to reduce his

71. (1984), 65 N.S.R. (2d) 113 (T.D.).

72. (1985), 67 N.S.R. (2d) 444 (T.D.)

wife's entitlement, the respondent has done his best to blacken her character and has paraded before the court an ugly array of unsubstantiated doubts and suspicions stretching back to the earliest days of the marriage. Naturally there was a response on her part and between them they have continued, all to no purpose, a most unpleasant public display of dirty laundry . . . instances in which misconduct can be the sole basis for an unequal division under the *Matrimonial Property Act* must be very rare and exceptional and attempts to use allegations of misconduct as a pretext for needlessly vilifying the other spouse in court should, I think, be resisted by deterrent awards of costs.

XI. *Evidence and Length of Marriage*

In *Best, MacGregor and Briggs*,⁷³ Hallett J. emphasized that the burden of proof is on the party seeking to obtain unequal division and that the words "unfair" or "unconscionable" in s. 13 are not easily satisfied. In this he was supported by Glube C. J. in *Wilson v. Wilson*.⁷⁴ Moreover in *Briggs v. Briggs*⁷⁵ Hallett J. emphasized that the words "length of marriage" in s. 13(d) were more apt to cover short marriages rather than long ones. (No doubt because of the inclusion of property owned prior to marriage as matrimonial assets.) A long marriage was to be presumed and a wife could not expect an unequal division merely by proving that a marriage had lasted a number of years.

This is not to say that the 59 year old wife in *Bedgood v. Bedgood*⁷⁶ is not entitled to the security of an order under either an unequal division under s. 13 or to lump sum maintenance under the Divorce Act. As the Court of Appeal explained in *Bedgood* there is some overlap between the two provisions, though s. 13 has certain advantages. There is no need to provide evidence of need and s. 13 has more specific criteria likely to accommodate the wife's particular case including s. 13(i):

the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent.

73. *Id.*

74. 66 N.S.R. (2d) 361 (T.D.).

75. (1984) 64 N.S.R. (2d) 40 at 43 (T.D.). See also Glube C.J.'s confirmation of this view in *Wilson v. Wilson*, *supra*, at note 74.

76. (1982), 28 R.F.L. (2d) 113 (N.S.S.C., A.D.).

XII. *Costs*

In *Lawrence v. Lawrence*⁷⁷ Hart J.A. suggested that the time might have come to treat costs of matrimonial proceedings as one of the liabilities of matrimonial property and to arrange any division of matrimonial assets so as to allow each party to pay equally towards the whole amount of the costs. Rule 67.06 of the Procedure Rules supplements this by allowing offers to settle and under Rule 67.06(4) & (5) the court can consider such offers and their rejection in determining the appropriate costs. It is not, however, clear to what extent in practice formal offers are being made under Rule 67. Nor is it clear even when a plaintiff's oral testimony reveals that she is only asking for a "reasonable or 50%:50% division", when this position was adopted. It is not unusual for a plaintiff to adopt a moderate position at the end of trial. In these cases where it seems likely that for much of the negotiations the wife was asking for an unequal division of everything and the husband was trying to depict everything as a business asset, it may be appropriate to treat the costs as an incident of the ownership of matrimonial assets and to share them.⁷⁸ What is also clear is that the mere fact that a petitioning wife gets a divorce and an equal division of matrimonial assets is no guarantee of her entitlement to costs when her position throughout has been that she is entitled to an unequal division.

In *Best v. Best*,⁷⁹ although the husband's claim that the farm was a business asset failed the husband won on the question of costs. His offer in dollar terms (even accepting that the farm was, as the court eventually held, a matrimonial asset) exceeded the division ordered by the courts and became relevant to the award of costs. In *DeVenney v. DeVenney*⁸⁰ the court found that the plaintiff's unnecessary prolongation of the trial by raising the issue of conduct (which could be proved to be relevant on the available evidence) also became relevant to costs. It will be interesting to speculate on how a client's costs will be taxed if a court holds that a substantial amount of a client's costs were only incurred as a result of a lawyer

77. (1981), 20 R.F.L. (2d) 414 (N.S.S.C., T.D.).

78. *Id.*

79. (1984) 61 N.S.R. (2d) 400 (T.D.).

80. *supra* at note 72.

mistakenly advising his client that irrelevant issues should be pursued. In *Devenney*⁸¹ the wife's award was more favourable to her than the pre-trial offers. Costs were fixed in the amount of \$3,000 subject to a set off of the husband's costs on his counter-petition until the wife's adultery was admitted. Counsel argued that taxed party and party costs would have been approximately \$2,000 and that an award of 1.5 times the normal costs would be approximate by analogy with Civil Procedure Rule 41A (although that rule was not in force at the time of the offer). Subsequently in *Vezina v. Vezina*⁸² costs were awarded against the respondent husband because he had not provided basic financial information, had misled the court with respect to his absence at the time set for the trial and had neglected to provide information which would have led to a more appropriate solution of the matter. An equal division of matrimonial assets was ordered.

81. A separate decision as to costs. As yet unreported March 25, 1985.

82. Unreported decision of Kelly, J. 201-31932, dated July 16, 1985.