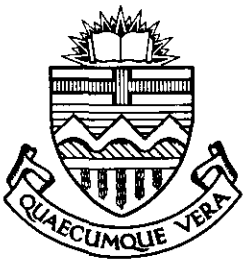

INSTITUTE OF LAW RESEARCH AND REFORM

THE UNIVERSITY OF ALBERTA

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MATRIMONIAL PROPERTY

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REPORT ON MATRIMONIAL PROPERTY

I
INTRODUCTION

1. Inception of Project

In 1971 the Legislature asked the Institute to study the feasibility of legislation which, upon dissolution of marriage, would give each spouse the right to an equal share in the assets accumulated during marriage other than by gift or inheritance from outside sources. This Report embodies the results of our study.

2. Nature of Issues

The Legislature's question appears to be simple. Analysis shows that it is not. It appears to be a question about law, but implicit in it are other questions about other values. What is the nature of the relationship between husband and wife? Does the relationship suggest or require that the husband and wife should in some way share the benefits of the economic gains which each makes during the marriage? In what ways can the law provide for the sharing of those gains? What are the likely effects of a new system of law providing for sharing? Would those effects be better or worse than the effects of the existing law? Those questions cannot be answered without legal analysis, but they cannot be answered by legal analysis alone.

3. Contents of Report

We find ourselves divided in our answer to the Legislature's question. That is because it involves the extra-legal considerations which we have mentioned. We are unanimous in finding faults in the existing law. Six of

the seven members of our Board think that the law should be changed, the seventh being of the view that the effects of either of the proposed changes described in this Report would be worse than the effects of the existing law. Four of our seven members, while thinking that either of those changes would be an improvement, recommend the adoption of the proposal contained in Part IV. The other three think that the alternative proposal contained in Part V would be better. One of the three concluded that his views cannot be adequately reflected in this Paper.[1]

We propose to describe both proposals, and to set out the arguments for and against each of them. That course of action is suggested by the substantial divergence of opinion which we have described. It is also suggested by a consideration of the importance of enabling the Legislature to make a fully informed decision. No proposal, whether for a change in this important area of the law or for retention of the existing law, should be accepted without a close and careful consideration of the consequences of each.

4. Summary of Proposals

We will now give a brief summary of two proposals for change. As we have said, the first is the recommendation of a majority of our Board, being four of its seven members,

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[1] Dean G. H. L. Fridman, who, though no longer a member of the Institute Board, was a member during most of the time during which the law of Matrimonial Property was under consideration. He has maintained a consistent opposition to the deferred sharing proposal and favours the English discretionary system which in some respects differs from the discretionary system proposed as an alternative in this Report.

while the second is preferred by the remaining three members.

(1) Majority Proposal

(a) Couples already married and living in Alberta

The proponents of the majority proposal accept the principle that a husband and wife should share the economic gains which they make. They think, however, that it should not apply automatically to couples already married and living in Alberta, that is, having a "common habitual residence" in the province. The retroactive interference with the mutual rights and obligations of a husband and wife would in their opinion be too harsh if it is automatic. They propose instead that the court be given a discretionary power upon dissolution of marriage to distribute property between the husband and wife. It would resemble the discretionary power which would be given to the court under the minority proposal which we will describe later in this summary, but would be different in some important details and also in one fundamental characteristic, i.e., it would permit distribution only of the economic gains made during marriage, while the alternative proposal would permit distribution of all property. It would apply after separation and, with variations, upon death.

(b) Couples who marry later or live elsewhere

(i) Description of deferred sharing

The majority propose that, except in the case of a couple already married and living in Alberta, a husband and wife should share equally in the economic gains made by the couple during marriage other than by gift or inheritance and that the sharing should be effected by a system or regime

of matrimonial property law which we will refer to as "deferred sharing". In the usual case deferred sharing would require the spouse with the larger share of the economic gains of the couple to make a "balancing payment" to the other spouse so as to leave each of them with half of the economic gains. The amount of the balancing payment would be computed as follows:

(1) The total value of the husband's property would be ascertained. His liabilities would then be deducted from that total, the balance being his net estate. From his net estate would be deducted the value at the time of marriage of the property he then owned, and the value at the time of acquisition of property which he received during marriage by gift or inheritance from others. The remainder would be the shareable gains made by him during marriage.

(2) The wife's net gain would be determined in the same way.

(3) The balancing payment would be payable by the one with the larger shareable gain and would be one-half the difference.

A spouse may be a bad "partner". The court would therefore be given power to reduce or cancel the share of a spouse whose contribution to the welfare of the family is substantially less than might reasonably have been expected under the circumstances, but the contribution which is to be taken into consideration would include comfort, society, services and assistance.

(ii) Residents of Alberta who marry later

Unless they agree otherwise before marriage, deferred sharing as we have described it would apply to a couple who are both residents of Alberta or who establish a common habitual residence in Alberta when they marry.

(iii) Couples who settle elsewhere first

If a couple subject to the law of another province or country take up habitual residence in Alberta so as to be subject to Alberta law, deferred sharing would apply to them retroactively, that is, it would relate back to the time of their marriage. They would be able, however, to agree at any time that it should not apply to them; and either of them would have a special right to ask the court to vary their respective shares in the economic gains of the couple.

(iv) Marriage terminated by death

Deferred sharing would apply upon the dissolution of a marriage by the death of a spouse, but only if it required the estate of the deceased spouse to make a balancing payment to the surviving spouse; the surviving spouse would not be required to pay into the estate. The surviving spouse could, however, be required to make all or part of the balancing payment for the benefit of dependant children of the deceased spouse by a previous marriage if the money is needed for their support and not for the support of the surviving spouse.

(2) Minority Proposal

We will now give a summary of the minority proposal. It is a system of distribution of property between a married couple by judicial discretion after consideration of all the circumstances of the case. The distribution would take place at the time of the dissolution of marriage. The statute giving effect to the proposal would require the court to pay attention to a list of circumstances thought to be relevant and important. These would include the contribution of each spouse to the welfare of the family, including looking after the home and caring for the family. They would include a number of economic factors affecting the financial needs of each spouse, the property and earning capacity available to satisfy those needs, and the effect which the marriage has had upon both. They would include any history of distribution of property between the couple, any agreements made by them, the effect of any legal systems under which they have lived, and the economic effects of any sale or transfer of property made necessary by the court's discretionary order. They would include the conduct of the spouses.

The alternative proposal would apply to all couples subject to Alberta law, wherever and whenever they were married. The court's discretionary power of distribution would apply to all property owned by either or both of the spouses and not merely to the economic gains which they make during marriage. It could be exercised by reason of separation or upon dissolution of marriage during lifetime or by the death of a spouse. In the case of death, only the survivor could apply, except that the dependant children of the deceased spouse by another marriage would be entitled to make a claim against the survivor for part or all of the

amount which the deceased could have claimed so long as it is needed for the maintenance of the dependant children and is not needed for the maintenance of the surviving spouse.

5. Relationship between Matrimonial Property and Support

The obligation of support is an important part of the economic relationship of husband and wife. We issued a Working Paper on that subject in June, 1974, and we regard the preparation of a final Report on Support as a matter of the highest priority.

We think that in an individual case the first step should be to determine the property rights of the spouses. Once that has been done, the next step should be to deal with the support obligation in the light of the financial position of the spouses after the sharing of property; indeed, the fact that support upon divorce is governed by federal law while matrimonial rights are governed by provincial law makes it necessary to take the two steps in divorce matters, which constitute a substantial part of all cases in which the distribution of property must be considered. We think also that in considering the general question of the economic relationship of spouses, the subject of property can be considered first and that the law of support can then be considered with relation to it. We have therefore decided to issue this Report on Matrimonial Property only and not to delay it until we are able to make our Report on Support.

6. Rights of Children

It is sometimes suggested that children should have some claim to property acquired by their parents. For

example, the English statute which we will refer to allows the court to require that property be dealt with for the benefit of children. We do not propose to make any recommendations in this Report concerning the rights of children. We expect in a later Report to discuss the obligations of parents to support their children.

II
EXISTING LAW OF MATRIMONIAL PROPERTY

We will now describe the law governing the property rights of husband and wife. We will do so briefly and in terms as simple as the complex nature of the subject matter permits. Those who want a more extensive description will find it in our Working Paper on Matrimonial Property.

1. Separation of Property

In Alberta a husband and wife are separate as to property. That means that a spouse who acquires property owns it to the exclusion of the other spouse; for the purposes of property law the relationship of husband and wife is the same as the relationship of persons who are strangers to each other. We will now enumerate some exceptions to those propositions; the exceptions are important, but the law of separation of property is still a fundamental and striking characteristic of our law.

2. Exceptions to Separation of Property

(1) Trusts

The law will sometimes say that although one spouse owns property he holds it wholly or partly "in trust" for

the other spouse; that is to say that, although one spouse is the legal owner, the other spouse is entitled to the benefit of being an owner or part owner of the property. However, the law will not usually impose a trust unless the other spouse has contributed money or money's worth to the property or unless both spouses intended that the other spouse is to have an interest in the property.

(2) Maintenance

Upon divorce the court may require one spouse to make a lump sum payment to the other. If the lump sum is large enough the payment may have the effect, intended or otherwise, of dividing the property between the spouses. The legal basis for the payment, however, is the Divorce Act which provides for a lump sum payment only for the financial support (maintenance) of the other spouse and does not recognize that the other spouse has a legal claim to the property of the first.

(3) Domestic Relations Act

There are some provisions in the Domestic Relations Act which allow the courts to change property rights between husband and wife but these are so little known and of so little effect that they do not affect the general proposition that the husband and wife are separate as to property.

(4) Possession of Matrimonial Home

In our Working Paper we examined the law at some length and concluded that a wife probably has the right to live in a house owned by the husband so long as it is needed for her support, and that she may be able to resist

the husband's claim to have a jointly owned matrimonial home partitioned or sold. In some cases the court will go further and issue a restraining order which has the effect of excluding the husband from the home. The husband may have similar rights in the converse circumstances but these have not been as thoroughly canvassed by the courts.

(5) Dower Act

The Dower Act prohibits a spouse who owns the matrimonial home (homestead) from dealing with it in any substantial way without the consent of the other spouse. The Dower Act also gives the other spouse a "life estate" in the homestead and in those goods of the other spouse which are protected by the Exemptions Act from being seized and sold for a debt by the owner's creditors. The life estate includes the right to possession of the home, but it arises only after the death of the spouse who owns it and lasts only for the lifetime of the survivor.

(6) Intestate Succession Act

If one spouse dies without a will, the Intestate Succession Act gives the survivor all of the estate, or, if the deceased spouse had children, part of it. A spouse can avoid the operation of the Act by leaving a will, and the Act is therefore not a true exception to separation of property.

(7) Family Relief Act

The court has power under the Family Relief Act to require part or all of the estate of the deceased spouse to be used to support a surviving spouse who is not otherwise

adequately provided for. The court can provide for regular payments, or it can turn over to the survivor part or all of the estate. The Act provides only for financial support, and does not recognize that the survivor has a right of property in the estate of the deceased spouse.

(8) Joint Ownership and Sharing of Assets

The widespread practice of putting the matrimonial home in the names of both husband and wife and the common but less widespread sharing of other assets are not exceptions in law to separation of property but they do give important relief against its consequences.

3. Dissatisfaction with Separation of Property

Separation of property as it applies to husband and wife has been much criticized in recent years. Proposals for change have been made either tentatively or definitively by the Royal Commission on the Status of Women, the Ontario Law Reform Commission, the British Columbia Royal Commission on Family and Children's Law, the Law Reform Commission of Canada and the Saskatchewan Law Reform Commission. The Northwest Territories, England and New Zealand have given their courts discretionary powers to divide matrimonial property upon divorce, and Saskatchewan has done so temporarily pending consideration of further reforms. The American Conference of Commissioners on Uniform State Laws has recommended a similar discretionary power which has been adopted in three States. Quebec and several European countries have adopted regimes providing for the sharing of property upon dissolution of marriage.

In Canada, criticism of the existing law increased after the decision of the Supreme Court of Canada in Murdoch

v. Murdoch, [1974] 1 W.W.R. 361 in which it was held that a ranch wife does not have a claim to share in property acquired by the husband through the efforts of the couple during marriage. Although some later cases suggested that there was a developing judicial tendency to interpret the law more in favour of the spouse who does not have legal ownership, the recent decision of the Appellate Division in Fiedler v. Fiedler, [1975] 3 W.W.R. 681 is to much the same effect as Murdoch v. Murdoch.

We think it imperative that the law relating to matrimonial property be acceptable to the great majority of married persons. We therefore thought it necessary to obtain an informed impression of public attitudes and opinions on the subject. We took two major steps to that end.

First we commissioned a survey of the ownership of property by married persons in Alberta and of their attitudes about ownership. The survey was made in 1973 by L. W. Downey Research Associates and paid for by the Provincial Government. Interviewers went over a lengthy questionnaire with almost 1,500 persons who were married or divorced and who represented a fair cross section of the population in terms of age, occupation and income. Most regarded both spouses, and not merely one of them, as the owners of assets like the house, its contents, cars, boats and the like, stocks, bonds and securities. Even businesses acquired since marriage were considered to be the property of husband and wife by somewhat more than half of those who owned businesses. There was no significant difference between the responses of husband and wives.

Our second major step was to publish a Working Paper on Matrimonial Property and to obtain views and comments from

the public on it. A questionnaire was circulated in conjunction with it. During the summer and fall of 1974, senior members of the Institute accepted twenty-five invitations to speak on the Working Paper, at places from Grande Prairie to Lethbridge and before audiences ranging from a handful to four hundred.

We issued our Working Paper in April, 1974, and distributed some 3,000 copies. In it we described the existing law and discussed three major alternative proposals for reform. The first was a community of property regime. The second was a regime called "deferred sharing" under which the economic gains made by the couple during marriage would be shared between the husband and wife on dissolution. The third was a discretionary system under which upon dissolution the property would be divided by the court on a discretionary basis. The Working Paper also discussed two proposals of lesser importance. One was a proposal for joint ownership of the matrimonial home. The other was a proposal for changes in a number of miscellaneous legal rules which are thought to be inequitable.

The news media gave much publicity to the Working Paper, and we spoke to many groups about it. The Alberta Women's Bureau made a most significant contribution by advertising the Working Paper extensively and bringing it to the attention of women's groups. The Bureau also distributed through government outlets such as Treasury Branches and Liquor Stores a questionnaire prepared by the Institute, of which more than 1,400 copies were completed and returned to us.

We received 93 signed submissions. The great majority of those who responded to the Working Paper were

in favour of a system of deferred sharing upon dissolution of marriage during the lifetime of both spouses, though some were daunted by the difficulties and preferred a discretionary system. Some preferred community of property but they were not many. The preponderance of views was in favour of deferred sharing upon the death of a spouse, but the preponderance was much smaller because of the protection which the law already gives to the surviving spouse. Most submissions came from women and women's groups, but the submissions received from groups composed of or including men also favoured some form of equal sharing. We will list in Appendix A those who made signed submissions.

Those who answered the questionnaire also showed a strong preference for some form of sharing. Husbands and wives at all levels of property ownership thought that a wife who looked after the home should share in property as it is acquired. They also thought that there should be an equalizing payment at dissolution and that specific kinds of property should be shared. The answers are summarized in Appendix B.

What does all this mean? To the extent that the results are valid they are evidence of attitudes which are more consistent with a system of sharing than with a system of separation of property, and they are one factor in the decision of the majority of our Board to recommend the system described in Part IV. The other members of our Board are not satisfied that those who responded to the Working Paper and questionnaire fully understood the practical implications of a deferred sharing system and do not regard the responses as necessarily supporting such a system.

III
PROPOSALS FOR CHANGE

1. Description of Proposals

We will now proceed to examine the three major proposals for change which we made in our Working Paper. The first is community of property in which husband and wife would share the ownership of property as it is acquired. The second is deferred sharing under which the economic gains made by the couple during marriage would be shared upon dissolution of the marriage. The third is a system of judicial discretion under which the court would have power to distribute the property of the husband and wife between them according to principles of fairness and equity. We have chosen these three systems for study for a number of reasons. One is that each is a working system in existence in communities whose experience is relevant. A second is that each of them goes some way to solve the problems of the existing law. A third is that we see no reasonable possibility of devising a system which will work and be acceptable and which is not similar to one of them. There could, of course, be many variations of any of them but we have tried to describe those systems which are most likely to be most suitable in Alberta.

We will pause to mention a number of other miscellaneous reforms which in our Working Paper we said could be made in order to cure some inequities in the existing law. The law could provide that a spouse who makes a contribution to the acquisition or improvement of property owned by the other may claim an interest in it, and it could recognize that each spouse has an interest in savings from housekeeping allowances, income from boarders and joint bank accounts.

We think these changes unnecessary in view of the major recommendations which we will make. We also discussed in our Working Paper a proposal for co-ownership of the matrimonial home, but we postpone our discussion of that proposal until later in this Report.

We turn now to our description of the three major proposals, judicial discretion, community of property and deferred sharing.

(1) Judicial Discretion

The essence of a discretionary system of distribution of property is that the law give to the courts the power to divide between husband and wife the property owned by the two of them. The courts would from case to case work out the ways in which they would exercise the power, but the law could point to various things to be taken into consideration, or it could set up rules to be followed, e.g., a rule that the division should be equal unless there is reason to the contrary. The philosophical approach adopted would determine the choice. We will describe three different approaches which could be followed in establishing a discretionary system.

The law could simply authorize the court to divide the property of a married couple in any way which it thinks fair and equitable. That would give the court the broadest power. It is the form of discretion conferred by the 1975 amendment to the Saskatchewan Married Women's Property Act, and it is probably what is intended by section 28 of the Matrimonial Property Ordinance, c. 3, Ordinances of the Northwest Territories, 1974. It would be for the courts to work out the principles upon which the exercise of the discretion would be based. We recommend against such a discretion.

A statute conferring a discretionary power should give direction to the courts as to how they should exercise the power.

A second approach would be to emphasize as a goal at marriage breakdown the placing of each spouse on a sound financial footing for the future with consequent reduction in or elimination of the need for continuing payments for support. By adopting that approach the law would recognize that the complexity of the economic intertwining of the lives of married persons is not adequately measured by their accumulated property. The principal example of a factor which would otherwise be overlooked is the inequality in the earning powers of the husband and wife which is often much greater at the end of the marriage than it was at the beginning. Other examples are the loss of dower and inheritance rights, and the loss of life insurance, pension benefits, and other investments made to secure the future of the married couple. Because it does not give effect to such factors, the equal division of property is, in this view, unlikely to achieve a fair result. It will not place the spouses on a footing at the end of the marriage equal respectively to what each enjoyed at the beginning of the marriage. On this approach the principle would be that there should be equal sharing in equal circumstances. Many factors would have to be looked at to determine what changes had taken place in the circumstances of each spouse during the time of the marriage and as a result of the marriage, and what division of property would be fair, having regard to those changes and to the desirability of placing each spouse as far as possible on a sound financial footing for the future. That approach would often, though not inevitably, result in the spouse with the lesser future earning capacity being held to be entitled to more than half the existing property of the couple. We do not

recommend it. While we think that it be desirable that each spouse be placed on an independent footing and that a clean break be made between the spouses, we think that in a discretionary division of property that should only be one factor to be taken into consideration along with many others.

Finally, the law could give to the courts the power to distribute property between husband and wife but require them to have regard to certain factors in exercising it. The English statute does so. It is the Matrimonial Causes Act 1973, of which sections 24 and 25 are relevant. The factors which it sets out are the income, financial needs, standard of living, and physical or mental disability of the husband and wife, the duration of the marriage, the contribution made by each to the welfare of the family, and the benefits that either party will lose because of the dissolution of the marriage. It also requires the court so to exercise its powers

> . . . as to place the parties, so far as it is practicable, and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

The judicial interpretation of this section has been that a wife should not have her share reduced because of misconduct unless it is so "obvious and gross" that the award would be repugnant to "anyone's sense of justice" (Wachtel v. Wachtel, [1973] 1 All E.R. 829). Her share is not necessarily half. We will put forward a similar form of discretionary system of distribution of property as an alternative to the majority proposal set out in this Report.

It should be noted that under the English statute the court on divorce has power to require one spouse to make financial provision for the other which includes both the distribution of property and financial support. By that means the statute provides a coherent scheme for dealing at once with the whole economic relationship of the husband and wife. There is much to be said for that approach, but as we have said at page 7 we prefer instead to see property dealt with first, and then to see support dealt with in the light of the resulting financial situation of the spouses; and we think that that procedure is required in divorce cases by the division of powers between the federal Parliament and the provincial Legislature. We also think that upon death of a spouse the property claims of the surviving spouse should be dealt with before the competing maintenance claims of the surviving spouse and the dependant children.

(2) Community of Property

Community of property is the opposite to separation of property. Under it the property of the husband and wife is the property of both in equal shares. In some systems, some or all property owned before marriage is included, but we believe that the only system of community which should even be considered in Alberta is one which includes only property acquired after marriage. Traditionally the husband was the only spouse able to deal with the community property but other arrangements are possible; the British Columbia Royal Commission on Family and Children's Law, for example, would require the consent of the non-owning spouse to some important transactions while leaving either spouse free in other cases to incur obligations and to deal with the property which is in his or her name. Usually creditors can take all community property to meet the debts of either

spouse, though the law can confer some immunity against loss of a spouse's interest in community property to satisfy obligations arising from wrongdoing not done on behalf of the community and it can require the creditor or injured party to realize first from the property of the spouse by whom the obligation was incurred or the wrongdoing done.

(3) Deferred Sharing

The property regime which we will call "deferred sharing" is much like the one that the Royal Commission on the Status of Women recommended and that the Legislature asked us to examine. It is of the same kind as that which Quebec adopted in 1970, that which the Ontario Law Reform Commission recommended in March, 1974, and that which the Saskatchewan Law Reform Commission tentatively recommended later in that year.

Under deferred sharing each spouse would during marriage be separate as to property and free to deal with it, though there would be some safeguards against a spouse stripping himself or herself of property in order to defeat the claim of the other spouse. When the marriage ends or breaks down the couple would share the economic gains which they made during the marriage, either by a money payment or by a distribution of property. The law could require that the parties in every case share equally in the gains, or it could give the court some discretion to make a different distribution in exceptional cases. If the marriage is terminated by the death of a spouse the law could require that the survivor and the estate share in the same way as the living spouses would have shared if the marriage had been otherwise dissolved, or it could apply deferred sharing only in favour of the survivor.

(4) Variations

There can be many variations of each of the kinds of matrimonial property system which we have briefly described above. Absolute powers of management, for example, can be given to the owner spouse under a community of property regime, and the spouses can be given protection against liability for the debts and wrongdoing of each other; such a regime would begin to resemble a deferred sharing regime. A deferred sharing regime with some discretionary power of adjustment in the court would be similar to a discretionary regime with a presumption of equal sharing. The descriptions we have given should, however, be sufficient for the purpose of working out an appropriate matrimonial property regime for Alberta.

2. Comparison of Deferred Sharing with Community of Property

Community of property gives greater effect to the concept of marriage as a co-operative venture than does any other property regime; the gains realized by the venture are the property of both spouses from the time they are realized. It gives a greater assurance of equality and a greater degree of certainty than does deferred sharing. The British Columbia Royal Commission on Family and Children's Law says that deferred sharing "does nothing to render more equitable the positions of the spouses during the marriage," while under community "both spouses may participate in marriage as economic equals if they wish."

We think, however, that there are other considerations:

(i) It appears to us that it would be unfair to treat an indolent, extravagant or

dissolute spouse in precisely the same way as a good homemaker or a good provider. We think it unfair that a good "partner", having compensated during marriage for the failure of the other to make a proper contribution to the family life, should then be called upon to share gains made despite, rather than with the help of, the other. Under deferred sharing, adjustments can be made in such cases without departing from the principles upon which the regime is based.

(ii) Under deferred sharing a couple would be able, as they now are, to protect each other by distributing property between them. Under community, a spouse's business insolvency, or a spouse's negligence resulting in a motor vehicle accident causing damage beyond insurance limits, might wipe out that protection by making the community property of both spouses available to pay the liabilities of one. We do not think that a matrimonial property statute should make that change in the law.

(iii) The administration of community property is more complex than the administration of separate property. Traditionally the husband had sole

power to deal with the community property and that was a great objection to community as it made the wife's rights largely illusory. To require the other spouse's consent to business and property transactions, as proposed by the British Columbia Royal Commission, or to provide for joint administration or control by husband and wife, as Texas and Washington now do, seems to us to be cumbersome. We do not think it necessary or desirable in the interest of husband and wife to hamper the provider in dealing with the property which he has amassed, and we do not see how any system of consent would fit in well with partnership or other business arrangements.

(iv) It appears likely that a system of consent would extend into other business dealings involving real property or substantial personal property undesirable complexities and complications similar to those which the Dower Act causes in relation to the homestead.

(v) Community of property would be an extreme remedy, and we do not think it necessary to go to that length to cure the unfairness of the law of separate property.

Some of the answers received in our survey, and some of the answers to our questionnaire, are consistent with the notion of community. However, while some submissions which we received favoured community, most did not. To us, the arguments against community are decisive, particularly the lack of differentiation between a good partner and a bad one and the complications arising from joint administration or from the need of the consent of the other spouse to transactions involving property.

For all these reasons we think that deferred sharing is to be preferred to community of property. That being so, there is nothing to be gained by comparing community to a discretionary system and we will dismiss it from further consideration in this Report.

3. Comparison of Separation of Property, Deferred Sharing and Judicial Discretion

We will now consider the three remaining choices, separation of property, deferred sharing, and distribution of property by judicial discretion.

The first question is whether the existing separation of property regime is satisfactory. Our answer is 'no'. The next question is whether either a deferred sharing regime or a system of judicial discretion would be better. To that question our answer is divided. Four of our seven members prefer deferred sharing, though they would not apply it to couples already married and living in Alberta and would make some adjustments to it; but they would prefer judicial discretion to the present law. The other three prefer judicial discretion to deferred sharing, and one of the three prefers the present law to either. We think it desirable to

set out the arguments which should be considered in choosing among the three systems, though some of these same arguments may also have to be discussed in other contexts elsewhere in this Report.

(1) Relevant Considerations

(a) Criticisms of separation of property

The basic reason for criticism of the system of separate property is that it is unfair to the wife. A wife who looks after the household and the raising of the children makes a contribution to the joint objectives of the married couple, just as does her husband who brings in the money which supports them and their family. At the economic level, her services would have a substantial economic value if they had to be paid for, and by performing them she frees her husband to earn money. In most cases, however, she is not in as good a position as her husband to amass assets or even to improve her qualifications for paid work; indeed, her ability to go to the labour market becomes increasingly impaired as she devotes her time to the home.

Today more women work at the beginning of the marriage than in the past. Some support their student-husbands. Some continue to undertake paid work throughout the marriage while others take time out to raise a family and then afterwards take paid work. Generally, however, a wife is not able to achieve as good an economic position as the husband; her contribution to the building up of assets is usually indirect. The law does not recognize it in the sense of conferring on her a share in the ownership of the assets merely by reason of the indirect contribution. The law treats as separate property (and usually as the husband's) assets which the

spouses themselves often regard as "ours".

There are, of course, couples to whom these remarks do not apply. Some already share their property and a law which requires sharing would merely give effect to what they have already done. The wife is sometimes the principal earner of money and the considerations we have mentioned apply in reverse.

We agree with the criticisms. We think that the present law does not operate fairly between husband and wife, and should be changed in order to achieve fairness and to conform to the wishes of the people who live under it. It should be based upon the principle that a husband and wife carry on their married life, including their economic functions, for their mutual benefit and account and according to arrangements accepted by both for that purpose. That principle, if accepted, requires that the law provide in some way for the sharing of their economic gains between the husband and wife. That can be done by a system of deferred sharing or by a system of judicial discretion.

(b) Comparison of deferred sharing with judicial discretion: general considerations

We now turn to the advantages and disadvantages of deferred sharing and judicial discretion in themselves and in relation to each other.

The three members of our Board who favour judicial discretion find two great merits in it in comparison with deferred sharing. The first is that a discretionary system could be expressed and applied more simply than deferred sharing, which they consider unnecessarily complex and

cumbersome and which they think will, because of its complexity, lead to misunderstanding and to litigation. The second is that a discretionary system would allow the courts to make a decision based upon the individual merits of the particular case rather than upon the rules prescribed by a deferred sharing regime, which they consider rigid, unlikely to be as suitable to the particular circumstances as a discretionary order, and unlikely to distinguish satisfactorily between the deserving and the undeserving. They believe that any unfairness caused to a spouse by separation of property can best be put right by a judge who takes into account the circumstances before him and that the uncertainty implicit in a discretionary power can be reduced by directing the court to consider a list of specific kinds of circumstances. They point to the experience in England where a system of judicial discretion appears to be working satisfactorily.

The four members who constitute a majority of our Board, however, think that a system of judicial discretion is necessarily more uncertain than deferred sharing. They think that it does not give sufficient recognition of the right of a spouse to share in the couple's economic gain, as differentiated from a mere opportunity to ask for a share. While they agree that a deferred sharing statute would have to deal with many problems and would therefore have to be complex they say that the principles upon which a judicial discretion is exercised will have to be worked out by judicial decisions in individual cases which will not be as accessible and as easily understood as a deferred sharing statute. They think that a discretionary system, because so much would depend upon the views of the judge, would involve more applications to the court, while a statement of the rules in a statute would tend to make applications

unnecessary. They think also that the number of factors to be considered under a system of judicial discretion and the difficulty in forecasting how a discretion will be exercised will make settlements more difficult to negotiate under judicial discretion than they would be under deferred sharing. They think that in order to achieve fairness a court exercising a discretionary power would have to decide what is to be shared, what its value is, and what the relative rights of the spouses should be, so that the process would involve the same complications as the determination of the balancing payment but without the same guidance to the court.

(c) Special considerations

We now turn to a consideration of some matters which must be considered in deciding whether or not to adopt a system of deferred sharing, and, if the decision is affirmative, the nature of the system which should be adopted.

(i) Are contributions equal?

The first question relates to the contributions made by the spouses to the welfare of the family. Should they be treated equally? It can be argued that they are not equal. It would certainly be a rare case in which the amount of money brought in by one spouse during marriage was precisely the same as the amount of money brought in by the other, and there may well be cases in which by any standard there is a difference in the respective contributions. Those who favour judicial discretion say that it should be for the judge to consider in each case the contribution made by each spouse and the importance it should have in the distribution of property; in that way justice would be most likely to be

done in each individual case. The majority take a different view. They think that the spouses perform their respective functions in accordance with arrangements accepted by each and for their common benefit, and that each should therefore be entitled to share in all the benefits which result. There should not be a detailed canvas in each case to establish what each spouse did and to assign a specific monetary value to it, and, while the English courts under the English discretionary system have decided that such a canvas is unnecessary, the place for such a rule is in the statute. The remedy for any unfairness resulting from unequal contributions is to give the court a discretionary power to change the shares if a spouse's contribution is substantially less than might reasonably have been expected under the circumstances, and the deferred sharing regime which the majority will propose would give the court such a discretionary power.

(ii) Should a new system apply to couples already married and living in Alberta?

An important question is whether a different system or regime of matrimonial property law should apply to couples already married and living in Alberta. That raises the question of retroactivity, that is, the interference by a new law with vested rights acquired by a spouse under separation of property. In the view of the majority of the Board deferred sharing should not apply. Instead, they would apply a discretionary system of distribution of the economic gains made during marriage. A discretionary system would also, in a sense, have retroactive effect, as the court could interfere with property acquired before the proposed statute comes into force; but we think that the opportunity to put the whole of the circumstances before

the judge for whatever decision is fair under the circumstances represents the best balance of the interests involved. We will discuss the question at greater length later in this Report.

(iii) Should a new system apply to couples who move to Alberta?

Is it fair to apply deferred sharing to a married couple who came to Alberta after a period of married life elsewhere? There are two principal arguments to the contrary which would not apply, or would apply less strongly, to a discretionary system.

One is somewhat similar to the argument against applying it to couples already married and living in Alberta. That is, that it would be unfair to create a new obligation based upon property accumulated in the past and at a time when people could not have it in mind, either because the property was accumulated before the adoption of the new law or because it was accumulated before they had any reason to think that they would be subject to the new law.

The second argument is different. The policy of the Alberta government appears to be to encourage people with money to settle in Alberta; it does so, for example, by refraining from imposing its own estate tax or succession duties. The argument is that a well-to-do person may well be dissuaded from settling in Alberta if he comes under an obligation to share his wealth with his spouse.

The majority think, however, that deferred sharing should apply to such a couple retroactively if two special provisions are made for them. One is that the couple should

be able to agree that deferred sharing should not apply to them. The other is that the court should have a special discretion to vary the shares of the couple if it would be reasonable to infer that they would have ordered their affairs differently if there had been a deferred sharing regime applicable to them earlier. The couple move to Alberta by choice and should be taken to have accepted the law of Alberta.

(iv) Would deferred sharing be unduly disruptive to farmers and small businessmen?

Another question is whether deferred sharing will be unduly disruptive to farmers, small businessmen and others who have property of a substantial value but no ready way of raising money or transferring property to make a balancing payment. We will deal with it at some length.

A farm or a small business may have a substantial value. It may be the only substantial property which the owner has. It may not be possible to sell part of it without the rest, or the sale of part may leave a remainder which is not an economic unit. It may not be possible to raise a substantial amount of money upon it at all, or the payments upon a substantial loan may be crippling to the owner. The proposed regime would therefore constitute a threat to the family farm. Some of those who oppose deferred sharing think that its adverse effects in this area is a sufficient reason for rejecting it. Under judicial discretion they think that those effects could be taken into consideration, and the proposals for discretionary systems which we will put forward in this Report so provide.

The majority recognize that these arguments have force, but think that other considerations are decisive. Under their recommendations, deferred sharing will not apply to couples already married and living in Alberta and the court will be able to give effect to the kinds of argument we have set forth if they are justified in a particular case of that kind. Those who marry under deferred sharing would be able to exclude a business or farm owned before marriage, and not merely its value, from the sharing. The accumulation of farm property after marriage is likely to be attributable to the efforts of both spouses and the benefit should not be arbitrarily awarded to one merely because he or she did the couple's business and managed to get legal title; the convenience of one does not excuse injustice to the other. The majority also note that there is already a significant amount of co-ownership of farm property, a circumstance which suggests that it is not necessarily a bad thing, and they note that the National Farmers Union, the only men's farm group who communicated with the Institute, favoured a division of accumulations. Finally, the majority propose that steps be taken to minimize the possible difficulties by giving the court broad powers to give time for payment and to allow payment by transfer of property.

(v) Would deferred sharing impose an undue accounting burden on married couples?

A final question is whether deferred sharing will impose an accounting burden upon married couples. The proposal is that the value of property at marriage is deductible in the final accounting, and so is the value of property received by gift or inheritance from third parties during marriage. That will involve the valuation

of property and keeping records of the valuation. To require a couple to make the necessary arrangements to cover the possibility that the marriage will not succeed is itself disruptive of the relationship. Problems of valuation may also provide for increased antagonism on dissolution of the marriage.

The reply of the majority is that the valuation and accounting will only be required if there is substantial property involved, in which case it is better that the couple pay some attention to property matters the lack of which now leads to unfortunate results. Under the proposed regime there would be a presumption that property owned at dissolution resulted from gains made during marriage, and there should not be much difficulty in most cases. They also think that under a discretionary system the court would want to know what property was accumulated during marriage and what was not; that is a factor which is likely to have an influence on the court's decision, and would make the accounting necessary there too.

(2) Conclusions

As we have said, these considerations have led four of our members to one conclusion and three of our members to another. The conclusion of the majority is that a system of distribution of gains by judicial discretion should apply to couples already married and habitually resident in Alberta, and that a system of deferred sharing should apply to those who marry or establish a common habitual residence in Alberta after the new law comes into force. The conclusion of the minority is that a system of distribution of all the property of husband and wife by judicial discretion should apply to all couples whether married before or after the new law comes into force. We will now describe the two proposed

systems. We will attach to our Report two draft bills. Bill No. 1 would give effect to the majority recommendation and Bill No. 2 would give effect to the minority recommendation.

IV

THE MAJORITY PROPOSAL: JUDICIAL DISCRETION FOR MARRIED COUPLES NOW LIVING IN ALBERTA: DEFERRED SHARING FOR OTHERS

1. Application of Deferred Sharing

For reasons which we gave in Part III of this Report a majority of our Board recommend that a matrimonial property regime of deferred sharing be adopted in Alberta. It would apply to couples who marry after the proposed statute is enacted and who at the time of their marriage are subject to Alberta property law, that is, who are then residents of Alberta. For reasons which we will give later in this Report it would apply with some changes to couples who move to Alberta (that is who establish a common habitual residence in the province) after a period of married life elsewhere. For reasons which we gave briefly in Part III and will amplify later, it would not apply to couples already married and having a common habitual residence in Alberta when the proposed statute comes into force; a system of judicial discretion would apply to them.

2. Deferred Sharing

(1) General Rules

We will now set out the rules of the deferred sharing regime as it would apply during the lifetime of both spouses. They are as follows:

(i) During marriage each spouse will be separate as to property.

(ii) Upon dissolution or breakdown of the marriage each spouse will be entitled to one-half of the economic gains made by both during the marriage, unless the contribution of one spouse to the welfare of the spouses and their family was substantially less than might reasonably have been expected under the circumstances.

(iii) The sharing will normally be carried out by a balancing payment which will leave each spouse with the proper share of the economic gains of the couple, but in some cases it may be carried out by transfer of property instead.

(iv) In arriving at the amount of gains to be shared the value of property owned by each spouse at marriage or received by one of them by gift or inheritance from a third person will not be counted, and debts will be taken into consideration.

RECOMMENDATION #1

THAT THERE SHALL BE IN ALBERTA A STATUTORY MATRIMONIAL REGIME BASED UPON THE FOLLOWING PRINCIPLES:

(1) EACH SPOUSE SHALL BE SEPARATE AS TO PROPERTY DURING MARRIAGE.

(Bill No. 1, sec. 11)

(2) UPON DISSOLUTION OR BREAKDOWN OF MARRIAGE DURING THE LIFETIME OF BOTH SPOUSES THEY SHALL SHARE THE ECONOMIC GAINS MADE BY THEM DURING THE MARRIAGE.

(Bill No. 1, sec. 12(1))

(2) Detailed Description

(a) Commencement and Termination of Regime and Time of Sharing

(i) Commencement of regime

A deferred sharing regime would affect economic gains during marriage and should commence at marriage for those who will then be subject to the proposed statute, that is, a couple each of whom at the time of marriage is resident in Alberta.

We will deal with other couples later in this Report.

RECOMMENDATION #2

THAT A DEFERRED SHARING REGIME COMMENCE AT THE TIME OF THE MARRIAGE OF A COUPLE EACH OF WHOM IS THEN RESIDENT IN ALBERTA.

(Bill No. 1, secs. 2, 7(2))

(ii) When sharing takes place

A. Joint application of husband and wife

We will later recommend that a husband and wife who are subject to Alberta law at the time of their marriage should be able to contract out of deferred sharing

but only if the court approves the contract or is satisfied of its fairness. If they do not contract out in this way, the couple will be subject to a regime of deferred sharing. After marriage, however, circumstances may arise in which it would be better for the husband and wife to be able to apply to the court for an order for the sharing of their economic gains and for that order to have the effect of terminating the deferred sharing regime and making them separate as to property for the duration of the marriage. The function of the court upon the application should be to prevent over-reaching and it should be required to satisfy itself that the proposal is fair and just to both spouses. Both spouses should have to join in the application.

That procedure would have the additional effect of ensuring that a division is agreed upon and a formal record available. We recognize that the application will involve expense and that it may well be a mere formality in a particular case, but we think that those consequences have to be borne in order to ensure fairness to both parties.

RECOMMENDATION #3

> *THAT THE COURT SHALL MAKE AN ORDER UNDER THE PROPOSED ACT FOR THE SHARING OF THE ECONOMIC GAINS MADE DURING MARRIAGE UPON THE JOINT APPLICATION OF THE HUSBAND AND WIFE AND UPON BEING SATISFIED THAT IT IS FAIR AND JUST TO TERMINATE THE REGIME.*
>
> (Bill No. 1, sec. 9(1))

B. Separation

A husband and wife should share the economic gains which they make during their lives together.

When that life ends it is desirable that the deferred sharing regime should also end. However, its termination is a serious matter and may interfere with the prospects of reconciliation, so that it should not take place immediately and should not be automatic. We think that the proposal made by the Ontario Law Reform Commission achieves a reasonable balance of all the factors and we recommend its adoption. That proposal is that one spouse may apply for a winding up of the regime if the spouses have been separated and living apart for at least one year and if in the opinion of the court normal cohabitation between them has terminated. We would also give the court the power to exclude from the sharing any gains made while the couple are separated; circumstances will vary and the power should be discretionary.

RECOMMENDATION #4

(1) *THAT THE COURT SHALL EXERCISE ITS POWERS TO PROVIDE FOR THE SHARING OF THE ECONOMIC GAINS OF A MARRIED COUPLE UPON THE APPLICATION OF EITHER SPOUSE AND UPON BEING SATISFIED THAT THE SPOUSES HAVE BEEN LIVING SEPARATE AND APART FOR ONE YEAR IMMEDIATELY PRIOR TO THE MAKING OF THE APPLICATION AND THAT NORMAL COHABITATION HAS BEEN TERMINATED.*

(Bill No. 1, sec. 9(2)(i))

(2) *THAT THE COURT MAY EXCLUDE FROM THE SHAREABLE GAINS OF A SPOUSE ANY GAIN MADE WHILE THE SPOUSES ARE SEPARATED.*

(Bill No. 1, sec. 15(3)(i))

C. Dissipation of property

Later in this Report we will discuss the problem which may arise if one spouse makes substantial gifts

or transfers substantial amounts of property for an inadequate consideration. Here it is sufficient to recommend that in such cases a spouse be able to apply to terminate the regime. We think that a spouse should also be able to apply if the other spouse's course of conduct suggests that there is an undue risk of the waste or loss of his or her property.

RECOMMENDATION #5

> *THAT THE COURT SHALL EXERCISE ITS POWERS UPON THE APPLICATION OF A SPOUSE AND UPON BEING SATISFIED:*
>
> *(1) THAT THE OTHER SPOUSE HAS MADE OR INTENDS TO MAKE A SUBSTANTIAL GIFT OR TRANSFER OF PROPERTY FOR INADEQUATE CONSIDERATION, OR*
>
> *(2) THAT THERE IS UNDUE RISK THAT THE OTHER SPOUSE WILL DISSIPATE OR LOSE PROPERTY TO THE DETRIMENT OF THE APPLICANT.*
>
> (Bill No. 1, sec. 9(2))

D. Proceedings for divorce, nullity and judicial separation

The spouses should share their economic gains upon dissolution of marriage. They should also share their economic gains upon judicial separation as that recognizes the end, at least temporarily, of their lives together. A spouse should be entitled to make an application for a balancing payment at the time of a decree nisi of divorce or nullity, or thereafter. A spouse should be able to apply at the time of a declaration of nullity of a void marriage or of a judgment of judicial separation. We will later

discuss the question when the right to bring the application should terminate.

RECOMMENDATION #6

> *THAT THE COURT SHALL GIVE JUDGMENT FOR A BALANCING PAYMENT UPON THE APPLICATION OF A SPOUSE IN PROCEEDINGS IN WHICH DIVORCE, NULLITY OR JUDICIAL SEPARATION IS CLAIMED AND UPON OR AFTER*
>
> *(1) THE MAKING OF A DECREE NISI OF DIVORCE OR NULLITY, OR*
>
> *(2) THE MAKING OF A DECLARATION OF NULLITY OF A VOID MARRIAGE OR A JUDGMENT OF JUDICIAL SEPARATION.*
>
> (Bill No. 1, sec. 9(3))

(iii) Lapse of right to apply

A spouse should be prompt in asserting his or her claim for a balancing payment. A long period of uncertainty is undesirable and would be unfair to the other spouse.

We have recommended that a spouse be entitled to apply for a balancing payment after a year's separation. The application should be made within one year after the date upon which the right arises, i.e., after the first anniversary of the separation and on or before the second anniversary. The same requirement should apply to a spouse who wishes to apply on the grounds that the other spouse has wrongfully divested himself of property. No limitation period is needed in the case of a threatened disposition or threatened dissipation.

It is highly desirable that sharing take place during proceedings for divorce, nullity or judicial separation and that all matters be settled at that time. There may be cases, however, in which it would be unfair that the right of a spouse for a balancing payment should be extinguished by a decree absolute or final judgment in a matrimonial proceeding; the spouse may not be aware of his or her rights and may not take legal advice or appear at the trial. In order to avoid injustice we think that the claimant should have the right to apply for one year after the decree absolute or final judgment unless advised of his or her rights in time to bring an application during the legal proceedings. If the spouse bringing the proceedings wishes to have matters decided once and for all, and not to have a possible claim outstanding for another year, it will be incumbent upon him to see that the notice is given. The statute should provide a form of notice.

RECOMMENDATION #7

(1) THAT AN APPLICATION FOR A JUDGMENT FOR A BALANCING PAYMENT UNDER RECOMMENDATION #4(1) OR RECOMMENDATION #5 SHALL BE BROUGHT WITHIN ONE YEAR AFTER THE DATE OF THE MAKING OF THE GIFT OR TRANSFER OR THE ANNIVERSARY OF THE SEPARATION.

(2) THAT AN APPLICATION FOR A JUDGMENT FOR A BALANCING PAYMENT UNDER RECOMMENDATION #6 SHALL BE MADE

(i) BEFORE THE MAKING OF THE DECREE ABSOLUTE OR FINAL JUDGMENT IN PROCEEDINGS FOR DIVORCE, NULLITY OR JUDICIAL SEPARATION, IF THE APPLICANT IS SERVED WITH A NOTICE IN A FORM TO BE PROVIDED BY THE PROPOSED STATUTE OR TO THE LIKE EFFECT WITH THE PETITION OR OTHER PROCESS BY WHICH THE PROCEEDINGS

ARE COMMENCED OR AT SUCH OTHER TIME DURING THE PROCEEDINGS AS THE COURT MAY DIRECT; OR

(ii) WITHIN ONE YEAR AFTER THE DATE OF THE MAKING OF THE DECREE ABSOLUTE OR FINAL JUDGMENT IN SUCH PROCEEDINGS IF NOTICE IS NOT GIVEN IN ACCORDANCE WITH SUBCLAUSE (i) OF SUBSECTION (2) OF THIS RECOMMENDATION.

(3) THAT EXCEPT IN A CASE IN WHICH A STATUTORY REGIME IS TERMINATED BY THE DEATH OF A SPOUSE AND EXCEPT AS PROVIDED IN THIS RECOMMENDATION A RIGHT TO APPLY FOR A BALANCING PAYMENT CEASES TO EXIST UPON THE TERMINATION OF THE STATUTORY REGIME.

(Bill No. 1, sec. 10)

(iv) Termination of regime

A deferred sharing regime should terminate when the court makes an order for the sharing of the economic gains of the couple or when it approves a renunciation or settlement of the claim for a balancing payment. The regime is intended to bring about a sharing of gains and once that has been accomplished the spouses should be separate as to property.

The regime should also terminate upon the final disposition of an action for divorce, nullity or judicial separation. The joint life of the couple has ended, and, with it, the justification for the existence of the deferred sharing regime insofar as it affects the couple. Under our previous recommendations a spouse may have the right to apply for a balancing payment for a year after the final disposition, but the regime itself will terminate and a spouse will not be entitled to share in gains made after termination.

The regime should also terminate upon the death of a spouse. We will later in this Report make separate and different recommendations for the consequences of termination by death.

The proposed statute will not apply to the couple after the termination of the regime. If their marriage is not formally ended and they come back together, they will under our other recommendations be able to adopt a new deferred sharing regime, or they will be able to make any agreement that the general law permits.

RECOMMENDATION #8

THAT A STATUTORY REGIME TERMINATE UPON

(1) A DECREE ABSOLUTE OF DIVORCE,

(2) A DECREE ABSOLUTE OF NULLITY OF A VOIDABLE MARRIAGE,

(3) A DECLARATION OF NULLITY OF A VOID MARRIAGE,

(4) A JUDGMENT OF JUDICIAL SEPARATION,

(5) A JUDGMENT FOR A BALANCING PAYMENT OR TRANSFER OF PROPERTY IN LIEU THEREOF,

(6) THE APPROVAL BY A COURT OF A RENUNCIATION OR SETTLEMENT OF A CLAIM FOR A BALANCING PAYMENT,

WHICHEVER FIRST OCCURS.

(Bill No. 1, sec. 8)

(b) How Gains Should be Shared

(i) General

What is to be shared is the economic gains

of the couple. The making of a money payment, which we will call a "balancing payment", will often be the most appropriate method of sharing, and even if property is to be transferred it should usually be valued and considered as part of the balancing payment. We will now set out in summary form the procedure which should be followed, and we will then go on to discuss the steps in detail.

When the court is called upon to give effect to deferred sharing it should take the following steps:

(1) It should decide what the share of each spouse is to be.

(2) It should establish the amount of the shareable gains of each spouse and the total shareable gains of the couple.

(3) It should give judgment requiring the spouse who has more than his or her share of the total shareable gains to make a balancing payment to the other.

RECOMMENDATION #9

THAT UPON AN APPLICATION TO DETERMINE THE RIGHTS OF THE PARTIES THE COURT SHALL DETERMINE

(1) (i) THE SHAREABLE GAINS OF EACH SPOUSE,

(ii) THE SHARE OF THE SHAREABLE GAINS OF THE COUPLE TO WHICH EACH SPOUSE IS ENTITLED, AND

(iii) THE AMOUNT OF THE BALANCING PAYMENT,

AND

(2) GIVE JUDGMENT FOR THE BALANCING PAYMENT.

(Bill No. 1, sec. 15(1))

(ii) Determination of the respective shares of the spouses

We have recommended the adoption of the principle of equal sharing but we do not think that it should be rigidly applied regardless of the merits of the particular husband and wife. There must be some provision for variation.

What can be done? The Legislature cannot look at every case and it cannot prescribe in advance for every case. We think that it must be left to the courts to decide when it would be unfair to apply the principle without relaxation. The Legislature can, however, say that the policy of the law is a policy of equal sharing of gains and that that policy is to be departed from only in a few exceptional cases in which one spouse substantially fails to perform his or her function.

The Ontario Law Reform Commission dealt with this problem in their report on Family Property Law. The report recommends that the court have power to vary an equalizing claim in four special cases, only one of which (prolonged separation) has to do with the contribution made by either spouse. The report then recommends that "where in any other similar special situation" the rules would "lead to grossly inequitable results" the court may make an adjustment in the equalizing claim. It may not, however, have regard to "matrimonial fault". The following paragraph is a forceful

statement of the arguments in favour of a discretion to make an adjustment only in cases of gross inequity:

> The Commission is . . . strongly of the view that the matrimonial property regime should neither require nor allow a judge to enter into an assessment of matrimonial fault, moral entitlement or the worthiness of the parties to a termination proceeding in order to determine a spouse's eligibility for financial equalization. The Commission's recommendations in this report are aimed at creating a legal framework within which married persons can realize autonomy during the existence of the matrimonial property regime and financial equality at its termination. They are not designed to provide an economic sanction for any person's lack of industry, personal failings, or lapses from contemporary moral standards.

We follow the Commission most of the way, but not quite all. We agree that the matrimonial regime should not be designed to provide an economic sanction for personal failings or lapses from contemporary moral standards. We also agree that it should not be designed to provide an economic sanction, in the sense of punishment, for lack of industry. We do think, however, that there is a point at which it can be said that a spouse has failed to do what might reasonably be expected of him or her under the circumstances to such an extent that it would be unfair to allow him or her to participate fully in the economic gains of the couple during marriage and we think that the court should have the power to cancel or reduce that spouse's share. That would not happen in the ordinary case or in a case in which a disability has prevented one spouse from making a contribution or one in which it is the wish of both spouses that one should be idle.

It is necessary to find language which will ensure that all kinds of contribution to the marriage will receive

equal recognition and which will also provide for the exceptional case in which a spouse has not borne a fair share of the burden. "Contribution" includes much more than the bringing in of money. It includes also the work of a homemaker which under other circumstances would have an economic value. It includes also the support and assistance involved in the relation of husband and wife and in the nurture of their children. We believe that the recommendation which we have formulated below will have the effects which we have suggested.

We do not suggest that there should be a detailed canvas of the conduct of both spouses; indeed we do not think that marital conduct as such should enter into the discussions at all. Even a spouse who leaves the other for another man or woman should not be deprived of a share which was earned while he or she was a "good partner". Gains should be shared equally except in the exceptional case in which there is a substantial failure by one spouse to contribute to the welfare of the couple and their family and then only to the extent of the failure, though as a precaution the court should also be authorized to take into consideration the result of any previous litigation between the husband and wife over the division of property of the sharing of gains.

RECOMMENDATION #10

(1) THAT EXCEPT TO THE EXTENT THAT THE MARRIED COUPLE OTHERWISE AGREE IN ACCORDANCE WITH LATER RECOMMENDATIONS, EACH SPOUSE BE ENTITLED TO HALF THE ECONOMIC GAINS MADE BY THE SPOUSES DURING THE STATUTORY REGIME.

(2) THAT A SPOUSE'S SHARE MAY BE VARIED OR CANCELLED BY ORDER OF THE COURT.

(3) THAT THE COURT SHALL NOT EXERCISE ITS POWERS UNDER SUBSECTION (2) UNLESS

(i) IT IS SATISFIED THAT THE CONTRIBUTION OF A SPOUSE TO THE WELFARE OF THE SPOUSES AND THEIR FAMILY DURING ALL OR PART OF THE STATUTORY REGIME WAS SUBSTANTIALLY LESS THAN MIGHT REASONABLY HAVE BEEN EXPECTED UNDER THE CIRCUMSTANCES,

(ii) THERE HAVE BEEN PREVIOUS LEGAL PROCEEDINGS BETWEEN THE SPOUSES CONCERNING THE DIVISION OF PROPERTY OF THE SHARING OF GAINS, OR

(iii) IT IS EMPOWERED TO DO SO PURSUANT TO RECOMMENDATIONS MADE LATER IN THIS REPORT.

(4) FOR THE PURPOSES OF SUBSECTION (3) THE CONTRIBUTION OF A SPOUSE INCLUDES

(i) PROVIDING MONEY OR MONEY'S WORTH, AND

(ii) PROVIDING COMFORT, SOCIETY, SERVICES AND ASSISTANCE.

(5) IN EXERCISING ITS POWERS UNDER SUBSECTION (3), THE COURT SHALL NOT HAVE REGARD TO THE CONDUCT OF A SPOUSE BY REASON ONLY THAT THE CONDUCT CONTRIBUTED TO THE BREAKDOWN OF THE MARRIAGE OR WOULD AFFECT THE RIGHT OF THE SPOUSE TO RECEIVE FINANCIAL SUPPORT FROM THE OTHER SPOUSE.

(Bill No. 1, sec. 14)

(iii) Determining the shareable gains of the spouses

We will now describe the procedure to be followed in determining the shareable gains of the spouses. We will defer for the moment our discussion of the reasons for valuing all the property of the spouses and the reasons

for the deductions to be made from the value of their property.

The court would first compute the amount of the shareable gains of one spouse. We will take the case of a husband first. The court would proceed as follows:

(1) It would determine the value of all the husband's property.

(2) It would determine the amount of the husband's liabilities.

(3) It would deduct the amount of the husband's liabilities from the value of all his property. The remainder would be his net estate.

(4) It would determine the value at the time of the marriage of all property which the husband owned at that time and it would deduct from that value the amount of all of his then existing liabilities. The remainder would be deductible from the net estate of the husband.

(5) It would determine the value of any property received by the husband during the marriage by gift or inheritance from anyone other than his wife, and it would deduct from that value the amount of any liabilities payable by the husband with

respect to the property. Both amounts would be determined as at the time the property was acquired. The remainder would be deductible from the value of the husband's property.

(6) It would then add the deductible amounts and deduct the total from the husband's net estate. The remainder would be the husband's shareable gains.

The court would then determine the amount of the wife's shareable gains. It would follow the same procedure in order to do so.

Example

At dissolution of the marriage H has property worth $50,000. He has debts of $10,000. At marriage he had property worth $5,000. After marriage he received a legacy of $5,000. His net estate is $50,000 (assets) - $10,000 (debts) = $40,000. His shareable gains are $40,000 (net estate) - ($5,000 + $5,000) (allowable deductions) = $30,000.

W has property worth $15,000. She has no debts. She had no property at the time of marriage and received no gifts. Her shareable gains are $15,000.

RECOMMENDATION #11

THAT THE COMPUTATION OF SHAREABLE GAINS BE MADE AS FOLLOWS:

(i) THE VALUE OF ALL PROPERTY OF EACH SPOUSE SHALL BE DETERMINED AND THE LIABILITIES OF THAT SPOUSE SHALL BE DEDUCTED THEREFROM, PRODUCING THE NET ESTATE OF EACH SPOUSE,

(ii) FROM THE NET ESTATE OF EACH SPOUSE SHALL BE DEDUCTED THE DEDUCTIONS TO WHICH EACH SPOUSE IS ENTITLED,

(iii) THE AMOUNT REMAINING SHALL BE THE SHAREABLE GAINS OF THE SPOUSE.

(Bill No. 1, sec. 15(2))

(iv) Determining the amount of the balancing payment

Having established the respective shares to which the husband and wife are entitled, and having determined the shareable gains of each, the court would take the following additional steps to determine the amount of the balancing payment:

(1) It would add the amount of the husband's shareable gains and the amount of the wife's shareable gains in order to determine the total shareable gains of the couple.

(2) It would then determine how much of those shareable gains each spouse is entitled to. It would do so by computing the appropriate fractions of the total shareable gains of the couple. The appropriate fraction would be one-half in each case unless the court had exercised its power to vary or cancel a spouse's share.

(3) It would then compare the amount of one spouse's shareable gains with the amount of the total shareable gains to which that spouse is entitled. The difference would be the amount of the balancing payment.

The court would then give judgment requiring the spouse who has more than his or her share of the gains to make a balancing payment to the other. We leave aside for the moment the case in which the deductions from the value of the property of either spouse exceed that value.

Example

In the example at p. 50 H's shareable gains were found to be $30,000 and W's shareable gains were found to be $15,000. The total shareable gains of the couple are $30,000 (H's shareable gains) + $15,000 (W's shareable gains) = $45,000.

(1) Assume that the court has not varied or cancelled either spouse's share. H is entitled to $22,500 (one-half of $45,000) of shareable gains and therefore has more than his share by the amount of $30,000 (H's shareable gains) - $22,500 (the amount of shareable gains to which H is entitled) = $7,500. W is entitled to $22,500 (one-half of $45,000) of shareable gains and therefore has less than her share by the amount of $22,500 (the amount of shareable gains to which W is entitled) - $15,000 (W's shareable

gains) = $7,500. The balancing payment is therefore $7,500 and is payable by H to W.

(2) Assume instead that the court has varied W's share by reducing it to one-sixth. H is entitled to $37,500 (five sixths of $45,000) of shareable gains and therefore has less than his share by the amount of $37,500 (the amount of the shareable gains to which H is entitled) - $30,000 (the amount of H's shareable gains) = $7,500. W is entitled to $7,500 (one-sixth of $45,000) and therefore has more than her share by the amount of $15,000 (W's shareable gains) - $7,500 (the amount of shareable gains to which W is entitled) = $7,500. The balancing payment is therefore $7,500, payable by W to H.

RECOMMENDATION #12

THAT IF EACH SPOUSE HAS SHAREABLE GAINS THE BALANCING PAYMENT BE OWED BY THE SPOUSE WHOSE SHAREABLE GAINS EXCEED HIS SHARE OF THE SHAREABLE GAINS OF THE SPOUSES AS DETERMINED BY THE COURT AND THAT IT BE THE AMOUNT OF THE EXCESS.

(Bill No. 1, sec. 15(7))

(c) Valuation of a Spouse's Property

(i) Property included and deductions from value

The principle upon which deferred sharing is based is that unless they decide otherwise a husband and wife are to be regarded as carrying on their married life, including their economic functions, for their mutual benefit and account and according to arrangements accepted by both for that purpose. That principle entitles one spouse to share in the benefit of property (in which term we include money) accumulated by the other during the marriage, including earnings, appreciation on investments and windfall gains arising from the activities of the couple. We have already recommended that the property to be valued as the first step in determining the shareable gains of the spouses include all their property.

The principle does not entitle a spouse to share in the benefit of property owned by the other spouse before the husband and wife entered upon their married life. It does not entitle one spouse to share in the benefit of property given to or inherited by the other spouse during the marriage as that has nothing to do with the economic functions of the couple. It follows that one of two things must be done. Either the property which was owned at marriage and the property which was received by gift or inheritance from a third party thereafter must be excluded from the accounting entirely, or its value must be deducted. The next question is how the value of that property and income from it is to be dealt with.

An argument can be made for the proposition that the property itself or property obtained in exchange for it should be entirely excluded from the accounting. The couple may have had the benefit of the income from it for many years, and merely to give credit for the capital value does not recognize that benefit. Inflation may have occurred during the time of the marriage, and merely to give credit at the end of the marriage for a number of dollars equal to the original value of the property does not recognize that those dollars have less value than those in which the property was originally valued. Therefore, the argument goes, it is not fair to allow deduction only of the original dollar value of the property.

On the other hand we see grave practical problems in treating the property itself as exempt or in allowing its present value as a credit. The economic affairs of husband and wife are often intertwined. It is likely to be difficult or impossible to trace the original property or what is exchanged for it. Improvements will often have been made to the property, or encumbrances paid off, and it would be difficult or impossible to determine the appropriate credits. We think that the best thing to do is to allow credit for the value of the property at the time of marriage, and leave it to the couple, at marriage or after they establish a common habitual residence in Alberta, to vary the regime by agreement.

The next question is whether income from property owned by a spouse at marriage or given by a third party to a spouse during marriage should be included in computing the gains of that spouse during marriage. We think that it should. We think that it would be impracticable to make different provision for this one part of the economic

affairs of the couple. We would make one exception. A third party may want to give property for the sole benefit of one spouse. We think that the donor or testator should be able to exclude the property and its income from the operation of the proposed statute. The exclusion should be express and it should be in writing in the will or in the instrument of gift.

The next question is whether, apart from such express exclusion, the spouses should share in the increase in value of property owned at marriage or received by gift or inheritance from a third party, and whether any decrease in value should be taken into consideration.

The Ontario Law Reform Commission thought it right that the spouses should share in the increase in value of a spouse's separate property, on the grounds that the alternative would perpetuate with regard to capital the inequities afforded by the present law with regard to both capital and income. They did not, however, think it right that capital losses to such property should be made up out of gains during marriage; they thought that protecting a spouse against capital loss to ante-nuptial property and throwing half the capital loss on the other spouse is inconsistent with the purpose of the matrimonial regime, and recommended instead "that the deductible value of ante-nuptial property, or property acquired in substitution therefor, should never exceed its value at the date of the termination of the matrimonial property regime."

We do not think it right that the owner-spouse should be made to share a benefit if things go well, while being forbidden to ask the other spouse to share the burden if things go badly. We think that if the "partnership"

principle confers a right to share in the gain from separate property it should also impose the risk that the loss from separate property may be set off against the overall gain from the "partnership".

RECOMMENDATION #13

THAT PROPERTY BE DEFINED IN THE PROPOSED STATUTE TO INCLUDE MONEY.

(Bill No. 1, sec. 1(2))

RECOMMENDATION #14

(1) THAT THE DEDUCTIONS TO WHICH EACH SPOUSE IS ENTITLED BE:

(i) THE VALUE OF PROPERTY OWNED BY A SPOUSE AT THE COMMENCEMENT OF THE STATUTORY REGIME LESS HIS LIABILITIES AT THE SAME DATE, AND THE VALUE OF THE PROPERTY BE DETERMINED AS OF THAT DATE, AND

(ii) THE VALUE OF PROPERTY RECEIVED BY A SPOUSE FROM A THIRD PARTY DURING THE STATUTORY REGIME BY GIFT OR INHERITANCE LESS ANY LIABILITIES PAYABLE BY THE SPOUSE WITH RESPECT TO IT, AND IT BE VALUED AS OF THE TIME IT WAS RECEIVED.

(Bill No. 1, sec. 15(4))

(2) THAT A PERSON MAKING A GIFT OF PROPERTY TO A SPOUSE BY INSTRUMENT IN WRITING OR BY WILL MAY BY EXPRESS DECLARATION MADE THEREIN EXCLUDE THE PROPERTY OF THE SPOUSE FOR THE PURPOSES OF THE PROPOSED STATUTE.

(Bill No. 1, sec. 15(5))

(ii) How property should be valued

The value of property for the purposes of deferred sharing should be its fair actual value. That will usually be the market value, but the phrase "fair actual value" will allow the court to attribute a value to property even if there is no immediate market.

The next question is the date to be used for the valuation. In most cases the date of termination of the statutory regime would be appropriate, as that is when the sharing takes place. That date will usually be the date of the order giving judgment for the balancing payment, and no problem will arise. In some cases, however, the right to apply will continue to exist after termination of the statutory regime. In those cases, if there has been a substantial change in the value of an asset it may be unfair to the spouse who retains it to require him to pay on the basis of a value which the asset no longer has to him, or it may be unfair to the other spouse to allow the first to retain the benefit of a substantial increase in value. In those cases the court should have power to make the valuation as at a later date. Another recommendation in this Report would allow the court to vest the property in the husband and wife in proportion to their shares in the gains of the couple, and the court may upon occasion be able to use that power to avoid unfairness arising from a substantial change in value.

Any important consideration in the value of property is any liability which might have to be incurred in order to realize the value of the property. If the spouse who owns the property acquired it at a price much below its present value he may be unable to sell it without incurring

capital gains tax, or all or part of the increase in value may be treated as income in his hands. If the spouse who owns the property is required to transfer it to the other spouse, the tax liability may rest upon the transferor or transferee depending upon whether the property is transferred before the marriage is terminated or afterwards. The liability should be taken into consideration by the court in valuing the property

RECOMMENDATION #15

THE FOLLOWING RULES APPLY TO THE DETERMINATION OF THE VALUE OF THE PROPERTY OF A SPOUSE:

(1) "VALUE" MEANS FAIR ACTUAL VALUE.

(2) VALUE SHALL BE DETERMINED AS AT THE DATE OF TERMINATION OF THE STATUTORY REGIME OR, IF THE COURT SO ORDERS, AT SUCH LATER DATE AS THE COURT CONSIDERS FAIR TO THE PARTIES.

(3) THE COURT SHALL EXCLUDE FROM THE VALUE OF PROPERTY ANY TAX LIABILITY WHICH WOULD BE INCURRED IN REALIZING UPON THE PROPERTY OR IN TRANSFERRING THE PROPERTY PURSUANT TO AN ORDER OF THE COURT UNDER THIS ACT.

(Bill No. 1, sec. 16(1), (2) and (6))

(d) Rules Relating to Special Kinds of Property

(i) Damages for personal injuries

If one spouse is injured and receives damages from the wrongdoer or an insurer should the damages be included in the property to be shared? Section 1266(i) of the Quebec Civil Code says 'no'. The Ontario Law Reform

Commission says 'yes'. The British Columbia Royal Commission on Family and Children's Law would allow the court to restore to a disabled spouse all or part of damages paid for permanent disability. The question has caused difficulities elsewhere.

It may be argued that it is unfair to say that one spouse should, in effect, undergo for the benefit of the other the pain and suffering for which some or all of the damages are awarded; or that one spouse should suffer for the benefit of the other a loss such as the loss of a limb which will continue to have effect after dissolution of the marriage. It may be unfair to require a paraplegic or quadraplegic to share with a divorced spouse the money awarded for living expenses and medical and nursing care. If one spouse is to be allowed to sue the other for wrongful injuries as we have tentatively suggested in our Working Paper on Contributory Negligence and Concurrent Tortfeasors it may seem unfair that the plaintiff spouse should on termination of the regime have to give back half the damages to the wrongdoer spouse.

There are, however, other considerations. Part of the damages may be for repayment of out-of-pocket expenses laid out by the couple. Part may be for wages lost during a period while the marriage continues. Part may be for the loss of earning power over the indefinite future, including the duration of the marriage, and may, therefore, at least in part, replace earning power which otherwise would have been available to the couple. Even damages for loss of expectation of life in part replace the income expectations of the couple. These considerations, and the fact that damages are not always earmarked for the different categories of loss, suggest that damages for personal injury should be included.

We do not think that it is possible to legislate in advance for every case. The rule should be that damages for personal injury be included in the sharing to the extent that they can be treated as compensation for an economic loss suffered by the "partnership" of husband and wife but not otherwise. The burden of proof should be on the spouse who claims that the damages should not be included in the computation of his or her shareable gains.

RECOMMENDATION #16

> *DAMAGES PAID TO A SPOUSE FOR PERSONAL INJURIES MAY BE EXCLUDED FROM THE PROPERTY OF THE SPOUSE FOR THE PURPOSES OF THIS PART IF IT IS ESTABLISHED TO THE SATISFACTION OF THE COURT THAT THEY ARE NOT COMPENSATION FOR ECONOMIC LOSS SUFFERED BY THE MARRIED COUPLE DURING THE STATUTORY REGIME.*
>
> (Bill No. 1, sec. 16(5))

(ii) Life insurance policies

We will now discuss the rather complex subject of life insurance both in relation to dissolution of marriage during the lifetime of both spouses and in relation to dissolution of marriage by the death of one spouse. Life insurance premiums may be paid by the parties. They may be paid by others by way of gift or as a matter of business. They may be paid before or during the marriage. The beneficiary may be the estate of the insured, the other spouse, or a third party. The designation as beneficiary may or may not be irrevocable. Cash values may or may not accumulate.

Section 1766(e) of the Quebec Civil Code excludes from the partnership of acquests the interest of a spouse (consort) as beneficiary of a policy taken out by the other spouse or a third party. It treats as the property of the "partnership" any rights received during the existence of the regime. The Ontario Law Reform Commission agreed with that provision. They went on to recommend the exclusion of an amount received by one spouse as beneficiary of a policy on the life of the other, no matter who paid the premiums, apparently on the grounds that the proceeds would not fall in until after the death of the other spouse had terminated the regime. They would, however, include the value of rights accruing during the marriage and amounts payable to a spouse's estate under a policy on his own life. They would also include the cash surrender value of a policy taken out by the deceased spouse on his own life with a third party as beneficiary. They would put a spouse named as irrevocable beneficiary by the insured spouse to his or her election between retaining the rights of an irrevocable beneficiary on the one hand and renouncing those rights and having the cash value included in the other's shareable property, on the other.

We think that any benefits which are received by or which accrue to a spouse during the marriage from an insurance policy should be included in that spouse's shareable assets. Cash values accrued before marriage would not be shareable; cash values accrued during marriage would. If premiums are paid by a third party, the premiums would be treated in the same way as any other benefit received from a third party, but the value of the policy itself would be included in the accounting.

The Ontario Law Reform Commission would include in the estate of a deceased spouse the proceeds of a life insurance policy on the spouse if it was payable to the estate, but if it was payable to the survivor they would use the net estates as they stood at the time of death and the proceeds of insurance payable to the survivor would not be included. It appears to us that in both cases the proceeds of the insurance should be included. Insurance is likely to be considered by the couple as part of the estate which they have accumulated and before the survivor should be able to claim a balancing payment from the estate, we think that he or she should have to give credit for its proceeds.

RECOMMENDATION #17

(1) THAT WHERE A STATUTORY REGIME IS TERMINATED DURING THE LIFETIME OF BOTH SPOUSES, LIFE INSURANCE OWNED BY A SPOUSE BE VALUED AT ITS CASH SURRENDER VALUE AND INCLUDED IN THE PROPERTY OF THE SPOUSE WHO IS ABLE TO REALIZE THAT VALUE.

(Bill No. 1, sec. 16(3))

(2) THAT WHERE A STATUTORY REGIME IS TERMINATED BY THE DEATH OF A SPOUSE AND AN INSURANCE POLICY ON THE LIFE OF THE DECEASED SPOUSE IS OWNED BY EITHER SPOUSE

(i) IF THE POLICY IS PAYABLE TO THE SURVIVING SPOUSE THE PROCEEDS BE INCLUDED IN THE PROPERTY OF THE SURVIVING SPOUSE, AND

(ii) IF THE POLICY IS PAYABLE TO THE ESTATE OF THE DECEASED SPOUSE THE PROCEEDS BE INCLUDED IN THE PROPERTY OF THE DECEASED SPOUSE.

(Bill No. 1, sec. 23(iv), sec. 24(ii))

(iii) Pension plans and annuities

A pension may be an important part of the economic gains of a couple during marriage, and it seems reasonable that the value of that gain should be included in the shareable property of the couple. It is not, however, easy to devise rules which will do perfect justice.

A pension which has vested is one thing. A pension which will not vest until the spouse works for an additional time is another. A pension payable during the lifetime of the spouse may yield little or much, and to require payment according to an actuarial value at a given date may work unfairly one way or another. A pension plan under which the other spouse is guaranteed some benefits if the owner dies is different from one which gives no guarantee. Some plans may provide options which will give different yields. If a pension is given a substantial present value it may not be possible for the spouse entitled to it to raise elsewhere the money to provide the other spouse's share, and payment from the pension itself may leave the owner in a state of destitution if the whole proceeds are devoted to making up a lump sum representing the other spouse's share. Payment may be difficult or impossible to enforce by reason of the terms of the plan or by reason of public policy which prevents attachment of the proceeds of some public pensions.

The answer of the Ontario Law Reform Commission is to include in the shareable property of the beneficiary the amounts paid into a pension plan during marriage. That answer appears to assume that the employee-spouse got about what he was paying for and is a practical way of doing rough justice while avoiding difficult questions

of valuation and vesting. It does not give the other spouse any benefit from employer's contributions. Another possible answer, which has been adopted elsewhere, is to ignore "expectancies" and value only vested interests, using expert evidence, actuarial tables and other paraphernalia of valuation.

With some doubt, we think that if the regime is terminated during the lifetime of both spouses it should be valued at its cash value and that if it has no cash value it should be valued at the amount which the spouse entitled to it paid into it. If the regime is terminated by the death of a spouse, then it seems to us that if any amount is payable to the survivor under the terms of the plan it should be included in the survivor's property, and if any amount is payable to the estate it should be included in the estate. We think that the same provisions should apply to other forms of annuities as well.

RECOMMENDATION #18

(1) THAT WHERE A STATUTORY REGIME IS TERMINATED DURING THE LIFETIME OF BOTH SPOUSES A PENSION PLAN OR ANNUITY

(i) BE VALUED AT ITS CASH VALUE TO THE SPOUSE ENTITLED TO IT, OR

(ii) IF IT HAS NO CASH VALUE BE VALUED AT THE AMOUNT WHICH THE SPOUSE PAID FOR OR INTO IT.

(Bill No. 1, sec. 16(4))

(2) THAT WHERE A STATUTORY REGIME IS TERMINATED BY THE DEATH OF A SPOUSE, THE PROPERTY OF THE SURVIVING SPOUSE FOR THE PURPOSES OF THE PROPOSED ACT INCLUDES PROPERTY ACQUIRED BY REASON OF THE DEATH OF THE DECEASED BY VIRTUE OF A PENSION PLAN OR OTHER LUMP SUM

OR PERIODIC PAYMENT PAYABLE TO THE SURVIVING SPOUSE IN HIS OR HER CAPACITY AS SURVIVOR OF THE DECEASED SPOUSE.

(Bill No. 1, sec. 23(iii))

(e) Liabilities

(i) At marriage

We have recommended that a spouse who owns property at the commencement of the matrimonial property regime should, in computing the balancing payment, be entitled to a credit in the amount of the value of the property which was of benefit to the couple, only in the amount of the net worth of the property. From the total value of the property there should be deducted all liabilities of the owner spouse at the time of marriage, whether or not the liabilities were charged against the property.

A difficulty would arise if the debtor spouse has no property against which the liabilities can be set off, or if the liabilities exceed the value of the property. What should be done with the excess? The Ontario Law Reform Commission thought that the debtor should be treated as having nothing rather than be treated as having a negative estate. They thought that

> . . . net worth should be used for the computation of the ante-nuptial position to avoid cases of a unilateral right to withdraw an artificially high value from the assets existing at the termination of the matrimonial property regime, . . .

but that "if ante-nuptial debts exceed ante-nuptial assets . . . there is, under the Commission's recommendation, no

possibility of a withdrawal in any event." They thought that it is not correct that the law should require that all earnings after marriage must be directed towards the acquisition of shareable property.

We have come to a different conclusion, namely, that the debtor spouse should be charged in the computation of his shareable gains with the amount by which his liabilities exceeded the value of his property at marriage. If a liability has been paid off during marriage we think that the debtor spouse has gained as much as if he had acquired additional property to the same value. If a liability still exists at the termination of the regime it will be deducted from the debtor spouse's property in computing his shareable gains and that will cancel out the ante-nuptial liability. The proper arithmetical treatment to give effect to that view is to add the excess of the debtor spouse's liabilities at marriage to his net estate in order to compute the amount of his shareable gains.

RECOMMENDATION #19

> *THAT IF A SPOUSE'S LIABILITIES AT THE DATE OF MARRIAGE EXCEED THE VALUE OF HIS PROPERTY AT THE SAME DATE, THE AMOUNT OF THE EXCESS SHALL BE ADDED TO THE VALUE OF HIS NET ESTATE FOR THE PURPOSE OF COMPUTING HIS SHAREABLE GAINS.*
>
> (Bill No. 1, sec. 15(6))

(ii) At termination of a statutory regime

An economic gain results in an increase in property, and the value of property at the end of a

statutory regime is therefore charged against the spouse who owns it. However, to the extent that the spouse has liabilities there is no gain, and the amount of the spouse's liabilities is accordingly deducted from the value of his or her property. In the ordinary case in which a spouse has a shareable gain, the treatment of liabilities does not give rise to any problem and is covered by the recommendations we have already made.

An excess of liabilities does give rise to a problem. However that problem is the same as that which arises if the deductions for property owned at marriage or property acquired by gift or inheritance exceed the net estate of the spouse, and we will deal with both as the problem of negative shareable gains.

(f) Negative Shareable Gains

A spouse's liabilities would be deducted from the value of his property to produce his net estate. Then the value of the property which he owned at marriage or acquired by gift or inheritance would be deducted to produce his shareable gains. If his liabilities exceed the value of his property his net estate will be negative and the amount called "shareable gains" will usually be negative. Or if his net estate is a positive figure but is exceeded by the value of the deductible property the amount called "shareable gains" will necessarily be negative. In other words, "shareable gains" could be negative either because the increase in a spouse's liabilities during marriage is greater than the increase in value of his property or because he suffered a capital loss in the value of his deductible property.

What should be done with a negative "shareable gain"? Should it be made up from the shareable gains of the other spouse? Should it be treated as a "shareable loss", i.e., should the other spouse have to pay half of it or some other fraction fixed by the court? If the married couple is to be treated as a partnership, those results might follow; and it may be argued that the law should not leave one spouse with the burden of a loss incurred during marriage while allowing the other spouse to retain a full share of the shareable gains made by that other spouse. However, subject to some difference of opinion on our Board, we think that in the usual case the spouse with the negative "shareable gains" should merely be treated as having no shareable gains and should not be able to require the other spouse to share in or pay the loss. One spouse should not be able to claim indemnity from the other when the other has no control over the activities of the first and indeed may be entirely ignorant of those activities. We agree with the Ontario Law Reform Commission who thought that "full participation in gains, as of right . . . is a necessary step in view of the present imbalance in the economic position of the partners in a marriage" but that "full sharing of losses . . . would not necessarily be an advance towards the goal of minimizing economic disadvantages."

The difference between the two approaches may be illustrated by the example of a husband who brought into the marriage property worth $5,000 and who now has property worth $10,000 and debts of $10,000 while the wife has property worth $10,000 and no liabilities or deductions. If the husband were to be allowed to bring all his liabilities into account, there would first be deducted the

$5,000 which he brought into the marriage and his $10,000 of liabilities would be set off against the assets of $5,000 leaving a net loss of $5,000 which would have to come from the net gains of the other spouse before the balance of the net gains is shared. In the result the other spouse would pay $5,000 to pay off the net loss and $2,500 being half the remaining net gains. On the basis of our recommendations, however, the wife would have to pay the husband only $5,000 as the husband would be treated as having neither property nor liabilities.

We do, however, see the need for one exception. There may be a case in which the other spouse was benefited by the incurring of liabilities by the debtor, i.e., a case where goods and services were acquired for the benefit of the family or of a member of the family, and we think that the other spouse should be required to pay a share of laibilities of that kind.

If each spouse has a net loss we do not think that there should be any claim by one spouse against the other.

RECOMMENDATION #20

(1) THAT IF THE COMPUTATION OF THE SHAREABLE GAINS OF A SPOUSE RESULTS IN A NEGATIVE AMOUNT

(i) HIS SHAREABLE GAIN BE NIL, AND

(ii) HE IS ENTITLED TO CLAIM FROM THE OTHER SPOUSE SUCH AMOUNT NOT EXCEEDING THE SHAREABLE GAINS OF THE OTHER SPOUSE AS IS NECESSARY TO PAY LAIBILITIES INCURRED BY THE CLAIMANT SPOUSE FOR THE PURPOSE OF OBTAINING GOODS OR SERVICES FOR THE SPOUSES OR THEIR FAMILY, AND THE SHAREABLE GAINS OF THE OTHER SPOUSE BE REDUCED ACCORDINGLY.

(2) THAT IF EACH SPOUSE HAS A NET LOSS THERE BE NO BALANCING PAYMENT.

(Bill No. 1, sec. 15(8), (9))

(g) Balancing Payment and Alternative Methods of Sharing

We have already recommended that the court give judgment for the amount of the necessary balancing payment in each case and not for sharing property in specie. We now give our reasons. In most cases antagonistic spouses should not be placed in the continuing relation of co-owners of property; and if property is held by one spouse in association with a third person, as in a business partnership or closely held company, it will usually be inappropriate to introduce the other spouse into the relationship. There are items of property such as the family farm or business which in most cases should not be shared with or transferred to the non-owning spouse. The non-owning spouse's claim is not a claim to specific property; it is claim to a share in the economic advantages accruing to the couple. There will often be liabilities which are not attributable to specific property but are set-offs against the net worth of the debtor spouse; if property is to be shared, so should the liabilities, and it would not, we think, be appropriate to require or allow one spouse to assume part of a liability incurred by the other.

There may, however, be particular cases in which property should be transferred at a stated valuation in satisfaction of part of the balancing payment. It may be better to have the matrimonial home transferred to the spouse who will rear the children, or the transfer may be the simplest way of sharing and may be the best way of

avoiding problems of collection. The court have therefore the power to order that property be transferred as part of the balancing payment.

We recommend also that the court have power to direct the transfer of property into the names of both spouses in the proportions in which they are entitled to share in the gains. If that is done, the property would be excluded from the accounting entirely. The power might occasionally be useful where for some reason it is impracticable to value the property or unfair to leave one spouse with it.

RECOMMENDATION #21

(1) THAT THE COURT HAVE POWER TO ORDER A SPOUSE TO TRANSFER PROPERTY IN SATISFACTION OF PART OR ALL OF THE AMOUNT OF A JUDGMENT FOR A BALANCING PAYMENT.

(Bill No. 1, sec. 19(1)(i))

(2) THAT THE COURT HAVE POWER TO EXCLUDE THE VALUE OF PROPERTY FROM THE ACCOUNTING AND ORDER A SPOUSE TO TRANSFER THE PROPERTY SO AS TO BE HELD BY THE SPOUSES AS TENANTS IN COMMON IN THE PROPORTIONS IN WHICH EACH IS ENTITLED TO SHARE IN THE NET GAINS OF THE SPOUSES.

(Bill No. 1, sec. 19(1)(ii))

(3) THAT IN LIEU OF AN ORDER UNDER SUBSECTION (1) OR (2) OF THIS RECOMMENDATION THE COURT HAVE POWER TO MAKE A VESTING ORDER AND GIVE CONSEQUENTIAL DIRECTIONS.

(Bill No. 1, sec. 19(1)(iii))

(h) Jurisdiction, Nature of Proceedings and Burden of Proof

The Trial Division of the Supreme Court of Alberta is the court having jurisdiction in divorce and it seems appropriate that it be the court to have jurisdiction over the distribution of matrimonial property and the sharing of economic gains between spouses.

RECOMMENDATION #22

> *THAT THE TRIAL DIVISION OF THE SUPREME COURT OF ALBERTA BE THE COURT WITH JURISDICTION UNDER THE PROPOSED STATUTE.*
>
> (Bill No. 1, sec. 1(1))

Section 17 of the English Married Women's Property Act and section 12 of its Ontario counterpart provide for the resolution of property disputes between husband and wife by summary application to the court. We do not recommend a general provision of that kind, since it seems to have given rise to a substantial amount of litigation. However, procedures under the proposed Act should be as simple as possible.

In divorce, nullity and judicial separation cases there is already a legal proceeding, and property can be disposed of in that proceeding by separate application or by being joined with an application for other relief. In cases of separation and cases of death we think that it should be possible to bring proceedings by originating notice, upon which the judge would either be able to dispose of the matter summarily or make directions for proper trial if one is needed.

In one sense an originating notice allows a prompt disposition of the matter. In an emergency, however, it may be too slow. We think that it should be left open for a spouse to bring an action by Statement of Claim so that an ex parte application can be made for emergency relief in a proper case.

RECOMMENDATION #23

(1) THAT PROCEEDINGS UNDER THE PROPOSED ACT BE BROUGHT BY

(i) STATEMENT OF CLAIM,

(ii) ORIGINATING NOTICE, OR

(iii) APPLICATION IN AN ACTION BETWEEN THE SPOUSES.

(2) THAT THE COURT MAY DISPOSE OF ANY APPLICATION IN A SUMMARY WAY.

(Bill No. 1, sec. 44)

The economic affairs of a husband and wife are often intertwined and they will often have defective records, or no records, of financial matters. It will therefore be difficult or impossible in many cases to trace the origin of gains represented by assets. An important question, and one the answer to which will often be decisive, is whether it is for the one spouse to establish a right to a credit in the accounting or for the other spouse to prove that there is no right. We think that the law should favour sharing. Therefore, a spouse claiming a credit for property owned at marriage should have to prove its ownership and value. A spouse claiming a credit for property received by gift or inheritance should similarly have to prove the relevant facts, and so should a spouse claiming credit for

a debt, a spouse claiming a credit for damages for personal injuries, or a spouse claiming that property he or she owns is held in trust for another.

RECOMMENDATION #24

> *(1) THAT UNTIL THE CONTRARY IS PROVED IT SHALL BE PRESUMED THAT PROPERTY OWNED BY A SPOUSE AT THE TERMINATION OF A STATUTORY REGIME RESULTED FROM GAINS MADE BY THE SPOUSE DURING THE STATUTORY REGIME.*
>
> (Bill No. 1, sec. 17(1))
>
> *(2) THAT EXCEPT AS PROVIDED IN SUBSECTION (1) THE ONUS OF PROOF OF A FACT SHALL LIE UPON THE PARTY ASSERTING IT.*
>
> (Bill No. 1, sec. 17(2))

A proper sharing depends upon information about what is to be shared. In many cases that information will be known only to the spouse who owns property. Some provision must be made for disclosure of that information to the other spouse, and we so recommend.

RECOMMENDATION #25

> *(1) THAT UPON TERMINATION OF A STATUTORY REGIME OR IN PROCEEDINGS IN WHICH TERMINATION IS CLAIMED A SPOUSE SHALL UPON WRITTEN NOTICE FROM THE OTHER FORTHWITH DISCLOSE IN WRITING VERIFIED BY AFFIDAVIT ALL PROPERTY OWNED BY THAT SPOUSE AND ALL DEBTS AND PARTICULARS OF ALL DEDUCTIONS CLAIMED BY HIM.*
>
> (Bill No. 1, sec. 18(1))
>
> *(2) THAT IN PROCEEDINGS FOR OR LEADING TO TERMINATION THE COURT HAVE POWER TO*

(i) DIRECT A SPOUSE TO SUPPLY THE INFORMATION PROVIDED FOR IN SUBSECTION (1) AND SUCH OTHER INFORMATION AS THE COURT MAY DEEM FIT,

(ii) ALLOW A SPOUSE TO EXAMINE THE OTHER SPOUSE UNDER OATH AS TO HIS PROPERTY, THE VALUE THEREOF, THE DISPOSITION OF PROPERTY PREVIOUSLY OWNED, AND AS TO DEBTS AND DEDUCTIONS, AND

(iii) GIVE OTHER AND FURTHER DIRECTIONS IN ORDER TO ESTABLISH ALL MATERIAL FACTS.

(Bill No. 1, sec. 18(2))

A spouse may fail to disclose property. He may fail to disclose a material fact, or he may make a false or misleading statement. He should not benefit from his failure to disclose. The other spouse should be able to make a claim, whether at the time of the division of property or later, for payment of any amount of which he was deprived by the other's failure to make proper disclosure. Unless there is fraud, however, the application should be brought before the court within one year after the date of the agreement or judgment based upon the incorrect or incomplete information.

RECOMMENDATION #26

(1) THAT UPON BEING SATISFIED

(i) THAT A SPOUSE HAS INTENTIONALLY OR NEGLIGENTLY OMITTED OR MISSTATED INFORMATION WHICH HE WAS OBLIGED TO GIVE UNDER RECOMMENDATION #25, AND

(ii) THAT HIS NEGLECT OR OMISSION HAS RESULTED IN AN INCREASE IN A BALANCING PAYMENT PAYABLE TO HIM OR A DECREASE IN A BALANCING PAYMENT PAYABLE BY HIM, WHETHER THE BALANCING PAYMENT IS PAYABLE BY AGREEMENT OR JUDGMENT,

THE COURT MAY GIVE JUDGMENT TO THE OTHER SPOUSE FOR THE AMOUNT OF THE INCREASE OR DECREASE.

(Bill No. 1, sec. 18(3))

(2) THAT EXCEPT IN THE CASE OF FRAUD AN APPLICATION FOR JUDGMENT UNDER SUBSECTION (1) SHALL BE BROUGHT BY ORIGINATING NOTICE RETURNABLE WITHIN ONE YEAR AFTER THE EXECUTION OF THE AGREEMENT OR THE GIVING OF THE JUDGMENT.

(Bill No. 1, sec. 18(4))

(i) Incidential Powers of the Court

One drawback to any form of sharing or to any provision under which one spouse can be required to make a substantial lump sum payment to the other is that it may often be difficult to raise the lump sum without selling assets at a low value or selling part of a property such as a business or a farm with the result that the remainder is not an economic unit. We believe that the court should have broad powers to minimize such difficulties by spreading the payments over whatever period of time appears to be appropriate. We believe that the court should also have the consequential power to require payment of interest and to require the debtor spouse to give security for payment. The court should also have power to vary the terms of any order giving time or requiring security, though not as to the capital amount, because the circumstances may change. Our previous recommendations with regard to the

transfer of property can also be used to minimize difficulties.

The court should also have power to direct that property be sold and that the proceeds of sale be divided between the husband and wife. It may be that that power would not be frequently exercised, but it may occasionally be better to have the property sold than to have it held in common by two people who are not on good terms.

We believe also that the court should be empowered to have regard to the likely tax consequences of the transfer or ownership of property. Obviously, for example, a property which cannot be disposed of without incurring a recapture of depreciation, an addition to income, or a taxable capital gain, is not worth as much to the owner as if it could be disposed of without those consequences. Further, there may be cases in which the tax consequences would suggest one form of distribution rather than another; for example, if a property whose value has increased since its acquisition is transferred to the spouse with the lower income, the potential tax liability will be somewhat less than if it is retained by the spouse with the higher income. The statute should also be flexible enough to permit the change of ownership from one spouse to the other to take place either before or after the dissolution of a marriage with a view to avoiding unnecessary tax.

RECOMMENDATION #27

(1) THAT IN EXERCISING ITS POWERS UNDER THE PROPOSED STATUTE, THE COURT MAY

(i) ORDER A SPOUSE TO PAY THE AMOUNT OF THE JUDGMENT FOR A BALANCING PAYMENT OVER A PERIOD OF TIME WITH OR WITHOUT INTEREST,

(ii) ORDER A SPOUSE TO GIVE SECURITY,

(iii) CHARGE PROPERTY WITH THE PAYMENT OF THE AMOUNT OF A JUDGMENT FOR A BALANCING PAYMENT AND PROVIDE FOR ENFORCEMENT OF THE CHARGE,

(iv) VARY THE TERMS OF ORDERS MADE UNDER SUBPARAGRAPHS (i), (ii) AND (iii) OF THIS SUBSECTION,

(v) ORDER THAT PROPERTY BE SOLD AND THAT THE PROCEEDS BE DIVIDED BETWEEN THE SPOUSES IN SUCH PROPORTION AS THE COURT MAY DIRECT,

(vi) AWARD COSTS,

(vii) MAKE CONSEQUENTIAL ORDERS AND DIRECTIONS.

(Bill No. 1, sec. 19(1))

(2) IN DECIDING WHICH ORDER TO MAKE THE COURT MAY HAVE REGARD TO

(i) ANY HARDSHIP OR DISRUPTION WHICH IS LIKELY TO BE CAUSED TO A SPOUSE OR HIS AFFAIRS,

(ii) THE LIKELY TAX CONSEQUENCES OF ITS ORDER OR OF THE TRANSFER OR OWNERSHIP OF PROPERTY.

(Bill No. 1, sec. 19(2))

(j) Varying and Contracting out of Deferred Sharing

An important question is whether a couple should be able to make changes in the deferred sharing regime or to contract out of it altogether. We will first consider the case of a couple who are about to marry.

We think that a prospective husband and wife should be free to make their own special arrangements if they wish. Special circumstances may make the proposed regime inappropriate, or the couple may prefer another arrangement. We do not think that prior to marriage there is any imbalance of bargaining power against which the law should give protection, or that there is any public policy which requires uniformity.

On the other had, we think that steps should be taken to ensure that a prospective spouse understands the effect of any agreement which may adversely affect the rights of that spouse. We have considered recommending that a certificate of independent legal advice be required or even a court order, but we have concluded that such a requirement would put the prospective husband and wife to expense and trouble which are not justified. We recomment a safeguard similar to that required for a consent to disposition of property under the Dower Act. In order to choose a different matrimonial property regime or to make a change in the statutory regime, each spouse whose right to receive a balancing payment is affected should have to sign a written agreement and acknowledge before a Commissioner for Oaths that he has read and understood it and is signing freely and voluntarily for the purpose of choosing the different regime or making the agreed changes. We hope that arrangements could be made through the office of the Registrar of Vital Statistics to have Commissioners for Oaths available for this purpose. We have considered whether or not the law should require the agreement to be filed in the office of an official such as the Registrar of Vital Statistics, but we do not recommend such a requirement. We think that it should be left for the parties to keep the agreement safe and to be able to produce it when

it is needed, and we do not see any public interest in having such agreements available for inspection.

We will next consider whether a couple who are residents of Alberta at marriage should afterwards be able to contract out of or make changes in deferred sharing. As in the case of the prospective husband and wife there may be special circumstances, or the couple may prefer an arrangement other than deferred sharing. We are concerned however about the possibility that one spouse may overreach the other or make use of a stronger economic position to coerce the other into a disadvantageous agreement. We think that the right balance would be to allow the couple to make an agreement but to require that, in addition to the requirements of consent and acknowledgement, one of two conditions be satisfied before the agreement can be enforced. One condition would be that an application be made by both spouses for the approval of the agreement by the court. That could be done at any time. If that is not done, the alternative way of making the agreement enforceable would be to satisfy the court when the agreement is put forward that the agreement was fair and just at the time it was made.

We now turn to couples who were not subject to the property law of Alberta at the time of marriage and who therefore had no effective opportunity to vary or contract out of deferred sharing. If the husband and wife make an agreement before they move to Alberta and if the agreement was valid by the law to which they were subject when it was made, we see no reason why the law of Alberta should not recognize it, and we will make a recommendation in accordance with that view. If they make their agreement after they establish a common habitual residence in Alberta we

think that they should observe the requirements of consent and acknowledgement which would apply to other Albertans but, for reasons which we will give later in this Report, we think that they should otherwise be free to vary or contract out of deferred sharing without fulfiling any additional condition.

An agreement may provide only for certain aspects of the property relationship between a married couple and the law must provide for the others. We think that it should do so by saying that deferred sharing should apply except as varied by the agreement.

RECOMMENDATION #28

(1) THAT AN AGREEMENT UNDER THIS RECOMMENDATION MAY BE ENTERED INTO BY

(i) A COUPLE WHO INTEND TO MARRY EACH OTHER, OR

(ii) A MARRIED COUPLE OTHER THAN A COUPLE WHO ARE MARRIED BEFORE THE COMMENCEMENT OF THE PROPOSED STATUTE AND SUBJECT TO IT AT ITS COMMENCEMENT.

(2) THAT A COUPLE REFERRED TO IN SUBSECTION (1) MAY:

(i) AGREE THAT THE STATUTORY REGIME SHALL NOT APPLY TO THEM,

(ii) SUBSTITUTE A DIFFERENT MATRIMONIAL PROPERTY REGIME,

(iii) AGREE TO BE SUBJECT TO THE DISCRETIONARY SYSTEM APPLICABLE TO A COUPLE WHO ARE MARRIED BEFORE THE COMMENCEMENT OF THE PROPOSED STATUTE AND ARE SUBJECT TO IT AT ITS COMMENCEMENT, OR VARY THE TERMS OF THE STATUTORY REGIME OR EXCLUDE PROPERTY FROM ITS OPERATION.

(3) THAT AN AGREEMENT TO DO ANY OF THE THINGS DESCRIBED IN SUBSECTION (2) BE OF NO EFFECT UNLESS

(i) IT IS IN WRITING,

(ii) EACH SPOUSE WHOSE RIGHT TO RECEIVE A BALANCING PAYMENT IS AFFECTED BY THE AGREEMENT ACKNOWLEDGES APART FROM THE OTHER

(a) THAT HE IS AWARE OF THE NATURE AND EFFECT OF THE AGREEMENT,

(b) THAT HE IS AWARE THAT THE PROPOSED ACT GIVES HIM THE RIGHT TO A BALANCING PAYMENT UPON THE TERMINATION OF THE MATRIMONIAL PROPERTY REGIME AND THAT HE INTENDS TO GIVE UP THAT RIGHT TO THE EXTENT NECESSARY TO GIVE EFFECT TO THE AGREEMENT, AND

(c) THAT HE IS EXECUTING THE AGREEMENT FREELY AND VOLUNTARILY WITHOUT ANY COMPULSION ON THE PART OF THE OTHER SPOUSE OR PROSPECTIVE SPOUSE, AND

(iii) IN THE CASE OF A MARRIED COUPLE EACH OF WHOM AT THE TIME OF MARRIAGE WAS RESIDENT IN ALBERTA THAT THE COURT

(a) APPROVES THE CONTRACT AT ANY TIME UPON THE JOINT APPLICATION OF THE COUPLE, OR

(b) IS SATISFIED THAT THE AGREEMENT WAS FAIR AND JUST WHEN IT WAS ENTERED INTO.

(4) THAT THE ACKNOWLEDGEMENT BE TAKEN BEFORE A PERSON AUTHORIZED TO TAKE PROOF OF THE EXECUTION OF INSTRUMENTS UNDER THE LAND TITLES ACT AND A CERTIFICATE OF ACKNOWLEDGEMENT IN A FORM TO BE PRESCRIBED BY THE PROPOSED STATUTE OR TO THE LIKE EFFECT, SHALL BE ENDORSED ON OR ATTACHED TO THE AGREEMENT EXECUTED BY THE SPOUSE.

(5) THAT THE STATUTORY REGIME APPLY EXCEPT AS VARIED BY THE AGREEMENT.

(6) THAT AN AGREEMENT UNDER THIS RECOMMENDATION MAY HAVE RETROACTIVE EFFECT.

(Bill No. 1, sec. 5)

RECOMMENDATION #29

THAT NOTHING IN THE PROPOSED STATUTE SHALL AFFECT AN AGREEMENT MADE BY PERSONS NOT SUBJECT TO IT AT THE TIME THE AGREEMENT IS MADE OTHER THAN A COUPLE EACH OF WHOM IS RESIDENT IN ALBERTA AND WHO INTEND TO MARRY EACH OTHER.

(Bill No. 1, sec. 6)

(k) Waiver and Renunciation

A spouse would in effect be able to waive a claim to a balancing payment by not advancing it. The reason is that our proposals do not give one spouse an interest in the property of another; only the transfer of property by or under a judgment of the court could confer such an interest. The statute should do more than allow a spouse to waive a right by not asserting it; it should go on to provide for a way in which the spouses can settle their respective claims and a way in which one spouse can unilaterally renounce his or her rights. The spouses should not, however, be able to do so except at the termination of the matrimonial property regime, or during proceedings leading to it.

We think that there should be a safeguard to protect a spouse who might give up his or her rights in ignorance of the effect of doing so or under the influence of the

other spouse. The majority view is that the appropriate safeguard is to require the approval of the court, the time and expense being justified by the importance of ensuring that there is no overreaching. In many cases the couple will be before the court in any event and the additional time and cost should not be great.

RECOMMENDATION #30

> *(1) THAT AT OR AFTER THE TERMINATION OF A STATUTORY REGIME OR IN THE COURSE OF PROCEEDINGS LEADING THERETO A SPOUSE MAY*
>
> *(i) RENOUNCE HIS RIGHT TO RECEIVE A BALANCING PAYMENT, OR*
>
> *(ii) AGREE TO ACCEPT PROPERTY OR A SUM OF MONEY IN FULL SETTLEMENT OF HIS RIGHT TO RECEIVE A BALANCING PAYMENT.*
>
> *(2) THAT A RENUNCIATION OR AGREEMENT UNDER SUBSECTION (1) BE OF NO EFFECT UNLESS IT IS APPROVED BY THE COURT UPON THE APPLICATION OF EITHER SPOUSE.*
>
> (Bill No. 1, sec. 27)

(1) Rights of Persons other than the Married Couple

The next question is whether a spouse's right to share in the gains of the other spouse should come ahead of the other spouse's obligations to other creditors, whether it should rank equally with those obligations, or whether it should be subordinated to them.

Until the claimant spouse obtains a judgment for a balancing payment, we think that his or her claims must rank behind the claims of creditors. The claimant spouse

should take the other spouse as he is, with the benefit of his thrift and the burdens of the obligations which he incurs. Until judgment, the claim to a balancing payment is inchoate and should not interfere with the owner spouse in dealing with his property unless he does it with intent to defeat the claim. If a spouse's claim could defeat outside creditors the deferred sharing regime would be likely to interfere with credit and with the financing of persons in business, and that is not a function of the matrimonial property regime and is not in the interest of the public.

When judgment has been given for the balancing claim, however, we think that that judgment should rank equally with judgments in favour of other unsecured creditors. The deduction of liabilities in arriving at the balancing payment should leave enough assets in the hands of the debtor to protect creditors. The property which is the basis of the shareable gains should protect the other spouse.

We think, however, that if the court orders a spouse to give security for the equalizing claim, that is another matter. In making such a direction the court will have canvassed the whole situation and will no doubt consider whether the giving of security would act unfairly on other creditors. The very nature of security is that it comes ahead of unsecured claims and later securities affecting the same property.

RECOMMENDATION #31

(1) THAT UNLESS OTHERWISE PROVIDED THE PROPOSED STATUTE DOES NOT AFFECT THE RIGHTS OF PARTIES OTHER THAN A HUSBAND AND WIFE AND THEIR PERSONAL REPRESENTATIVES.

(Bill No. 1, sec. 40)

(2) THAT A JUDGMENT FOR A BALANCING PAYMENT RANK EQUALLY WITH A JUDGMENT IN FAVOUR OF ANOTHER JUDGMENT CREDITOR AND THAT THE PROVISIONS OF THE EXECUTION CREDITORS ACT APPLY TO A WRIT OF EXECUTION BASED THEREON.

(Bill No. 1, sec. 41)

(3) THAT SECURITY PROVIDED OR A CHARGE IMPOSED UNDER THE PROPOSED ACT TAKE PRIORITY AS A SECURED CLAIM.

(Bill No. 1, sec. 42)

(4) THAT UNTIL JUDGMENT IS OBTAINED A RIGHT TO RECEIVE A BALANCING PAYMENT BE NOT ASSIGNABLE OR SUBJECT TO ATTACHMENT BY A THIRD PARTY.

(Bill No. 1, sec. 43)

(m) Dissipation of Property

A spouse might strip himself of his shareable gains in order to defeat the other's claim. He could do so by giving his property to his family or by transferring it for less than its value. That would also allow him in some cases to share in the other spouse's shareable gains. We think that the proposed statute should give protection against such a practice.

The proposed statute should prohibit such a gift or transfer unless the other spouse consents. We have already

recommended that a prohibited gift or transfer should be grounds for an application for a balancing payment. The statute should go on to empower the court to make an order restraining the gift or transfer.

If the gift or transfer is made, the donor should have to add it back into the value of his property in determining his shareable gains so that he will bear the burden of it. In the case of a gift innocently made there should be a limitation period, which we think should be six years. If the donor intended to affect the amount of the balancing payment or the ability of the other spouse to obtain payment there should be no limitation period.

What if the donor spouse does not have enough property left to make the balancing payment? Should the other spouse be able to recover from the donee? We do not think that the court should have the power to set aside the gift or transfer; that might affect third parties and it would be harsh if the value of the gift or transfer much exceeds the amount needed to satisfy the other spouse's claim. We do think, however, that the court should have the power to require the donee to make good the amount of the loss suffered by reason of the gift or transfer, but only if the donee was a party to the wrongdoing, that is, intended to prevent the other spouse from realizing that spouse's claim. The donee should be required to prove that he did not have any such intention.

RECOMMENDATION #32

(1) THAT WHILE A STATUTORY REGIME IS IN FORCE A SPOUSE SHALL NOT WITHOUT THE CONSENT OF THE OTHER SPOUSE MAKE

(i) A SUBSTANTIAL GIFT OF PROPERTY, OR

(ii) A SUBSTANTIAL TRANSFER OF PROPERTY FOR NO CONSIDERATION OR FOR A CONSIDERATION WHICH IS KNOWN TO BE INADEQUATE.

(2) THAT THE VALUE OF ANY GIFT OR TRANSFER MADE IN CONTRAVENTION OF SUBSECTION (1)

(i) WITHIN SIX YEARS BEFORE THE TERMINATION OF A STATUTORY REGIME, OR

(ii) AT ANY TIME WHILE A STATUTORY REGIME IS IN FORCE IF MADE WITH THE INTENTION OF AFFECTING THE AMOUNT OF THE BALANCING PAYMENT OR PREVENTING RECOVERY THEREOF,

SHALL BE ADDED TO THE VALUE OF THE PROPERTY OF THE SPOUSE WHO MADE IT.

(3) THAT UPON BEING SATISFIED THAT A SPOUSE HAS MADE OR INTENDS TO MAKE A GIFT OR TRANSFER IN CONTRAVENTION OF SUBSECTION (1) THE COURT MAY MAKE ANY OR ALL OF THE FOLLOWING ORDERS:

(i) AN ORDER RESTRAINING SUCH GIFT OR TRANSFER, AND

(ii) IF THE DONEE OR TRANSFEREE RECEIVED THE GIFT OR TRANSFER WITH THE INTENTION OF PREVENTING COLLECTION OF THE CLAIM OF THE OTHER SPOUSE, AN ORDER REQUIRING THE DONEE OR TRANSFEREE TO PAY TO THE OTHER SPOUSE THE AMOUNT OF THE LOSS SUFFERED BY REASON OF THE GIFT OR TRANSFER.

(4) THAT UNTIL THE CONTRARY IS PROVEN, THE DONEE OR TRANSFEREE IS PRESUMED TO HAVE THE INTENTION REFERRED TO IN SUBSECTION (3)(ii) WITH REGARD TO ANY GIFT OR TRANSFER MADE WITHIN THREE YEARS BEFORE THE COMMENCEMENT OF PROCEEDINGS BY THE OTHER SPOUSE.

(Bill No. 1, sec. 39)

3. Married Couples who Move to Alberta

Some couples, having been married and habitually resident elsewhere, will come to Alberta and establish a common habitual residence in the province. We have said at page 30 of this Report that the view of the majority of our Board is that deferred sharing should apply to them retroactively, and we will now make a recommendation to that effect.

RECOMMENDATION #33

(1) THAT A DEFERRED SHARING REGIME COMMENCE UPON THE ESTABLISHMENT IN ALBERTA OF A COMMON HABITUAL RESIDENCE BY A MARRIED COUPLE WHO ARE NOT ALREADY SUBJECT TO DEFERRED SHARING.

(Bill No. 1, sec. 7(2)(ii))

(2) THAT UPON COMMENCEMENT OF A DEFERRED SHARING REGIME UNDER SUBSECTION (1) IT SHALL BE CONCLUSIVELY DEEMED TO HAVE COMMENCED ON THE DATE OF THE MARRIAGE OF THE MARRIED COUPLE.

(Bill No. 1, sec. 7(3))

We said at the same page that two special provisions should be made for such couples. One is that they should be able to agree that deferred sharing should not apply to them; that has been dealt with in Recommendation #28. The second is that the court should have a special discretion to vary the shares of the couple, and we will now make a recommendation to that effect.

RECOMMENDATION #34

THAT THE COURT MAY VARY OR CANCEL THE SHARE OF A SPOUSE IN THE SHAREABLE GAINS MADE BY A

COUPLE BEFORE THE PROPOSED STATUTE APPLIES TO THEM IF IT IS REASONABLE TO INFER THAT THE SPOUSES OR EITHER OF THEM WOULD HAVE ORDERED THEIR AFFAIRS DIFFERENTLY IF THEY HAD BEEN SUBJECT TO DEFERRED SHARING WHILE THE SHAREABLE GAINS WERE BEING MADE.

(Bill No. 1, sec. 14(3)(ii))

4. Death of a Spouse

(1) Choice of Property Regime

There is less dissatisfaction with the existing law which applies when one spouse dies than there is with the existing law which applies on marriage breakdown or divorce. In many cases the deceased spouse leaves a will which treats the survivor fairly. If there is no will, the Intestate Succession Act often gives fair treatment. Whether or not the deceased spouse leaves a will the Family Relief Act gives substantial protection to the survivor.

Most of those who answered the Downey Survey thought a $30,000 estate should go to a surviving spouse and that anyone making a will should not have an unrestricted right to leave property away from spouse and children. In the written submissions which we received, the ones from major organizations were divided between those who made no specific recommendation, those who think that the existing law is generally adequate, and those who think that a matrimonial property regime based on sharing should apply at death. A very substantial majority of the husbands and wives who replied to the questionnaire circulated by the Alberta Women's Bureau thought that a widow should get all of a deceased husband's property or the same share as she would have got if they had broken up.

We are not able to deduce from all of this that there is a great preponderance of feeling in favour of or against deferred sharing upon the death of a spouse. If it is to apply we do not have any real evidence whether the public would favour a regime which would only require the estate to share with the survivor or a regime which, if the survivor has more than his or her share of the economic gains made during marriage, would require the survivor to pay into the estate.

We have given consideration to three different proposals. The majority proposal is that the survivor be entitled to share with the estate if the estate has more than the deceased's proper share of the shareable gains made by the couple, but would not oblige the survivor to make a balancing payment to the estate if the survivor has more than his or her share. The second proposal is that deferred sharing should apply on death no matter whether it is the deceased's estate or the survivor who has more than the appropriate share of the shareable gains. The third proposal is to leave the situation on death to be dealt with as it now is by the Intestate Succession Act, by will, and by the Family Relief Act, possibly with some amendment giving greater relief to the surviving spouse under either or both of the Acts. Each of the three proposals finds support on our Board, and we will outline them all. We will first deal with the majority proposal that the matrimonial property regime should apply upon the death of a spouse, but, except in special circumstances, only in favour of the survivor.

(a) Majority Proposal: Sharing only in Favour of Surviving Spouse

The majority of our Board start with the proposition that there should be equal sharing between husband and

wife. However they have in mind the living husband and wife and not persons who may claim under the will or through the estate of either. They are not prepared to carry the logic of equal sharing through to a conclusion which, in their view, conflicts with an even more fundamental aspect of the economic relation between husband and wife, their right and their duty to see that their resources remain available for the support of both of them while either remains alive.

The majority are conscious that deferred sharing may cause difficulty for a spouse who must make a balancing payment. They have concluded that occasional difficulties must be accepted in order to ensure fairness to both spouses while they live, but they are not prepared to accept them in order to require the making of a balancing payment which, by the nature of things, cannot go to the benefit of the deceased spouse but must either go to the benefit of others or be returned to the paying spouse.

There are cases in which the husband and wife divide property between them while both are alive so that each, and in particular the one with the lesser earning capacity, will have some financial resources come what may. If the survivor could be required to pay into the estate, the majority of our Board think that that protection would not be possible. If a husband should die insolvent because of a business failure or because he is responsible for a fatal automobile accident which renders his estate liable for huge damages, the surviving wife would have to share her economic gains with the estate for the benefit of the estate's creditors, and the majority think that that should not happen. A matrimonial property regime intended for the benefit of husband and wife should not work to their detriment.

There are many cases in which there will be children to be looked after. The majority think that the survivor, who will be under obligation to support them and whose appreciation of the needs of the children must necessarily be better than that of the deceased, should not have to turn over to the estate property from which he or she would be able to look after them, especially since the property of the estate may not be available for support of the children at all or may be available only by court proceedings under the Family Relief Act.

The majority agree that their recommendation, if accepted, might cause a husband or wife to think that there is an advantage in accumulating assets in his or her own name so as to have something to leave by will. They agree that the desire to have something to leave is a human one and one which should be taken into consideration by the law. They do not, however, think that these considerations provide sufficient grounds for the law to impose upon a living husband or wife an obligation to make a balancing payment into the estate.

It should be noted here that the Ontario Law Reform Commission's recommendation is similar to that just made but with one important difference. They would apply their proposed matrimonial property regime in favour of the survivor only, as does the majority proposal, but they would include in the property to be shared not only the property accumulated during marriage but also the value of the separate property of the deceased. Their reasons for the latter proposal are that because the deceased spouse is not there to give evidence it would be difficult to establish or agree upon deductible values; that an executor or administrator is under an obligation to do his best for the estate

and will not be able to agree at all as to what payment should be made, or will be able to do so only after an application for court approval; and that taken as a group, marriages which are terminated by death last longer than those terminated during the lifetime of both spouses so that on the one hand, the difficulties in identifying and valuing separate property are magnified and on the other (since the Ontario proposal involves a deduction of the dollar value of a spouse's separate property at marriage) the length of time and inflation will both make the deduction less significant. While they recognize the force of these statements the majority nevertheless think that it is better to adhere to the original principle of sharing only the accumulations during marriage.

The majority would make one exception to the recommendation that the matrimonial property regime should apply only in favour of the survivor. That exception would be made to relieve against the hard case of a spouse who has dependant children from a previous marriage and who, it may be assumed, would want to provide for them. Their recommendation is that a child who is a dependant of the deceased spouse (i.e., who is under eighteen years of age or unable to earn a living because of a physical or mental handicap) should be entitled to apply for a payment from the surviving spouse to provide for the child's maintenance. The amount paid should not exceed the balancing payment which would be made if the matrimonial property regime applied in favour of the estate, and it should not apply so as to leave the survivor without adequate provision for his proper maintenance.

The surviving spouse may die before making an application for a balancing payment. We think that no application should then be maintainable by the estate of the

surviving spouse as we see no reason to enrich one estate at the expense of another. Upon that view there is no need to make specific provision for the case in which it is doubtful which spouse survived the other, other than to ensure to the dependants of each the claim which we have described in the preceding paragraph.

The obligation to share economic gains with the survivor would be much like an obligation to a creditor. After it is provided for, the law of succession would apply to the remainder of the estate; a married person who does not want his spouse to share in the remainder can dispose of it by will. The Family Relief Act should also apply; the sharing may not leave the surviving spouse with adequate provision for his or her proper maintenance, and any balancing payment can be taken into consideration in determining the amount needed by the survivor for maintenance. It should be possible for the surviving spouse to join an application under the Family Relief Act with an application under the proposed statute, but the application for sharing should take precedence over Family Relief Act applications.

RECOMMENDATION #35

(1) WHERE A STATUTORY REGIME IS TERMINATED BY THE DEATH OF A SPOUSE THE SURVIVING SPOUSE MAY APPLY TO THE COURT FOR AN ORDER DETERMINING THE RIGHTS OF THE PARTIES IN THE SAME MANNER AS UPON AN APPLICATION FOR A BALANCING PAYMENT DURING THE LIFETIME OF BOTH SPOUSES.

(Bill No. 1, sec. 20(1) and 21(1))

(2) NO APPLICATION SHALL BE MADE OR MAINTAINED BY OR ON BEHALF OF AND NO JUDGMENT OR

ORDER SHALL BE MADE IN FAVOUR OF AN ESTATE OR THE PERSONAL REPRESENTATIVES OF A SPOUSE OR OF A DEPENDANT.

(Bill No. 1, sec. 21(2))

(3) UNLESS OTHERWISE PROVIDED THE GENERAL PROVISIONS RELATING TO SHARING UPON DISSOLUTION OR MARRIAGE BREAKDOWN DURING LIFETIME SHALL APPLY TO APPLICATIONS FOLLOWING THE DEATH OF A SPOUSE.

(Bill No. 1, sec. 20(2))

(4) THAT DEFERRED SHARING DO NOT AFFECT

(i) THE APPLICATION OF THE WILL OF A DECEASED SPOUSE OR THE INTESTATE SUCCESSION ACT TO THE ESTATE OF THE DECEASED SPOUSE AS IT STANDS AFTER THE GIVING OF A JUDGMENT FOR A BALANCING PAYMENT, OR

(ii) THE RIGHT OF THE SURVIVING SPOUSE TO MAKE AN APPLICATION UNDER THE FAMILY RELIEF ACT.

(Bill No. 1, sec. 26(1))

(5) THAT AN APPLICATION UNDER THE FAMILY RELIEF ACT MAY BE JOINED WITH AN APPLICATION UNDER THIS RECOMMENDATION.

(Bill No. 1, sec. 26(2))

(6) THAT AN APPLICATION UNDER THIS RECOMMENDATION TAKE PRECEDENCE OVER AN APPLICATION UNDER THE FAMILY RELIEF ACT AND FOR THE PURPOSES OF THIS RECOMMENDATION THE COURT SHALL HAVE REGARD TO THE PROPERTY OF THE DECEASED SPOUSE AT THE TIME OF THE DEATH OF THE DECEASED SPOUSE AND TO THE PROCEEDS OF ANY POLICY OF LIFE INSURANCE PAYABLE TO THE ESTATE OF THE DECEASED SPOUSE.

(Bill No. 1, sec. 26(3))

RECOMMENDATION #36

(1) IN THIS RECOMMENDATION WORDS AND PHRASES HAVE THE SAME MEANING AS IN THE FAMILY RELIEF ACT.

(2) THIS RECOMMENDATION APPLIES IF

(i) ADEQUATE PROVISION HAS NOT BEEN MADE FOR THE PROPER MAINTENANCE OF

(a) A DEPENDANT OF A DECEASED SPOUSE WHO IS NOT A DEPENDANT OF THE SURVIVING SPOUSE,

(b) A DEPENDANT OF EITHER SPOUSE WHO IS NOT A DEPENDANT OF THE OTHER SPOUSE, IF THE SPOUSES DIE IN CIRCUMSTANCES IN WHICH IT IS DOUBTFUL WHICH SURVIVED THE OTHER, OR

(c) A DEPENDANT OF THE SURVIVING SPOUSE WHO IS NOT A DEPENDANT OF THE DECEASED SPOUSE, IF THE SURVIVING SPOUSE DIES WITHOUT OBTAINING A JUDGMENT FOR A BALANCING PAYMENT AGAINST THE ESTATE OF A DECEASED SPOUSE, AND

(ii) THE PROVISION WOULD HAVE BEEN ADEQUATE OR LESS INADEQUATE IF ALL OR PART OF THE BALANCING PAYMENT HAD BEEN MADE TO THE ESTATE OF THE DECEASED SPOUSE.

(3) THAT UPON APPLICATION BY A DEPENDANT REFERRED TO IN SUBSECTION (2) THE COURT MAY GIVE JUDGMENT AGAINST THE OTHER SPOUSE OR HIS ESTATE FOR SUCH PART OF THE BALANCING PAYMENT DETERMINED UNDER RECOMMENDATION #9 AS IS NECESSARY TO MAKE PROPER PROVISION FOR THE ADEQUATE MAINTENANCE OF THE DEPENDANT.

(4) THAT THE COURT MAY DIRECT THAT THE PAYMENT BE MADE TO THE DEPENDANT OR TO THE PERSONAL REPRESENTATIVES OF THE DECEASED OR A TRUSTEE IN TRUST FOR THE DEPENDANT UPON SUCH TERMS

AND SUBJECT TO SUCH CONSEQUENTIAL DIRECTIONS AS THE COURT MAY DEEM FIT.

(5) THE COURT SHALL NOT REQUIRE THE SURVIVING SPOUSE TO MAKE A PAYMENT WHICH WILL LEAVE HIM WITHOUT ADEQUATE PROVISION FOR HIS PROPER MAINTENANCE.

(Bill No. 1, sec. 22)

(b) Second Proposal: Sharing Both Ways

We will now discuss the second proposal which we referred to above, which is that deferred sharing should apply upon death whether the balancing payment is in favour of the survivor or of the deceased's estate. Its proponents say that if marriage is to be recognized as an economic partnership, and if one spouse is to be regarded as having a claim to share in the gains made by the other, it follows that the claim arises as the gains are made and should not be taken away by any event, including the death of either spouse. If it can be taken away by death then the law has not recognized the non-owning spouse as having a full and equal share in the gains and has not treated him or her as a matrimonial partner. To refuse that spouse an equal claim to the economic gains of the couple is in their view to negate the principle of equal sharing.

Further, in this view, there is a good reason why the deceased spouse's estate should be entitled to share. Fairness requires that the deceased spouse should have something to leave to the children of the marriage, to his or her children by an earlier marriage, or to others. If the property is all or largely in the name of the survivor, then the deceased will have little or nothing to leave. During lifetime the non-owning spouse will have to accept the proposition that he or she will not have much or anything

to leave, while the other, by virtue of having got title to the property, will have something to leave.

In this view, the effect of refusing to require the survivor to pay into the estate in a proper case will be to give a partial right of survivorship to the spouse with the most assets and to deny it to the spouse with the least assets. If the spouse with the most assets dies first, his estate will retain the right to dispose of half the property accumulated by the couple during their marriage because the survivor's claim (excluding the Family Relief Act from consideration) will be to only half of the economic gains of the couple. However, if the spouse with the most of the property survives, then, in the absence of a balancing payment or transfer, he or she will retain the benefit of the share which should have gone to the deceased. This is another way of stating that there would be unfair and unequal treatment unless deferred sharing is allowed to work in favour of the estate as well as in favour of the survivor.

There is a further consideration. One very desirable result of instituting a new matrimonial property regime will be to remove any incentive on the part of one spouse to try to get title to property in his or her own name. However if the estate of the deceased spouse is treated differently from the survivor, there will be such an incentive, and that circumstance is a strong argument for an equal sharing on death, whether in favour of the survivor or of the estate. Those members of our Board who favour sharing in either direction do not want a divisive scramble for assets, nor do they want the law to give an incentive to a sick or elderly spouse to break up a marriage so as to get a share of the property before dying.

In the view of the proponents of this alternative, the arguments for the majority recommendation break down on two fundamental propositions. One is that fairness requires equal treatment of husband and wife. The second is that it is not equal treatment if the spouse with more than his or her share of the economic gains of the couple has the power to dispose by will of property resulting from those gains while the other spouse does not, and if one spouse has a right of survivorship which the other does not have.

Their specific proposal is that the situation be the same on death as on termination of the regime during the lifetime of the parties. The general law of succession and the Family Relief Act would apply to the remainder of the estate.

(c) Third Proposal: Existing Law with Possible Variation

The proponents of the third proposal think that the matrimonial property regime should not apply so as to require a sharing on death. They are of the opinion that the present law makes reasonable provision for the surviving spouse and the children, and that the imposition of deferred sharing will require elaborate computations and court applications which are not necessary and which will serve no useful purpose. The pressure for change has come in connection with divorce, and complaints about unsatisfactory treatment of the surviving spouse are comparatively rare.

That is not to say that some changes might not be desirable. We have received several complaints about the present pattern of the Intestate Succession Act from people who think that the $20,000 share first distributed to the

surviving spouse is not sufficient, and from others who think the surviving spouse should not have to share with adult children. That is a subject which might well be looked into. Further, if there is any feeling that the Family Relief Act is not sufficient, then it could be strengthened even to the extent of giving the court a discretionary power to distribute property in favour of the survivor even if the property is not needed for the maintenance of the survivor.

The specific proposal is that the present law should remain substantially unchanged insofar as it relates to the rights of a surviving spouse. Alternatively, the Family Relief Act could be amended along the lines suggested recently by the English Law Commission so that the court would have the power to order reasonable financial provision from the estate for the surviving spouse even if the property is not needed for the proper maintenance of the surviving spouse.

(2) Ascertainment of Property on Death

We will now discuss the valuation of property upon the death of a spouse for the purposes of deferred sharing. The general rules would be the same as upon the termination of a deferred sharing regime during the lifetime of both parties. There are, however, some special circumstances which require special rules.

If the survivor takes joint property by right of survivorship, the whole value of the property should be included in the survivor's property. The same should be true of the value of a life estate under the Dower Act. We have already made recommendations dealing with pension plans and with the proceeds of life insurance.

All the property of the deceased spouse at the time of death should be included in the valuation for the purpose of computing the deceased's shareable gains. The claim of the surviving spouse comes before a claim under a will, a claim under the Intestate Succession Act, or a claim under the Family Relief Act. In addition, we think that the proceeds of an insurance policy on the deceased's life payable to the estate should be included in the estate if the policy is owned by either spouse. So should a lump sum payment under a pension plan or other money payable to the estate by reason of the death of the deceased.

RECOMMENDATION #37

(1) THAT THE PROPERTY OF THE SURVIVING SPOUSE INCLUDE PROPERTY ACQUIRED BY REASON OF THE DEATH OF THE DECEASED BY VIRTUE OF

(i) A RIGHT OF SURVIVORSHIP,

(ii) THE DOWER ACT,

(iii) A PENSION PLAN OR OTHER LUMP SUM OR PERIODIC PAYMENT PAYABLE TO THE SURVIVING SPOUSE IN HIS CAPACITY AS SURVIVOR OF THE DECEASED SPOUSE, AND

(iv) A POLICY OF LIFE INSURANCE ON THE LIFE OF THE DECEASED SPOUSE OWNED BY EITHER SPOUSE WHICH ARE PAYABLE TO THE SURVIVING SPOUSE.

(Bill No. 1, sec. 23)

(2) THAT THE PROPERTY OF THE DECEASED SPOUSE INCLUDE

(i) THE PROPERTY OF THE DECEASED SPOUSE AT THE TIME OF HIS DEATH,

(ii) THE PROCEEDS OF A POLICY OF LIFE INSURANCE ON THE LIFE OF THE

DECEASED SPOUSE AND OWNED BY EITHER SPOUSE WHICH ARE PAYABLE TO THE ESTATE, AND

(iii) ANY OTHER SUM OF MONEY PAYABLE TO THE ESTATE BY REASON OF THE DEATH OF THE DECEASED SPOUSE.

(Bill No. 1, sec. 24)

(3) When Application Must be Brought

We think that an application by a surviving spouse should be brought within six months of the death of the deceased spouse. That coincides with the minimum time during which the estate cannot be administered by reason of the requirements of the Family Relief Act. We think that it is fair to require the surviving spouse to apply within that period and we do not think that the period of uncertainty should be prolonged more than six months. An application by a dependant child of one spouse, whether against the other spouse or against his or her estate, should have to be made within the same period of time.

RECOMMENDATION #38

(1) THE APPLICATION BY A SURVIVING SPOUSE FOR A BALANCING PAYMENT SHALL BE BROUGHT WITHIN SIX MONTHS AFTER THE DATE OF THE DEATH OF THE DECEASED SPOUSE.

(Bill No. 1, sec. 25(1))

(2) AN APPLICATION BY A DEPENDANT SHALL BE BROUGHT WITHIN SIX MONTHS AFTER THE DATE OF THE DEATH OF THE SPOUSE WHO DIES FIRST.

(Bill No. 1, sec. 38)

5. Couples Already Married and Living in Alberta

(1) Choice of Matrimonial Property System

We said at page 29 of this Report that the majority think that a discretionary system of distribution of economic gains should apply to couples already married and living in Alberta. We will now give the reasons for that recommendation.

It is one thing for the law to say in advance that, unless they agree to the contrary, a couple who marry will be subject to a property regime involving the sharing of assets; before being committed to marriage the couple have an opportunity to consider their economic relationship and to make their own arrangements if they wish. It is quite another to impose a new matrimonial property regime upon a couple who married on the basis of the old. There are powerful arguments against retroactive legislation in general and retroactive interference with matrimonial property rights in particular. It may be argued that it is unfair to change the ground rules after people have married under them, lived under them, acquired property under them, and ordered their affairs under them. It may be argued that it is unfair to change the nature of a marriage which a husband and wife freely and knowingly entered into.

There are also powerful arguments to the contrary. If nothing is done about the rights of husbands and wives already married, nothing will be done for the very people who are now dissatisfied with the law as it stands; it is the immediate and present unfairness of the law which has produced dissatisfaction with it much more than its possible application to couples who marry later. It is the present

generation of married persons whose views in favour of sharing have been recorded. A reform which would affect only future marriages would be of little effect for ten or twenty years. We are persuaded that some change should be made in the law affecting couples already married.

The problem has been dealt with in different ways. The Ontario Law Reform Commission would apply its recommended matrimonial property regime to couples already married only if they both agree to it. The Law Reform Commission of Canada would apply a regime of sharing to couples already married unless they both agree not to be bound by it. The Saskatchewan Law Reform Commission has tentatively suggested that, while a deferred sharing regime should apply to future marriages, a system of judicial discretion should apply to existing marriages. England's system of judicial discretion applies without differentiation between existing and future marriages. The British Columbia Royal Commission on Family and Children's Law would give either spouse six months to agree not to be bound by their proposed retroactive community of property regime, though it would require both spouses to agree not to be bound by community thereafter.

There are other choices. It would be possible, for example, to distinguish between property acquired before the proposed statute comes into force and property acquired later and to say that a deferred sharing regime applies fully to property acquired later but that a discretionary system or separation of property applies to property previously acquired. It would be possible to provide that the regime does not apply unless one or both spouses want it to apply, or that it does apply unless one or both spouses want it not to apply. It is difficult to choose the best course of action.

We turn to two questions. The first is what law should apply to couples already married. The second is whether the application of that law should depend in any way upon the consent of either or both spouses. The answer to one question may influence the answer to the other; the argument against imposing a change without the consent of the spouses is stronger if the proposed change is more drastic and gives less effect to the wishes of each.

We have considered three possible choices to be of serious consideration. The first would be to apply deferred sharing to couples already married, possibly with a somewhat enlarged discretion to cancel or reduce the share of one spouse. We have concluded that it would be unfair to apply deferred sharing on a retroactive basis and without giving each spouse an opportunity to contract out of it. We will later give reasons why we do not think that the law should give such an opportunity.

The second choice would be to recommend the system of judicial discretion which we will propose later in this Report as an alternative to deferred sharing. The majority of the Board are, on the whole, against doing so. Because it applies to all the property of the couple, whether or not accumulated during marriage or by gift or inheritance, that discretionary system goes further than they think it should.

The third choice, and the one which the majority propose as part of their principal recommendation, is that there be a discretionary system of distribution of property between couples already married, but that it apply only to the gains made during marriage. They think that the imposition of such a discretionary system is justifiable

although the imposition of deferred sharing is not; the difference is that it would remain open to a spouse to satisfy the court that the fairness and justice of the case do not require a full sharing or any sharing. We note that the imposition of a discretionary system in England appears to have met with much approval and little disapproval and the system now proposed, being restricted to dealing with economic gains during marriage, is less drastic than the English discretionary system. We do not, however, think that it should apply to couples whose life together has been terminated by a judicial separation or by separation for three years or more.

We will now discuss the question of contracting out of whatever system is applied to couples already married. We do not think that the agreement of both spouses should be required either to make a new system applicable or to prevent a new system from applying. That requirement would leave one spouse bound either by the existing law or by the new law unless the consent of the other could be obtained. It would therefore either leave without recourse one spouse who objects to the existing system and therefore would not meet the objections to the existing system; or it would leave without recourse one spouse who objects to the new system and therefore would not meet the objections to retroactive change in the law. We fear that a statute which would have the effect of requiring married couples to discuss their respective rights and make a common decision would cause a strain upon some marital relationships which are already somewhat precarious.

We also think it unwise to provide that one spouse alone may make a choice between the existing system and the new system. A spouse who wanted to avoid the new system

would have to make a formal decision and give notice of it to the other spouse in some way that could be proved later; it would be unfair to leave the other spouse in ignorance of such a material fact. The notion that one of the parties to a continuing marital relationship should be required to sign a formal document depriving the other of the full benefit of that relationship, and should then be required to serve it upon the other spouse so that proof of service would be available later, is too unattractive. The filing of the document in a government office is less unattractive in itself, but we think that formal notice would still have to be given to the other spouse. We see no satisfactory method of contracting out.

For these reasons we are driven to the conclusion that the new system should apply without their consent to a couple already married and living in Alberta. That conclusion, as we have said, is one reason for the majority recommendation in favour of a discretionary system, and that system would give a spouse a chance to satisfy the court that it would be unfair in the particular case to require a sharing of economic gains with the other spouse.

(2) Description of System

The court should have power to distribute between the couple the net gains made during marriage. It should do so upon principles of fairness and justice in the individual case, but it should be required to have regard to certain factors which would be the same as those which we will propose in our alternative proposal for a general discretionary system, and for the same reasons. Otherwise, the rules which apply to deferred sharing should apply here, subject to necessary changes. For example, the grounds upon

which an application may be made during the lifetime of both the spouses should be the same; shareable gains should be computed in the same way; the court should have the same incidental powers; and upon the death of a spouse only the survivor should have the right to apply, except that dependants should have restricted rights similar to those provided for under our deferred sharing proposals.

RECOMMENDATION #39

(1) THAT RECOMMENDATIONS #40 to #49 DO NOT APPLY TO A MARRIED COUPLE WHO AT THE DATE OF COMMENCEMENT OF THIS ACT

(i) ARE LIVING SEPARATE AND APART UNDER A JUDGMENT OF JUDICIAL SEPARATION, OR

(ii) HAVE LIVED SEPARATE AND APART FOR THE PERIOD OF THREE YEARS IMMEDIATELY PRIOR TO THE DATE OF COMMENCEMENT.

(2) THAT EXCEPT AS PROVIDED IN SUBSECTION (1) RECOMMENDATIONS #40 TO #49 APPLY TO A MARRIED COUPLE

(i) WHO WERE MARRIED BEFORE THE DATE OF THE COMMENCEMENT OF THE PROPOSED STATUTE, AND

(ii) WHOSE COMMON HABITUAL RESIDENCE IS IN ALBERTA OR WHOSE LAST COMMON HABITUAL RESIDENCE WAS IN ALBERTA.

(Bill No. 1, sec. 28)

RECOMMENDATION #40

THAT RECOMMENDATIONS #41 to #43 APPLY DURING THE LIFETIME OF BOTH SPOUSES.

(Bill No. 1, sec. 29)

RECOMMENDATION #41

(1) THAT A SPOUSE MAY MAKE AN APPLICATION UNDER RECOMMENDATIONS #41 TO #43

(i) IF THE SPOUSES HAVE BEEN LIVING SEPARATE AND APART FOR ONE YEAR IMMEDIATELY PRIOR TO THE MAKING OF THE APPLICATION AND NORMAL COHABITATION APPEARS TO HAVE TERMINATED, OR

(ii) IF IT APPEARS THAT THE OTHER SPOUSE, WITHOUT THE CONSENT OF THE APPLICANT, HAS MADE OR INTENDS TO MAKE A SUBSTANTIAL GIFT OR TRANSFER OF PROPERTY FOR NO CONSIDERATION OR FOR INADEQUATE CONSIDERATION,

(iii) IF IT APPEARS THAT THERE IS UNDUE RISK THAT THE OTHER SPOUSE WILL DISSIPATE OR LOSE PROPERTY TO THE DETRIMENT OF THE APPLICANT, OR

(iv) UPON OR AFTER THE GRANTING OF A DECREE NISI OF DIVORCE OR NULLITY, A DECLARATION OF NULLITY, OR A JUDGMENT OF JUDICIAL SEPARATION.

(2) AN APPLICATION UNDER SUBPARAGRAPHS (i), (ii) AND (iii) OF SUBSECTION (1) SHALL BE MADE WITHIN ONE YEAR FROM THE DATE UPON WHICH THE APPLICANT BECOMES ENTITLED TO MAKE IT.

(3) AN APPLICATION UNDER SUBPARAGRAPH (iv) OF SUBSECTION (1) SHALL BE MADE

(i) BEFORE THE GRANTING OF THE DECREE ABSOLUTE OR FINAL JUDGMENT IN THE PROCEEDINGS IF THE APPLICANT HAS BEEN SERVED WITH A NOTICE IN FORM OR FORMS TO BE PROVIDED BY THE PROPOSED STATUTE OR TO LIKE EFFECT WITH THE PETITION OR OTHER PROCESS BY WHICH THE PROCEEDINGS ARE COMMENCED OR AT SUCH OTHER TIME DURING THE PROCEEDINGS AS THE COURT MAY DIRECT, OR

(ii) IN OTHER CASES, BEFORE THE EXPIRATION OF ONE YEAR AFTER THE DATE OF THE MAKING OF THE DECREE ABSOLUTE OR FINAL JUDGMENT.

(Bill No. 1, sec. 30)

RECOMMENDATION #42

THAT UPON AN APPLICATION UNDER RECOMMENDATION #41 THE COURT IN ORDER TO DISTRIBUTE FAIRLY BETWEEN THE SPOUSES THE NET GAINS MADE BY THE SPOUSES DURING MARRIAGE MAY

(1) GIVE JUDGMENT AGAINST A SPOUSE FOR THE PAYMENT OF MONEY OR THE TRANSFER OF PROPERTY TO THE OTHER SPOUSE,

(2) ORDER A SPOUSE TO MAKE PAYMENT UNDER SUCH A JUDGMENT OVER A PERIOD OF TIME WITH OR WITHOUT INTEREST,

(3) ORDER A SPOUSE TO GIVE SECURITY,

(4) CHARGE PROPERTY WITH THE PAYMENT OF MONEY AND PROVIDE FOR ENFORCEMENT OF THE CHARGE,

(5) VARY THE TERMS OF ORDERS MADE UNDER SUBSECTIONS (2), (3) AND (4),

(6) ORDER THAT PROPERTY BE SOLD AND THAT THE PROCEEDS BE DIVIDED BETWEEN THE SPOUSES IN EACH SUCH PROPORTIONS AS THE COURT MAY DIRECT,

(7) REQUIRE A SPOUSE AS A CONDITION OF OBTAINING JUDGMENT TO SURRENDER ALL CLAIM TO PROPERTY IN THE NAME OF THE OTHER SPOUSE,

(8) AWARD COSTS,

(9) MAKE CONSEQUENTIAL ORDERS AND DIRECTIONS.

(Bill No. 1, sec. 31)

RECOMMENDATION #43

THAT IT SHALL BE THE DUTY OF THE COURT IN DECIDING WHETHER AND HOW TO EXERCISE ITS POWERS UNDER RECOMMENDATION #42 TO HAVE REGARD TO ALL THE CIRCUMSTANCES OF THE CASE INCLUDING THE FOLLOWING MATTERS THAT IS TO SAY:

(1) THE CONTRIBUTIONS MADE BY EACH OF THE PARTIES TO THE WELFARE OF THE FAMILY, INCLUDING ANY CONTRIBUTION MADE BY LOOKING AFTER THE HOME OR CARING FOR THE FAMILY,

(2) THE INCOME, EARNING CAPACITY, PROPERTY AND OTHER FINANCIAL RESOURCES

(i) WHICH EACH SPOUSE HAD AT THE TIME OF THE MARRIAGE, AND

(ii) WHICH EACH SPOUSE HAS OR IS LIKELY TO HAVE IN THE FORESEEABLE FUTURE,

(3) THE FINANCIAL NEEDS, OBLIGATIONS AND RESPONSIBILITIES WHICH EACH PARTY HAS OR IS LIKELY TO HAVE IN THE FORESEEABLE FUTURE,

(4) THE AGE OF EACH PARTY,

(5) ANY TAX LIABILITY WHICH MAY BE INCURRED AS A RESULT OF THE TRANSFER OR SALE OF PROPERTY,

(6) IN THE CASE OF PROCEEDINGS FOR DIVORCE OR NULLITY OF MARRIAGE, THE VALUE TO EITHER OF THE PARTIES TO A MARRIAGE OF ANY BENEFIT WHICH, BY REASON OF THE DISSOLUTION OR ANNULMENT OF A MARRIAGE, THAT PARTY WILL LOSE THE CHANCE OF ACQUIRING,

(7) THE HEALTH OF EACH PARTY INCLUDING ANY PHYSICAL OR MENTAL DISABILITY,

(8) THE DURATION OF THE MARRIAGE,

(9) THE CONDUCT OF EACH PARTY,

(10) THE TIME WHEN PROPERTY WAS ACQUIRED, WHETHER AFTER A DECREE OF JUDICIAL SEPARATION OR WHILE THE PARTIES WERE LIVING SEPARATE AND APART DUE TO MARITAL DIFFICULTIES,

(11) THE MANNER IN WHICH THE PROPERTY WAS ACQUIRED, WHETHER BY THE EFFORT OF ONE OR BOTH PARTIES, OR BY GIFT OR INHERITANCE,

(12) THE TERMS OF ANY AGREEMENT BETWEEN THE PARTIES,

(13) ANY PREVIOUS DISTRIBUTION OF PROPERTY BETWEEN THE SPOUSES BY GIFT, AGREEMENT OR ORDER OF THE COURT,

(14) WHERE THE PARTIES HAVE NOT RESIDED IN ALBERTA THROUGHOUT THE MARRIAGE THE LAW OF THE PLACE OR PLACES IN WHICH THE PARTIES HAVE HAD A COMMON HABITUAL RESIDENCE AND THE LENGTH OF EACH RESIDENCE,

(15) THE EFFECT WHICH THE TRANSFER OF PROPERTY OR PAYMENT OF MONEY WILL HAVE ON THE EARNING POWER AND THE VALUE OF THE REMAINING PROPERTY OF A SPOUSE.

(Bill No. 1, sec. 32)

RECOMMENDATION #44

(1) THAT UPON THE DEATH OF A SPOUSE THE SURVIVING SPOUSE MAY APPLY TO THE COURT FOR AN ORDER UNDER THIS RECOMMENDATION.

(2) THAT AN APPLICATION UNDER THIS RECOMMENDATION SHALL BE BROUGHT WITHIN SIX MONTHS AFTER THE DATE OF THE DEATH OF THE DECEASED SPOUSE.

(3) THAT NO APPLICATION MAY BE MADE OR MAINTAINED UNDER THIS RECOMMENDATION BY OR ON BEHALF OF AN ESTATE OR THE

PERSONAL REPRESENTATIVES OF A SPOUSE OR OF A DEPENDANT.

(Bill No. 1, sec. 33)

RECOMMENDATION #45

THAT UPON AN APPLICATION UNDER RECOMMENDATION #44 THE COURT MAY MAKE ONE OR MORE OF THE ORDERS PROVIDED FOR IN RECOMMENDATION #42 IN ORDER TO DISTRIBUTE FAIRLY BETWEEN THE SURVIVING SPOUSE AND THE ESTATE OF THE DECEASED SPOUSE THE NET GAINS MADE BY THE SPOUSES DURING MARRIAGE.

(Bill No. 1, sec. 34)

RECOMMENDATION #46

THAT IT SHALL BE THE DUTY OF THE COURT IN DECIDING WHETHER AND HOW TO EXERCISE ITS POWERS UNDER RECOMMENDATION #45 TO HAVE REGARD TO ALL THE CIRCUMSTANCES OF THE CASE INCLUDING SUCH OF THE MATTERS SET FORTH IN RECOMMENDATION #43 AS THE COURT DEEMS RELEVANT AND THE BENEFITS TO BE RECEIVED BY THE SURVIVING SPOUSE FROM THE ESTATE OF THE DECEASED SPOUSE UNDER THE WILL OF THE DECEASED SPOUSE OR THE INTESTATE SUCCESSION ACT.

(Bill No. 1, sec. 35)

RECOMMENDATION #47

(1) THAT NOTHING IN RECOMMENDATIONS #44 TO #46 AFFECTS THE RIGHT OF THE SURVIVING SPOUSE TO MAKE AN APPLICATION UNDER THE FAMILY RELIEF ACT.

(2) THAT AN APPLICATION UNDER THE FAMILY RELIEF ACT MAY BE JOINED WITH AN APPLICATION UNDER RECOMMENDATION #44.

(3) THAT AN APPLICATION UNDER RECOMMENDATION #44 TAKES PRECEDENCE OVER AN APPLICATION UNDER THE FAMILY RELIEF ACT AND FOR THE PURPOSES OF RECOMMENDATIONS #44 TO #46 THE COURT SHALL HAVE REGARD TO THE PROPERTY OF THE DECEASED SPOUSE AT THE TIME OF THE DEATH OF THE DECEASED SPOUSE AND TO THE PROCEEDS OF ANY POLICY OF LIFE INSURANCE PAYABLE TO THE ESTATE OF THE DECEASED SPOUSE.

(Bill No. 1, sec. 36)

RECOMMENDATION #48

(1) THAT IN THIS RECOMMENDATION WORDS AND PHRASES HAVE THE SAME MEANING AS IN THE FAMILY RELIEF ACT.

(2) THAT THIS RECOMMENDATION APPLY IF

(i) ADEQUATE PROVISION HAS NOT BEEN MADE FOR THE PROPER MAINTENANCE OF

(a) A DEPENDANT OF A DECEASED SPOUSE WHO IS NOT A DEPENDANT OF THE SURVIVING SPOUSE,

(b) A DEPENDANT OF EITHER SPOUSE WHO IS NOT A DEPENDANT OF THE OTHER SPOUSE, IF THE SPOUSES DIE IN CIRCUMSTANCES IN WHICH IT IS DOUBTFUL WHICH SURVIVED THE OTHER,

(c) A DEPENDANT OF THE SURVIVING SPOUSE WHO IS NOT A DEPENDANT OF THE DECEASED SPOUSE, IF THE SURVIVING SPOUSE DIES WITHOUT OBTAINING A JUDGMENT FOR A BALANCING PAYMENT AGAINST THE ESTATE OF A DECEASED SPOUSE, AND

(ii) THE PROVISION WOULD HAVE BEEN ADEQUATE OR LESS INADEQUATE IF ALL OR PART OF

THE BALANCING PAYMENT HAD BEEN MADE TO THE ESTATE OF THE DECEASED SPOUSE.

(3) THAT UPON APPLICATION BY A DEPENDANT REFERRED TO IN SUBSECTION (2) THE COURT MAY

(i) DETERMINE THE AMOUNT OF THE JUDGMENT WHICH THE COURT WOULD HAVE GIVEN IN FAVOUR OF THE DECEASED SPOUSE IF THE DECEASED SPOUSE WERE LIVING AND ENTITLED TO APPLY UNDER RECOMMENDATION #44, AND

(ii) GIVE JUDGMENT AGAINST THE SURVIVING SPOUSE FOR SUCH PART OF THE SAID AMOUNT AS IS NECESSARY TO MAKE PROPER PROVISION FOR THE ADEQUATE MAINTENANCE OF THE DEPENDANT.

(4) THAT THE COURT MAY DIRECT THAT THE PAYMENT BE MADE TO THE DEPENDANT OR TO THE PERSONAL REPRESENTATIVES OF THE DECEASED OR A TRUSTEE IN TRUST FOR THE DEPENDANT UPON SUCH TERMS AND SUBJECT TO SUCH CONSEQUENTIAL DIRECTIONS AS THE COURT MAY DEEM FIT.

(5) THAT THE COURT SHALL NOT REQUIRE THE SURVIVING SPOUSE TO MAKE A PAYMENT WHICH WILL LEAVE HIM WITHOUT ADEQUATE PROVISION FOR HIS PROPER MAINTENANCE.

(Bill No. 1, sec. 37)

RECOMMENDATION #49

THAT AN APPLICATION UNDER RECOMMENDATION #48 SHALL BE BROUGHT WITHIN SIX MONTHS AFTER THE DATE OF THE DEATH OF THE SPOUSE WHO DIES FIRST.

(Bill No. 1, sec. 38)

V

JUDICIAL DISCRETION - AN ALTERNATIVE PROPOSAL

1. Principles

For reasons which we have already given at page 2 of this Report we have concluded that we should put forward an alternative proposal under which the court would be given a discretionary power to distribute between husband and wife, the property owned by either or both of them. We have already given a brief description of such a system at page 16.

The essence of the proposal is that the court be given power to divide the property of husband and wife between them on principles of fairness and justice in the individual case. The power would extend to property whenever and however obtained and would not be restricted to the economic gains made by the couple during the marriage. The court would exercise its power upon application by either spouse.

The system which we will discuss resembles that adopted by England in 1970. It is different in one very important respect; it deals only with the distribution of property, while the English statute deals at the same time with property and with support. There are also some important differences in detail. It appears likely, however, that if this alternative system is adopted, our courts would be likely to pay much attention to the way in which the English courts have worked out the similar system in the English statute. We therefore think it instructive to describe what has happened in England.

By 1969 the power of the English courts to deal with economic matters on divorce was much the same as that of our courts now. They could deal with maintenance by periodic payments or lump sums, but they could not deal with property as such except under very limited circumstances. In that year the English Law Commission recommended that the court be given a discretionary power to divide the property between husband and wife, and Parliament acted on that recommendation in 1970. The court's powers to deal with financial support were to be exercised with regard to the same factors as those to be considered in the distribution of property. In 1971 the Law Commission put forward for consideration various other proposals for the reform of matrimonial property law, including co-ownership of the matrimonial home and including a system of "deferred community" the essence of which is the same as the proposal for "deferred sharing" which we have put forward in this Report. However, after consultation with the public and interested parties, the Law Commission recommended against deferred community and instead recommended the continuation of the existing discretionary system together with the introduction of the principle of co-ownership of the matrimonial home.

In the meantime the landmark case of Wachtel v. Wachtel had been decided by the English Court of Appeal. That judgment said that the 1970 English Act giving discretionary powers to the court was a true reforming statute and was designed to give the courts the widest possible powers in readjusting the financial position of the parties. The contribution of each spouse to the welfare of the family is to be recognized. Each is to have a claim to a share in "family assets", being things acquired by either or both spouses with the intention that they should be a continuing

provision for the spouses and the children during their joint lives and used for the benefit of the family as a whole; that includes capital assets such as the matrimonial home and furniture and it also includes the earning power of the couple. If there is simply a division of existing property at the end of the marriage, it would be fair enough to divide it half and half, but if there is to be maintenance involved in the future then the starting place should be one-third as the greatest part of the later expense resulting from two households is likely to fall upon the husband. The marital misconduct of a husband or wife is not to affect the sharing unless the conduct is so obvious and gross that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice; financial penalities ought seldom to be imposed.

A more recent case shows a tendency to give greater consideration to the disparity in earning power between the spouses. In Jones v. Jones, [1975] 2 All E.R. 12 the English Court of Appeal referred with apparent approval to a judgment of Mr. Justice Latey of the High Court in Smith v. Smith, [1975] 2 All E.R. 19 which was decided in 1973 and upheld on appeal but was reported only as a note to the Jones case. In the Smith case the only asset was a house worth £8,500 which was subject to a mortgage of £1,900 leaving an equity of £6,600. The court ordered that the wife should receive the husband's interest in the house which was owned by the two of them. The following passage is significant:

> This wife like so many wives when there are children has come off worse as the result of the breakdown of the marriage. It is a sad fact of life that, where there are children, both husband and wife suffer on marriage breakdown, but it is the wife who usually suffers

> more. The husband continues with his career, goes on establishing himslef, increasing his experience and qualification for employment - in a word, his security. With children to care for a wife usually cannot do this. She has not usually embarked on a continuous and progressing career while living with her husband, caring for their child or children and running the home. If the marriage breaks down she can only start in any useful way after the children are off her hands and then she starts from scratch in middle life while the husband has started in youth.

The court also referred to the desirability of a "clean break" from which it may be taken that the court may consider it of importance to try to establish the spouses so that each may make his own economic way independent of the other.

We turn now to a detailed description of our alternative proposal.

2. Distribution of Property During Lifetime of Both Spouses

(1) Factors to be Considered

In exercising its discretion the court should take into account all the circumstances of the individual case before it. The proposed statute should, however, refer to a number of important circumstances which must be taken into consideration.

(a) Contribution

As we have said, it is common for one spouse, usually the husband, to earn more money and to accumulate

more property than the other. The other spouse, usually the wife, will make a contribution to the welfare of the family by looking after the house, caring for the children, and sometimes by helping to advance the career of the other spouse. She is less likely to accumulate money or property in her name. The fact that her contribution is ignored in the distribution of property between husband and wife is the source of much of the criticism of the present law. Our recommendation is that the contribution of both spouses to the welfare of the family should be taken into consideration by the court, and that the contribution made by looking after the home and caring for the family should be mentioned in the statute.

(b) Economic Circumstances

The court should consider the income, earning capacity, property and other financial resources which each spouse has or is likely to have in the foreseeable future. It should also consider the corresponding economic circumstances of each spouse at the time of the marriage so as to be able to take into account the changes which have taken place during the time of the marriage. It should consider the needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future, and, if the marriage is being terminated, the value of any benefit which a spouse will lose the chance of acquiring. The age and health of each spouse affects their economic circumstances and should also be considered.

These factors are normally considered in deciding how much financial support one spouse should provide for another, and it might be thought that they should not be considered in the division of property. We think, however,

that they should be considered, along with other factors, in the exercise of the discretionary power to divide property.

There are two other economic factors which should be considered. The division of property might require that it be broken up so that it will no longer be an economic unit, e.g., the family farm or business. To require one spouse to pay a large sum of money to the other may require the sale of property with a similar result. The court should be able to avoid that result if the harm would outweigh the benefit. We therefore think that the court should take into consideration the effect which the transfer of property or the payment of money will have on the spouse's earning power and on the value of his or her remaining property. The transfer of property itself, or the sale of property to raise a money payment, may impose a liability on either spouse to pay tax, and that liability should be taken into consideration.

(c) Duration of Marriage

Other things being equal, a spouse who is married for a long time is likely to have a greater claim in fairness and equity than is a spouse who has been married for a short time, and a longer marriage is likely to have a greater effect upon the economic condition of a spouse who does not continue in paid employment. The duration of the marriage should therefore be a factor for the court to consider.

(d) Conduct

Under a discretionary system the court should be able to take into consideration the conduct of the parties. It will do so in part by considering the contribution of

each spouse to the welfare of the family. We think that it should also be able to consider other kinds of conduct.

We do not expect that the court will conduct a minute study of the marital life of the parties. Even when awarding support, Alberta courts give much less weight to the conduct of the parties than they did in the past; and the English authorities which we have mentioned say that the marital misconduct of the spouse in the weaker financial position is not to affect the distribution of property, unless it is so obvious and gross that to order one party to support the other would be repugnant to anyone's sense of justice. On the other hand, in an extreme case the conduct of a spouse will influence the court. For example, Jones v. Jones, mentioned above (page 120), was a case in which the husband had been convicted and imprisoned for assaulting and injuring his wife. The English Court of Appeal found that that conduct justified an order turning over to the wife the matrimonial home which was the only substantial capital asset of the couple. We think that Alberta courts would be likely to follow similar lines of reasoning.

(e) Time and Manner of Acquisition of Property

Fairness will often suggest that property acquired by a spouse before marriage should not be shared at all or should be shared to a lesser degree than property acquired after marriage. The time of acquisition can sometimes be considered under one of the factors already proposed, the property which each spouse had at the time of the marriage. However, other circumstances surrounding the acquisition of property should also be taken into consideration.

If the property is acquired while the couple are separated, it is less likely that fairness will suggest that it be shared; and similarly with property received by a spouse by gift or inheritance. On the other hand the fact that one spouse has previously received property from the other may suggest a distribution more favourable to the giver than would otherwise have been the case. The court should therefore consider the time when the property was acquired and the manner in which it was acquired.

(f) Wrongful Disposal of Property

A spouse may during the marriage give property away or transfer it for an inadequate consideration so as to defeat the claim of the other spouse. The court should then be able to take into consideration not only the property which a spouse has, but also the property which he would have had if he had not made the gift or transfer.

(g) Previous Agreements, Dispositions and Legal Systems

The husband and wife may have made a marriage contract at the beginning of the marriage, or they may have agreed to settle their affairs at some time during the marriage. We do not think that such a contract should be absolutely binding, but we do not think that it should be ignored. It should be left as a factor for the court to consider, and if it was entered into in good faith and with the intention of treating both parties fairly, no doubt the court would attach great importance to it. The court should also take into consideration previous distributions of property between the spouses.

A somewhat similar consideration is that the couple may have lived for a long period of time under a different system of law before becoming subject to the law of Alberta. Vested rights may have arisen under a community of property regime, or expectations may have arisen under a regime such as Quebec's partnership of acquests. That circumstance should also be a factor which the court can take into consideration along with the other factors.

ALTERNATIVE RECOMMENDATION #1

THAT FOR THE PURPOSE OF DISTRIBUTING FAIRLY BETWEEN A MARRIED COUPLE ALL THE PROPERTY OF THE MARRIED COUPLE OR OF EITHER OF THEM THE COURT MAY GIVE JUDGMENT AGAINST A SPOUSE FOR THE PAYMENT OF MONEY OR THE TRANSFER OF PROPERTY TO THE OTHER SPOUSE.

(Bill No. 2, sec. 4(2)(i))

ALTERNATIVE RECOMMENDATION #2

IT SHALL BE THE DUTY OF THE COURT IN DECIDING WHETHER AND HOW TO EXERCISE ITS POWERS UNDER ALTERNATIVE RECOMMENDATION #1 TO HAVE REGARD TO ALL THE CIRCUMSTANCES OF THE CASE INCLUDING THE FOLLOWING MATTERS THAT IS TO SAY:

(i) THE CONTRIBUTIONS MADE BY EACH OF THE PARTIES TO THE WELFARE OF THE FAMILY, INCLUDING ANY CONTRIBUTION MADE BY LOOKING AFTER THE HOME OR CARING FOR THE FAMILY,

(ii) THE INCOME, EARNING CAPACITY, PROPERTY AND OTHER FINANCIAL RESOURCES

(a) WHICH EACH SPOUSE HAD AT THE THE TIME OF THE MARRIAGE, AND

(b) WHICH EACH SPOUSE HAS OR IS LIKELY TO HAVE IN THE FORE-SEEABLE FUTURE,

(iii) THE FINANCIAL NEEDS, OBLIGATIONS AND RESPONSIBILITIES WHICH EACH PARTY HAS OR IS LIKELY TO HAVE IN THE FORESEEABLE FUTURE,

(iv) THE AGE OF EACH PARTY,

(v) THE EFFECT WHICH THE TRANSFER OF PROPERTY OR PAYMENT OF MONEY WILL HAVE ON THE EARNING POWER AND THE VALUE OF THE REMAINING PROPERTY OF A SPOUSE,

(vi) IN THE CASE OF PROCEEDINGS FOR DIVORCE OR NULLITY OF MARRIAGE, THE VALUE TO EITHER OF THE PARTIES TO A MARRIAGE OF ANY BENEFIT WHICH, BY REASON OF THE DISSOLUTION OR ANNULMENT OF A MARRIAGE, THAT PARTY WILL LOSE THE CHANCE OF ACQUIRING,

(vii) THE HEALTH OF EACH PARTY INCLUDING ANY PHYSICAL OR MENTAL DISABILITY,

(viii) THE DURATION OF THE MARRIAGE,

(ix) THE CONDUCT OF EACH PARTY,

(x) THE TIME WHEN PROPERTY WAS ACQUIRED, WHETHER AFTER A DECREE OF JUDICIAL SEPARATION OR WHILE THE PARTIES WERE LIVING SEPARATE AND APART DUE TO MARITAL DIFFICULTIES,

(xi) THE MANNER IN WHICH THE PROPERTY WAS ACQUIRED, WHETHER BY THE EFFORT OF ONE OR BOTH PARTIES, OR BY GIFT OR INHERITANCE,

(xii) THE TERMS OF ANY AGREEMENT BETWEEN THE PARTIES,

(xiii) ANY PREVIOUS DISTRIBUTION OF PROPERTY BETWEEN THE SPOUSES BY GIFT, AGREEMENT OR ORDER OF ANY COURT,

(xiv) A SUBSTANTIAL GIFT OR TRANSFER OF PROPERTY MADE BY A SPOUSE FOR INSUFFICIENT CONSIDERATION IN ORDER TO PREVENT THE OTHER SPOUSE FROM OBTAINING OR ENFORCING AN ORDER UNDER ALTERNATIVE RECOMMENDATION #1,

(xv) WHERE THE PARTIES HAVE NOT RESIDED IN ALBERTA THROUGHOUT THE MARRIAGE THE LAW OF THE PLACE OR PLACES IN WHICH THE PARTIES HAVE HAD A COMMON HABITUAL RESIDENCE,

(xvi) ANY TAX LIABILITY WHICH MAY BE INCURRED AS A RESULT OF THE TRANSFER OR SALE OF PROPERTY.

(Bill No. 2, sec. 5)

(2) Incidental Powers of the Court

The court should have broad powers to make the most appropriate arrangement for the division of property or for the payment of money. The considerations are much the same as they would be in a deferred sharing regime, and the powers should be those which we have recommended for deferred sharing.

ALTERNATIVE RECOMMENDATION #3

THE COURT MAY IN RESPECT TO A JUDGMENT UNDER ALTERNATIVE RECOMMENDATION #1:

(i) ORDER A SPOUSE TO MAKE PAYMENT UNDER THE JUDGMENT OVER A PERIOD OF TIME WITH OR WITHOUT INTEREST,

(ii) ORDER A SPOUSE TO GIVE SECURITY FOR ALL OR PART OF THE JUDGMENT,

(iii) CHARGE PROPERTY WITH THE PAYMENT OF ALL OR PART OF THE JUDGMENT AND PROVIDE FOR ENFORCEMENT OF THE CHARGE,

(iv) VARY THE TERMS OF ORDERS MADE UNDER SUBSECTIONS (i), (ii) AND (iii) OF THIS RECOMMENDATION,

(v) ORDER THAT PROPERTY BE SOLD AND THAT THE PROCEEDS BE DIVIDED BETWEEN THE SPOUSES IN SUCH PROPORTIONS AS THE COURT MAY DIRECT,

(vi) AWARD COSTS,

(vii) MAKE CONSEQUENTIAL ORDERS AND DIRECTIONS.

(Bill No. 2, sec. 4(2))

(3) When Application May be Made

In our discussion of deferred sharing at pages 36 to 39 of this Report we outlined the circumstances under which a spouse should be able to apply for a judgment for a balancing payment. The same considerations apply to an application for distribution of property under a discretionary power, with two exceptions. One is that no provision need be made for a joint application by husband and wife. The second is that, because the power is discretionary, a simpler limitation provision is appropriate.

ALTERNATIVE RECOMMENDATION #4

(1) THAT THE COURT MAY EXERCISE ITS POWERS UNDER ALTERNATIVE RECOMMENDATIONS #1 AND #3

(i) UPON OR AFTER GRANTING A DECREE NISI OF DIVORCE, A DECREE NISI OF NULLITY OF MARRIAGE, A DECLARATION OF NULLITY OF MARRIAGE OR A DECREE OF JUDICIAL SEPARATION,

(ii) UPON BEING SATISFIED THAT THE SPOUSES HAVE BEEN LIVING SEPARATE AND APART FOR ONE YEAR IMMEDIATELY PRIOR TO THE MAKING OF THE APPLICATION AND THAT NORMAL COHABITATION HAS BEEN TERMINATED,

(iii) UPON BEING SATISFIED THAT A SPOUSE HAS MADE OR INTENDS TO MAKE A SUBSTANTIAL GIFT OR TRANSFER OF PROPERTY FOR INSUFFICIENT CONSIDERATION IN ORDER TO PREVENT THE OTHER SPOUSE FROM OBTAINING OR ENFORCING AN ORDER UNDER THIS RECOMMENDATION, OR

(iv) UPON BEING SATISFIED THAT THERE IS UNDUE RISK THAT A SPOUSE WILL DISSIPATE OR LOSE PROPERTY TO THE DETRIMENT OF THE OTHER SPOUSE.

(Bill No. 2, sec. 4(1))

(2) AN APPLICATION FOR AN ORDER UNDER ALTERNATIVE RECOMMENDATION #1 SHALL BE MADE:

(i) IN CASES UNDER SUBPARAGRAPH (i) SUBSECTION (1) OF THIS RECOMMENDATION, WITHIN ONE YEAR AFTER THE DATE OF THE MAKING OF THE DECREE ABSOLUTE OR FINAL JUDGMENT, OR

(ii) IN OTHER CASES, WITHIN ONE YEAR AFTER THE DATE OF THE GIFT OR TRANSFER OR THE ANNIVERSARY OF THE SEPARATION.

(Bill No. 2, sec. 4(3))

(4) Gifts and Transfers for Inadequate Consideration

A spouse should not be able to defeat the claim of the other spouse by giving away his property or by transferring it to someone else for an inadequate consideration. The discussion of this problem in connection with deferred sharing is relevant, but we believe that under a discretionary system, the protection should be somewhat less rigid. A somewhat similar question arises under the Family Relief Act, and when we study that Act we will consider the kind of protection given by sections 20 and 21 of the Uniform Act. At this time we will make the recommendation which follows:

ALTERNATIVE RECOMMENDATION #5

(1) UPON BEING SATISFIED THAT A SPOUSE IN ORDER TO PREVENT THE OTHER SPOUSE FROM OBTAINING OR ENFORCING AN ORDER UNDER ALTERNATIVE

RECOMMENDATION #1 IS ABOUT TO MAKE ANY SUBSTANTIAL GIFT OR TRANSFER OF PROPERTY FOR INSUFFICIENT CONSIDERATION THE COURT MAY MAKE SUCH ORDERS AS IT THINKS FIT RESTRAINING THE SPOUSE FROM SO DOING AND OTHERWISE PROTECTING THE CLAIM OF THE OTHER SPOUSE.

(2) THAT UPON BEING SATISFIED THAT WITHIN ONE YEAR PRECEDING AN APPLICATION UNDER ALTERNATIVE RECOMMENDATION #1 A SPOUSE HAS MADE A SUBSTANTIAL GIFT OR TRANSFER OF PROPERTY FOR INSUFFICIENT CONSIDERATION IN ORDER TO PREVENT THE OTHER SPOUSE FROM OBTAINING OR ENFORCING AN ORDER THEREUNDER, THE COURT IN ITS DISCRETION MAY

(i) ORDER THE DONEE OR TRANSFEREE TO PAY OR TRANSFER ALL OR PART OF THE PROPERTY TO THE OTHER SPOUSE, OR

(ii) GIVE JUDGMENT IN FAVOUR OF THE APPLICANT SPOUSE AGAINST THE DONEE OR TRANSFEREE FOR A SUM NOT EXCEEDING THE AMOUNT BY WHICH THE VALUE OF THE PROPERTY TRANSFERRED EXCEEDED THE VALUE OF THE CONSIDERATION GIVEN BY THE DONEE OR TRANSFEREE THEREFOR.

(3) THAT IT SHALL BE PRESUMED UNTIL THE CONTRARY IS PROVEN THAT A SUBSTANTIAL GIFT OR TRANSFER OF PROPERTY FOR INSUFFICIENT CONSIDERATION WHICH HAS THE EFFECT OF DEFEATING IN WHOLE OR IN PART THE CLAIM OF THE OTHER SPOUSE UNDER AN ORDER UNDER ALTERNATIVE RECOMMENDATION #1 WAS MADE IN ORDER TO ACHIEVE THAT EFFECT.

(Bill No. 2, sec. 13)

3. Distribution of Property Upon the Death of a Spouse

(1) Surviving Spouse's Right to Apply

If a system of distribution of property by judicial discretion is adopted, we recommend that it apply upon the death of a spouse so that the survivor would be able to

apply to the court for a share of the property of the deceased spouse. That right to apply would not be the same as the right to apply under the Family Relief Act for adequate provision for the proper maintenance of the survivor. It would rather be a right to receive a share of the property of the estate. It could be combined in one statute with the right to receive maintenance, but for the present we recommend that it be given by the proposed matrimonial property statute and remain separate from the right to receive maintenance under the Family Relief Act which is subject to a number of different considerations. It should have priority over the claims which may be made under the Family Relief Act, but provision should be made for the surviving spouse to bring one application under both Acts so as to avoid multiplicity of legal proceedings.

We think that the application should be brought within six months after the death of the deceased spouse. That coincides with the minimum time during which the estate cannot be administered by reason of the requirements of the Family Relief Act. We think that it is fair to require the surviving spouse to apply within that period, and we do not think that the period of uncertainty should be prolonged past the six months.

ALTERNATIVE RECOMMENDATION #6

(1) THAT THE SPOUSE OF A DECEASED PERSON MAY MAKE APPLICATION UNDER THIS RECOMMENDATION.

(Bill No. 2, sec. 6)

(2) THAT NOTHING IN THIS RECOMMENDATION AFFECTS THE SURVIVING SPOUSE'S RIGHT TO MAKE AN APPLICATION UNDER THE FAMILY RELIEF ACT.

(Bill No. 2, sec. 10(1))

(3) THAT AN APPLICATION UNDER THE FAMILY RELIEF ACT MAY BE JOINED WITH AN APPLICATION UNDER THIS RECOMMENDATION.

(Bill No. 2, sec. 10(2))

(4) THAT AN APPLICATION UNDER THIS RECOMMENDATION TAKE PRECEDENCE OVER AN APPLICATION UNDER THE FAMILY RELIEF ACT AND THAT THE COURT SHALL HAVE REGARD TO THE PROPERTY OF THE DECEASED SPOUSE AT THE TIME OF DEATH AND THE PROCEEDS OF ANY POLICY OF LIFE INSURANCE PAYABLE TO THE ESTATE.

(Bill No. 2, sec. 10(3))

(2) Factors to be Considered

There are great differences between a case in which both spouses are alive and a case in which one is dead. The deceased spouse has no future income, earning capacity or financial needs, and there are other factors which apply to the former case but not to the latter. We think, however, that the simplest way to draft the proposed statute would be to refer the court to the same factors that it would consider if both spouses were alive and to leave it to the court to determine which of those factors are relevant. The court should also, however, take into consideration any benefits which the surviving spouse will receive under the deceased spouse's will or under the Intestate Succession Act.

ALTERNATIVE RECOMMENDATION #7

THAT IT SHALL BE THE DUTY OF THE COURT IN DECIDING WHETHER AND HOW TO EXERCISE ITS POWERS UNDER ALTERNATIVE RECOMMENDATION #6 TO HAVE REGARD TO ALL THE CIRCUMSTANCES OF THE CASE INCLUDING SUCH OF THE MATTERS SET FORTH IN ALTERNATIVE RECOMMENDATION #2 AS THE COURT CONSIDERS RELEVANT AND INCLUDING

ALSO THE BENEFITS TO BE RECEIVED BY THE SURVIVING SPOUSE FROM THE ESTATE OF THE DECEASED SPOUSE UNDER THE WILL OF THE DECEASED SPOUSE OR THE INTESTATE SUCCESSION ACT.

(Bill No. 2, sec. 8)

(3) Incidental Powers of the Court

The court should have the same powers on an application by a surviving spouse as it has on an application while both spouses are alive.

ALTERNATIVE RECOMMENDATION #8

UPON APPLICATION UNDER ALTERNATIVE RECOMMENDATION #6 THE COURT IN ORDER TO DISTRIBUTE PROPERTY FAIRLY BETWEEN THE SPOUSES MAY EXERCISE THE POWERS CONFERRED UPON IT BY ALTERNATIVE RECOMMENDATION #3 AND MAY GIVE ANY JUDGMENT OR MAKE ANY ORDER AGAINST THE PERSONAL REPRESENTATIVES OF THE DECEASED SPOUSE WHICH IT COULD GIVE OR MAKE UNDER THAT SUBSECTION.

(Bill No. 2, sec. 7)

(4) Application by Dependant of Deceased Spouse

A dependant of a deceased spouse should have the same rights under this alternative proposal as he would have under the part of the majority proposal relating to couples already married and living in Alberta.

ALTERNATIVE RECOMMENDATION #9

(1) (i) IN THIS RECOMMENDATION WORDS AND PHRASES HAVE THE SAME MEANING AS IN THE FAMILY RELIEF ACT,

(ii) THIS RECOMMENDATION APPLIES IF

(a) ADEQUATE PROVISION HAS NOT BEEN MADE FOR THE PROPER MAINTENANCE OF:

A. A DEPENDANT OF A DECEASED SPOUSE WHO IS NOT A DEPENDANT OF THE SURVIVING SPOUSE,

B. A DEPENDANT OF EITHER SPOUSE WHO IS NOT A DEPENDANT OF THE OTHER SPOUSE, IF THE SPOUSES DIE IN CIRCUMSTANCES IN WHICH IT IS DOUBTFUL WHICH SURVIVED THE OTHER, OR

C. A DEPENDANT OF THE SURVIVING SPOUSE WHO IS NOT A DEPENDANT OF THE DECEASED SPOUSE, IF THE SURVIVING SPOUSE DIES WITHOUT OBTAINING A JUDGMENT FOR A BALANCING PAYMENT AGAINST THE ESTATE OF THE DECEASED SPOUSE, AND

(b) THE PROVISION WOULD HAVE BEEN ADEQUATE OR LESS INADEQUATE IF ALL OR PART OF THE BALANCING PAYMENT HAD BEEN MADE TO THE ESTATE OF THE DECEASED SPOUSE,

(iii) UPON APPLICATION BY A DEPENDANT REFERRED TO IN SUBSECTION (2) THE COURT MAY

(a) DETERMINE THE AMOUNT OF THE JUDGMENT WHICH THE COURT WOULD HAVE GIVEN IN FAVOUR OF THE DECEASED SPOUSE IF THE DECEASED SPOUSE WERE LIVING AND ENTITLED TO APPLY UNDER ALTERNATIVE RECOMMENDATION #1, AND

(b) GIVE JUDGMENT AGAINST THE SURVIVING SPOUSE FOR SUCH PART OF THE SAID AMOUNT AS IS NECESSARY TO MAKE PROPER PROVISION FOR THE ADEQUATE MAINTENANCE OF THE DEPENDANT,

(iv) THE COURT MAY DIRECT THAT THE PAYMENT BE MADE TO THE DEPENDANT OR TO THE PERSONAL REPRESENTATIVES OF THE DECEASED OR A TRUSTEE IN TRUST FOR THE DEPENDANT UPON

SUCH TERMS AND SUBJECT TO SUCH CONSEQUENTIAL DIRECTIONS AS THE COURT MAY DEEM FIT.

(v) THE COURT SHALL NOT REQUIRE THE SURVIVING SPOUSE TO MAKE A PAYMENT WHICH WILL LEAVE HIM WITHOUT ADEQUATE PROVISION FOR HIS PROPER MAINTENANCE.

(Bill No. 2, sec. 11)

(2) AN APPLICATION UNDER THIS RECOMMENDATION SHALL BE BROUGHT WITHIN SIX MONTHS AFTER THE DATE OF THE DEATH OF THE SPOUSE WHO DIES FIRST.

(Bill No. 2, sec. 12)

4. Jurisdiction and Form of Proceedings

The recommendations under this heading in the majority proposal are equally applicable here.

ALTERNATIVE RECOMMENDATION #10

THAT IN THE PROPOSED STATUTE, UNLESS THE CONTEXT OTHERWISE REQUIRES, "COURT" MEANS THE TRIAL DIVISION OF THE SUPREME COURT OF ALBERTA.

(Bill No. 2, sec. 1)

ALTERNATIVE RECOMMENDATION #11

(1) PROCEEDINGS UNDER THIS ACT MAY BE BROUGHT BY

(i) STATEMENT OF CLAIM,

(ii) ORIGINATING NOTICE, OR

(iii) APPLICATION IN AN ACTION BETWEEN THE SPOUSES.

(2) THE COURT MAY DISPOSE OF ANY APPLICATION IN A SUMMARY WAY.

(Bill No. 2, sec. 14)

VI
MATRIMONIAL HOME

1. Ownership

In our Working Paper we discussed the possibility of a change in the law which would automatically make a husband and wife co-owners of their matrimonial home and which would apply whether the home was acquired by either or both of them. We said that we would like to ascertain the general opinion as to whether co-ownership of the home should be enacted as a first step, with the possibility that further major changes in our present law of matrimonial property might not be necessary, and we invited comment. The comment we received was unfavourable. For that reason, and for the reasons we have outlined earlier in this Report, we decided to recommend a deferred sharing regime, with a discretionary system as an alternative. That raises the question whether either deferred sharing or a discretionary system is sufficient in itself or whether co-ownership of the matrimonial home should be added. We have decided not to recommend that it should.

The Ontario Law Reform Commission thought otherwise. They recommended a regime of deferred sharing, and they also recommended that the principle of co-ownership in the matrimonial home should be adopted and given immediate widespread, and retrospective effect. They say at page 134 of their report, Family Property Law:

> Reference has already been made in this chapter to the fact that the matrimonial home is not only the shelter and focal point of the family and, as such requires occupational rights in it to be secured, but also, in many marriages, it is the major asset and therefore requires special treatment of proprietary rights with respect to it. Although spouses purchase many things during marriage, there is no other major asset that is either so uniquely referable to the relation of husband and wife or which involves such exacting and prolonged demands for management of finances, mutual sacrifice and physical efforts towards a common goal, as does the matrimonial home. The courts in Canada and England have made it absolutely clear that if there is any single item of property which should be a "family asset" in which there would be an equitable sharing, it is the matrimonial home.

They go on to give reasons for finding that the existence of a financial contribution is not a satisfactory test for the existence of a proprietary right in the matriamonial home, and continue as follows:

> These reasons have led the Commission to recommend the adoption of the basic principle of co-ownership in the matrimonial home, a principle that would entitle the husband and wife to equal shares secured by their joint control of the asset. We believe that this proposal not only ensures what is fair and just, considering the nature of the family relationships, but also reflects the tenor of the behaviour of the parties to a once happy marriage before rancour and bitterness distorts their sense of values and impairs their judgment of what constitutes fair dealing one with the other. It would give full legal acceptance to the extremely prevalent and growing practice of husband and wife taking title to the matrimonial home in their joint names. . . .

While these arguments are forceful, we have come to a different conclusion for three reasons. One is that we think that our proposals will provide most of the benefits that would be provided by co-ownership. The second is that we think there may be cases in which the co-ownership principle would operate unfairly. The third is that it will introduce complications in the law which we think should be suffered only for major benefit. We will proceed to elaborate upon these reasons.

(1) Benefits Conferred by Deferred Sharing or a Discretionary System

Deferred sharing would give a non-titled spouse the benefit of one-half of the value of the matrimonial home unless his or her contribution to the welfare of the family is deficient; it would do so by means of the balancing payment upon dissolution or breakdown of the marriage which will normally be the time when distribution of capital assets becomes important. A discretionary system would also provide for distribution of the benefit of the value of the matrimonial home. Either would allow the court to require the matrimonial home to be transferred to one spouse. So far as the home is needed for shelter during the lifetime of both spouses, that would probably require an application to the court even under a system of co-ownership, and the court would, under the proposals which we will make later in this Report, be able to give possession to a spouse who needs it. The Dower Act has a similar effect on death; and it should be noted here that the existence of the Dower Act is a significant difference in the present law of Alberta from that of Ontario, which makes arguments for co-ownership less compelling in Alberta than they are in Ontario.

(2) Unfairness in the Operation of the Co-Ownership Principle

The co-ownership principle would apply even to a property which was owned by one spouse before the marriage. We think that the acquisition by the other spouse of a half interest in what might be an important property would be a windfall unrelated to the married life of the couple, and that it would go beyond the principle of sharing the accumulations which come about during marriage. Deferred sharing, on the other hand, would allow the non-titled spouse's claim to grow if the property is improved or if it increases in value, and would in effect provide for the free use of the home, so that the non-titled spouse would get significant advantages but only as time passed. A discretionary system would allow the court to take into consideration the circumstance that the home was owned by one spouse before marriage.

Adoption of the proposal would make a sudden change in property arrangements which may have been made for good reason. The Ontario Law Reform Commission met one aspect of that problem by recommending that if title is in the name of the wife there would be no co-ownership unless the court was satisfied by evidence that the spouses had agreed to share the beneficial interest therein, but we think that there may be other circumstances in which the parties have good reason for the arrangements which they have made. We can also foresee problems if the home is carved out of a larger property such as a farm.

(3) Complication

The existence of an unregistered ownership interest seems to us to be likely to give rise to complications,

though of course some of those complications are already in existence by reason of the provisions of the Dower Act. In some cases it might not be entirely clear just what property is subject to that outstanding unregistered ownership interest, and legislation dealing with the disposition of one home and the acquisition of another would be rather complicated.

We think that the proposal would be in conflict with the law which prohibits subdivision of real property without planning approval. The proposal would not be fully effective unless a disposable title could be obtained and there would be cases in which the home could not be subdivided out of a larger property without derogating from the policy embodied in the planning legislation.

ALTERNATIVE RECOMMENDATION #12

THAT THE LAW NOT BE CHANGED TO CONFER AUTOMATIC CO-OWNERSHIP OF THE MATRIMONIAL HOME.

2. Possession

This topic has aspects of property and aspects of support. It involves the possession and enjoyment of property. It may involve the provision of shelter which is an important element of support.

It is usually when children are involved that the right to possession of the matrimonial home becomes of special importance. Some of the reasons are emotional and psychological; it may be of importance to children, particularly if the marriage of their parents is breaking down, to remain in the home to which they have become attached.

Some of the reasons are financial; in many cases, a home could not, with the capital which could be got out of the existing home and with the amounts needed to maintain it, be obtained for the children and the spouse caring for them, elsewhere. On the other hand, there are some cases in which a spouse needs the proceeds of the sale of the home and should not be compelled to forego the benefit of his interest in it.

We think that the law should balance the interests of the spouses by conferring upon the court a discretionary power to make the matrimonial home available for the exclusive use of one spouse on an interlocutory basis or for an indefinite or fixed period of time. The power will be especially valuable if that spouse has the custody of the children of the marriage and is in need of the matrimonial home so that they may be looked after, but we do not think that it should in terms be restricted to those circumstances. We are somewhat troubled by a situation in which possession is separated from ownership, and we would not want to encourage it. We think, however, that it must be suffered in a proper case, and we think that it would be better for the court to have a discretionary power than to leave the law in the somewhat uncertain condition described in our Working Paper. We think also that the court should have the power to include in its order the couple's household goods and chattels.

Very often the matrimonial home in Alberta is in joint tenancy. If one spouse remains in possession and the joint tenancy remains in force, the right of survivorship subsists, and we do not think that that is the way it should be, since the death of either spouse would then vest the whole of the title in the other. We think that the court

should be empowered to make an order in such circumstances changing the joint tenancy into a tenancy in common, and that that order should be registerable at the Land Titles Office and have effect when it is registered.

We have so far discussed a matrimonial home which is owned by either or both spouses. We will now consider a matrimonial home of which one or both are tenants. We think that the same considerations apply and that the court should have power to grant possession to either spouse. We do not make any recommendation which would interfere with the rights of the landlord and we leave it to the parties and to the court to work out any necessary arrangements with regard to the rent and other tenant's obligations.

We discussed in our Working Paper the restraining or non-molestation orders which are granted by judges of the Trial Division of the Supreme Court of Alberta. An order of that kind may enjoin a husband from coming into the matrimonial home and may even enjoin him from molesting, annoying or interfering with the wife and children elsewhere. While the right to apply for such an order may be abused, we think that it serves a useful purpose if there is a danger that the husband will use violence towards the wife or children, and we recommend that any doubt as to their validity be resolved by statute. As this Report relates to property, we will restrict the scope of our recommendation to the making of orders in support of orders for possession of the matrimonial home.

Our recommendations relating to the matrimonial home should apply to all married couples and not merely to couples subject to a particular matrimonial property regime. We

therefore recommend that there be a separate statute entitled the "Matrimonial Home Possession Act" embodying these recommendations.

There remains the question of the Dower Act. That Act gives the non-titled spouse a life estate in the "homestead" which for this purpose is roughly equivalent to a "matrimonial home" but only after the death of the titled spouse. During the lifetime of the titled spouse, the Act prohibits him from making any more substantial disposition of the homestead than a lease of less than three years, without the consent of the non-titled spouse. We think that the Dower Act should remain in force. It should be regarded as an adjunct to support, though it does affect the use and possession of property.

RECOMMENDATION #50

THAT A MATRIMONIAL HOME POSSESSION ACT BE ENACTED AS FOLLOWS:

(1) IN THIS ACT:

(i) "HOMESTEAD" HAS THE SAME MEANING AS IN THE DOWER ACT,

(ii) "SPOUSE" INCLUDES A FORMER HUSBAND OR WIFE.

(2) (i) THE COURT MAY

(a) GRANT A SPOUSE THE RIGHT TO LIVE IN A HOMESTEAD OWNED BY EITHER OR BOTH SPOUSES OR SUCH PART THEREOF AS IT MAY DEEM APPROPRIATE WITH OR WITHOUT

A. THE RIGHT OF EXCLUSIVE POSSESSION OF THE HOMESTEAD, AND

B. THE RIGHT OF EXCLUSIVE POSSESSION AND USE OF HOUSEHOLD GOODS AND CHATTELS OWNED BY EITHER OR BOTH SPOUSES,

(b) EXCLUDE THE OTHER SPOUSE FROM LIVING IN THE HOMESTEAD,

(c) RESTRAIN A SPOUSE FROM ENTERING UPON OR ATTENDING AT OR NEAR THE HOMESTEAD, AND

(d) VARY OR DISCHARGE AN ORDER MADE UNDER THIS RECOMMENDATION,

(ii) THE COURT MAY MAKE AN ORDER UNDER SUBSECTION (1) PENDING TRIAL OF AN ACTION OR FOR AN INDEFINITE PERIOD OR FOR A FIXED PERIOD OF TIME,

(iii) IF THE SPOUSES ARE JOINT TENANTS OF THE HOMESTEAD THE COURT MAY BY ORDER SEVER THE JOINT TENANCY AND THE SPOUSES SHALL UPON REGISTRATION OF THE ORDER AT THE LAND TITLES OFFICE BE TENANTS IN COMMON,

(iv) IN EXERCISING ITS POWERS UNDER THIS RECOMMENDATION, THE COURT SHALL HAVE REGARD TO

(a) THE AVAILABILITY OF OTHER ACCOMMODATION WITHIN THE MEANS OF THE SPOUSES,

(b) THE NEEDS OF THE CHILDREN OF THE MARRIAGE, AND

(c) THE FINANCIAL POSITION OF THE SPOUSES.

(v) THE COURT MAY MAKE AN ORDER UNDER THIS RECOMMENDATION EX PARTE UPON BEING SATISFIED THAT THERE IS DANGER OF INJURY TO THE APPLICANT SPOUSE OR THE CHILDREN OF THE FAMILY.

(3) AN ORDER UNDER THIS ACT

(i) TAKES EFFECT NOTWITHSTANDING AN ORDER UNDER THE MATRIMONIAL PROPERTY ACT OR AN ORDER FOR PARTITION OR SALE OF THE PROPERTY,

(ii) MAY BE REGISTERED AT THE LAND TITLES OFFICE AGAINST THE TITLE TO THE MATRIMONIAL HOME, AND

(iii) UPON SUCH REGISTRATION REMAINS IN FORCE NOTWITHSTANDING ANY PARTITION, SALE OR DISPOSITION OF THE PROPERTY UNLESS THE APPLICANT SPOUSE CONSENTS TO OR PARTICIPATES IN ANY SUCH PARTITION, SALE OR DISPOSITION.

(4) IF THE SPOUSE TO WHOM THE COURT GRANTS POSSESSION UNDER SUBSECTION (2) BECOMES ENTITLED TO A LIFE ESTATE IN THE HOMESTEAD AN ORDER UNDER SUBSECTION (2) CEASES TO HAVE EFFECT.

VII

APPLICATION OF PROPOSED STATUTE

1. When a Married Couple is Subject to the Statute

A married couple may live in Alberta throughout their married lives. They may live in Alberta for a time and then go to another jurisdiction, or they may live for a time elsewhere and then come to Alberta. The other jurisdiction may have a community of property regime, a separation of property regime, or a system of sharing whether under a discretionary power of the court or under a regime of deferred sharing or partnership of acquests. Should the property rights of the couple be decided under Alberta law or under the law of the other jurisdiction?

The present rules for making a choice between systems of law are complex and unsatisfactory. Movables are subject to the law of the domicile of the couple which, in the absence of special circumstances, is the domicile of the husband, and there is some controversy whether it is his domicile at the time of the marriage or the domicile which he intends to and does adopt after marriage that is relevant.

With regard to immovables the law is not entirely clear, but the law of the place of the location of the property is likely to be applied.

We think it desirable that the proposed statute say to whom it applies. We think that such a statement will tend to reduce litigation and to ensure that the statute applies to cases to which it is appropriate, and not to others. The same considerations apply to the majority proposal put forward in this Report as to the minority proposal.

We think that the test of domicile is unsatisfactory. It is often arbitrary, particularly when the domicile of origin is revived by the abandonment of a domicile of choice. Its emphasis on the husband's domicile is inconsistent with the equality of the spouses.

The law of Alberta should apply if Alberta is the community with which the married couple have the closest connection. That connection is clearly established if a couple who have lived all their lives in Alberta marry and establish a matrimonial home in Alberta. It is clearly established if a couple terminate their association with another province or country and take up permanent residence here. Such couples should come under the law of Alberta.

The term "habitual residence" has been gaining some currency. It has been used in Conventions of the Hague Conference on Private International Law and has been used in an English statute as a test for recognition of forein divorces. Dicey and Morris "hazard the guess" that it "will be held to mean much the same thing as domicile, minus the artificial elements in that concept (e.g., the revival of

the domicile of origin, and a wife's domicile of dependency), and minus the stress now placed on the element of intention in domicile." The recent case of Cruse v. Chittum, [1974] 2 All E.R. 940 (High Court) suggests that it is the quality of the residence that counts and not its duration, and that it involves a regular physical presence which has to endure for some time, though not necessarily for any specific time period. There will be some cases in which it is difficult to decide whether or not a person's "habitual residence" is in Alberta, for example, a person who spends part of his time in Alberta and part elsewhere and maintains a permanent establishment in both places or neither, or a person who comes to Alberta for a limited period of time such as a consular official. We think, however, that an effort to give further definition is not likely to make the law more certain or its application fairer, and we think that the term "habitual residence" should be used as part of the test to be applied in deciding whether Alberta law applies to a couple.

The next question is whose habitual residence is important. Our answer is that it is the habitual residence of both spouses. The law of Alberta should apply to a married couple if their "common habitual residence" is in Alberta.

What if the couple have not established a common habitual residence? The Ontario Law Reform Commission suggests that the matrimonial law of the couple should be that of the husband's habitual residence at the time of marriage. That appears to us to be tantamount to making the husband's habitual residence the determining factor, and we do not think that a factor relating to one party only should be the governing factor. However, something must be

done, and we recommend that if each of the spouses is a resident of Alberta at the time of marriage, and if the couple have not established a common habitual residence, the Alberta statute should apply. If they do not have that much connection with Alberta, we do not think that there is sufficient reason to apply the Alberta statute to them, and the courts will have to make a choice of law based on the ordinary rules relating to the conflict of laws.

When should Alberta law cease to apply to a married couple? We think that it should continue to apply until the couple (and not merely one of them) establish a similar connection with another community, i.e., until they establish a common habitual residence elsewhere. If one leaves the province and the other remains, or if they go elsewhere and do not establish a common habitual residence, we think that the Alberta statute should continue to apply.

RECOMMENDATION #51

THAT THE PROPOSED STATUTE APPLY TO

(i) A MARRIED COUPLE

(a) EACH OF WHOM AT THE TIME OF THE MARRIAGE WAS RESIDENT IN ALBERTA, AND

(b) WHO HAVE NOT ESTABLISHED A COMMON HABITUAL RESIDENCE;

(ii) A MARRIED COUPLE WHOSE COMMON HABITUAL RESIDENCE IS IN ALBERTA; AND

(iii) A MARRIED COUPLE WHOSE LAST COMMON HABITUAL RESIDENCE WAS IN ALBERTA.

(Bill No. 1, sec. 2
Bill No. 2, sec. 2)

We have discussed the question: when should Alberta law apply? A separate question is: when should Alberta courts assume jurisdiction to administer whatever law is applicable? The usual rule is that an Alberta court will assume jurisdiction only if the person against whom proceedings are brought is in Alberta or, alternatively, submits to the legal jurisdiction of Alberta courts. It will also assume jurisdiction if the case is one in which the rules of court provide for service outside Alberta of the process by which the action is commenced. At present the Alberta rules of court allow service outside Alberta if the action is "a matrimonial cause". We think that the test we have proposed for the application of Alberta law is also an appropriate test for the assumption of jurisdiction by Alberta courts, and we therefore recommend that the Alberta rules of court be amended to allow service outside Alberta in proceedings under the proposed Matrimonial Property Act.

RECOMMENDATION #52

> *THAT UPON THE ENACTMENT OF A MATRIMONIAL PROPERTY ACT IN ACCORDANCE WITH EITHER OF THE PROPOSALS SET FORTH IN THIS REPORT, THE ALBERTA RULES OF COURT BE AMENDED TO PERMIT SERVICE OUTSIDE ALBERTA OF A STATEMENT OF CLAIM OR OTHER ORIGINATING PROCESS IN PROCEEDINGS UNDER THAT ACT.*

A further question is whether the law of other jurisdictions will recognize a judgment of the Alberta courts for a balancing payment. If the person against whom the judgment is granted is within Alberta, or if he submits to the legal jurisdiction of Alberta courts, it may be expected that other jurisdictions will recognize the judgment. It is somewhat doubtful that they will recognize it if the person against whom it is granted was outside Alberta and did not

submit to the jurisdiction. Despite that doubt, however, we think that if a spouse wants to bring action in Alberta, and if the connection of the common habitual residence has subsisted or has not been superseded by another, he or she should be permitted to do so. An example is the spouse who has been deserted and who wishes to be able to claim a share in assets located in Alberta without following the other spouse to another jurisdiction.

In some cases there will be property both in Alberta and elsewhere. An Alberta court would be able to grant a personal judgment which would be enforceable in Alberta, and it would in addition be able to exercise its incidental powers so as to have Alberta property transferred. The courts of another jurisdiction, however, might well refuse to recognize an order made by an Alberta court affecting property in the other jurisdiction. In such a case the Alberta court would probably give relief so far as possible against property here, leaving the property elsewhere as the share of the defendant spouse, or part of it. If the judgment cannot be satisfied from Alberta property, it may, to that extent, be empty, but there is nothing that the Alberta Legislature can do about that. In cases in which the rights of the claimant spouse are satisfied within Alberta, the court should have power to require that the claimant surrender claims against the other spouse's property elsewhere so that, for example, a spouse cannot get everything he or she is entitled to under Alberta law and then go elsewhere and get the benefit of another system of law such as that of community of property.

RECOMMENDATION #53

THAT THE COURT HAVE POWER TO REQUIRE A SPOUSE AS A CONDITION OF OBTAINING JUDGMENT EITHER

UNDER OUR MAJORITY PROPOSAL OR OUR MINORITY PROPOSAL TO SURRENDER ALL CLAIM TO PROPERTY IN THE NAME OF THE SPOUSE.

(Bill No. 1, secs. 19(1)(x), 31(7); Bill No. 2, sec. 4(2)(vii))

2. Void, Voidable and Polygamous Marriages

A form of marriage may be void because of some fact unknown to the couple. In such a case we think that the deferred sharing regime or discretionary system should apply until there is a declaration of nullity or until the regime is otherwise terminated. If only one party knows of the fact or knows that the marriage is void we think that the regime or system should apply in favour of the innocent party only; on the one hand an innocent party relying on the marriage ceremony should not suffer for something unknown to him, while, on the other, a party should not be able to take advantage of a marriage ceremony which he knows or should know to be no marriage at all.

Our law does not recognize a marriage celebrated while one spouse is party to an existing marriage. It goes further, and for most purposes refuses to recognize a marriage entered into under a system of law which permits one of the parties to have more than one spouse. We agree with the principle of the English Matrimonial Proceedings (Polygamous Marriages Act) 1972 which says that the court "shall not be precluded from granting matrimonial relief by reason only that the marriage in question was entered into under a law which permits polygamy"; there seems to be no reason why our law should, merely because a marriage could become polygamous, refuse to recognize a marriage which is in fact monogamous at the time it is celebrated.

If one spouse already had a spouse the marriage would not be recognized and, under our recommendation dealing with void marriages, a party could claim relief under a deferred sharing property regime or discretionary system only if he or she was not aware of the previous, still existing, marriage.

A marriage may be voidable, that is, one spouse may be entitled to have it annulled but until he does so it is valid. An example is a case in which either spouse is impotent. We see no reason why a deferred sharing regime or discretionary system should not apply.

RECOMMENDATION #54

(1) THIS ACT APPLIES TO A MARRIAGE NOTWITHSTANDING THAT IT IS

(i) VOID,

(ii) VOIDABLE, OR

(iii) ENTERED INTO BY TWO UNMARRIED PERSONS UNDER A SYSTEM OF LAW PERMITTING POLYGAMOUS MARRIAGES.

(2) FOR THE PURPOSES OF THIS ACT

(i) "MARRIAGE", "HUSBAND", "WIFE", "SPOUSE", AND "MARRIED COUPLE" INCLUDE A MARRIAGE DESCRIBED IN SUBSECTION (1) OR A PARTY OR PARTIES THERETO, AND

(ii) THE DATE OF THE MARRIAGE REFERRED TO IN SUBSECTION (1) IS THE DATE OF THE DAY UPON WHICH THE COUPLE FIRST WENT THROUGH A FORM OF MARRIAGE.

(3) NOTHING IN THIS ACT CONFERS A RIGHT TO A BALANCING PAYMENT UPON A SPOUSE WHO AT THE

TIME OF A FORM OF MARRIAGE KNEW THAT IT WAS VOID OR KNEW OF A FACT MAKING IT VOID.

(Bill No. 1, sec. 3;
Bill No. 2, sec. 3)

3. Non-Marital Relationships

We do not in this Report propose to deal with the question of persons living together who are not married. We expect to examine the legal benefits and disabilities of such a relationship, including property rights, at the later stage of our study of family law. We recognize that some of these relationships very closely resemble marriage.

W. F. Bowker
R. P. Fraser
William Henkel
W. H. Hurlburt
Frederick Laux
W. A. Stevenson

By: Robert P. Fraser
Acting Chairman

W. F. Bowker
Director

August, 1975.

Bill No. 1

(Majority Proposal)

MATRIMONIAL PROPERTY ACT

Part I

Definitions

1. In this Act, unless the context otherwise requires,

(1) "court" means the Trial Division of the Supreme Court of Alberta.

(2) "property" includes money.

(3) "statutory regime" means a statutory matrimonial property regime under Part III.

Part II

Application of Act

Married Couples

2. This act applies to:

(1) a married couple

(i) each of whom at the time of the marriage is resident in Alberta, and

(ii) who have not established a common habitual residence.

(2) a married couple whose common habitual residence is in Alberta; and

(3) a married couple whose last common habitual residence was in Alberta.

Void, Voidable and Polygamous Marriages

3. (1) This Act applies to a marriage notwithstanding that it is

(i) void,

(ii) voidable, or

(iii) entered into by two unmarried persons under a system of law permitting polygamous marriages.

(2) For the purposes of this Act,

(i) "marriage", "husband", "wife", "spouse", and "married couple" include a marriage described in subsection (1) or a party or parites thereto, and

(ii) the date of the marriage referred to in subsection (1) is the date of the day upon which the couple first went through a form of marriage.

(3) Nothing in this Act confers any rights upon a spouse who at the time of a form of marriage knew that it was void or knew of a fact making it void.

PART III

Couples Married after Commencement of Act and Couples who Acquire Alberta Residence after Marriage

Application of Part

4. This part applies to married couples married after the commencement of this Act and to other married couples who acquire a common habitual residence in Alberta after marriage.

Varying and Contracting Out of Statutory Regime

5. (1) An agreement under this section may be entered into by:

(i) a couple who intend to marry each other, or

(ii) a married couple other than a couple described in section 28(2).

(2) A couple referred to in subsection (1) may

(i) agree that the statutory regime shall not apply to them,

(ii) substitute a different matrimonial regime,

(iii) agree that sections 29 to 38 inclusive of this Act shall apply to them instead of the statutory regime, or

(iv) vary the terms of the statutory regime or exclude property from its operation.

(3) An agreement to do any of the things described in subsection (2) is of no effect unless

(i) it is in writing,

(ii) each spouse whose right to receive a balancing payment is affected by the agreement acknowledges apart from the other

(a) that he is aware of the nature and effect of the agreement,

(b) that he is aware that this Act gives him the right to a balancing payment upon the termination of the matrimonial property regime and that he intends to give up that right to the extent necessary to give effect to the agreement, and

(c) that he is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or prospective spouse, and

(iii) in the case of a contract entered into after marriage by a married couple each of whom at the time of their marriage was resident in Alberta, the court

(a) approves the contract at any time upon the joint application of the married couple, or

(b) is satisfied that the agreement was fair and just when it was entered into,

(4) The acknowledgement shall be taken before a person authorized to take proof of the execution of instruments under the Land Titles Act and a certificate of acknowledgement in Form 1 or to the like effect, shall be endorsed on or attached to the statement executed by the spouse.

(5) The statutory regime applies except as varied by the agreement.

(6) An agreement under this section may have retroactive effect.

6. Nothing in this Act invalidates an agreement made by persons not subject to the Act at the time the agreement is made other than a couple each of whom is resident in Alberta and who intend to marry each other.

Commencement of Statutory Regime

7. (1) This section is subject to sections 5 and 6.

(2) A statutory regime commences:

(i) upon the marriage of a couple each of whom at the time of the marriage is resident in Alberta,

(ii) upon the establishment in Alberta of a common habitual residence by a married couple who are not already subject to a statutory regime, or

(iii) upon the execution by a married couple of an agreement in writing adopting a statutory regime for their existing matrimonial property regime.

(3) Upon the commencement of a statutory regime under section 7(2)(ii) it shall be conclusively deemed to have commenced on the date of the marriage of the married couple.

Termination of Statutory Regime

8. A statutory regime terminates upon

(1) a decree absolute of divorce,

(2) a decree absolute of nullity of a voidable marriage,

(3) a declaration of nullity of a void marriage,

(4) a judgment of judicial separation,

(5) a judgment under this Part for a balancing payment or transfer of property in lieu thereof,

(6) the approval by the court pursuant to section 26(2) of a renunciation or settlement of a claim for a balancing payment,

(7) the death of a spouse,

whichever first occurs.

Application for Balancing Payment

9. The court shall exercise its powers under sections 14 and 15

(1) upon the joint application of a married couple and upon being satisfied that it is fair and just to terminate the regime,

(2) upon the application of either spouse and upon being satisfied

(i) that the spouses have been living separate and apart for one year immediately prior to the making of the application and that normal cohabitation has been terminated,

(ii) that the other spouse has made or intends to make a substantial gift or transfer of property in contravention of section 40(1), or

(iii) that there is undue risk that the other spouse will dissipate or lose property to the detriment of the applicant, or

(3) upon the application of a spouse in proceedings in which divorce, nullity or judicial separation is claimed and upon or after either

(i) the making of a decree nisi of divorce or nullity, or

(ii) the making of a declaration of nullity of a void marriage or a judgment of judicial separation.

10. (1) An application for a judgment for a balancing payment under section 9(2) shall be brought within one year after the date of the gift or transfer of the anniversary of the separation.

(2) An application for a judgment for a balancing payment under section 9(3) shall be made

(i) before the making of the decree absolute or final judgment in proceedings for divorce, nullity or judicial separation, if the applicant is served with a notice in Form 2 or to the like effect with the petition or other process by which the proceedings are commenced or at such other time during the proceedings as the court may direct, or

(ii) within one year after the date of the making of the decree absolute or final judgment in such proceedings if notice is not given in accordance with sub-paragraph (i) of this subsection.

(3) Except in a case in which a statutory regime is terminated by the death of a spouse and except as provided in this section a right to apply for a balancing payment ceases to exist upon the termination of the statutory regime.

Effect of Statutory Regime

11. Each spouse is separate as to property during a statutory regime

12. To the extent provided in this Act

(1) each spouse shall share with the other the shareable gains described in section 15, and

(2) the sharing shall be effected by a balancing payment.

Balancing Payment Upon Termination of Statutory Regime During Lifetime of Both Spouses

13. Section 14 to 19 inclusive apply if a statutory regime is terminated during the lifetime of both spouses.

14. (1) Except to the extent that the married couple otherwise agree under section 5 each spouse is entitled to half the shareable gains made by the spouses during the statutory regime computed under section 15.

(2) A spouse's share may be varied or cancelled

(i) by agreement between the spouses at or after termination of a statutory regime, or

(ii) by order of the court.

(3) The court shall not exercise its powers under subsection (2) unless

(i) it is satisfied that the contribution of a spouse to the welfare of the spouses and their family during all or part of the statutory regime was substantially less than might reasonably have been expected under the circumstances,

(ii) in the case of shareable gains made before this Act applied to the spouses, it is reasonable to infer that the spouses or either of them would have ordered their affairs differently if they had been subject to a statutory regime while the shareable gains were being made, or

(iii) there have been previous legal proceedings between the spouses concerning the division of property or the sharing of gains.

(4) For the purposes of subsection (3) the contribution of a spouse includes

(i) providing money or money's worth, and

(ii) providing comfort, society, services and assistance.

(5) In exercising its powers under subsection (3), the court shall not have regard to the conduct of a spouse by reason only that the conduct contributed to the breakdown of the marriage or would affect the right of the spouse to receive financial support from the other spouse.

15. (1) Upon an application to determine the rights of the parties the court shall

(i) determine

(a) the shareable gains of each spouse,

(b) the share of the shareable gains of the couple to which each spouse is entitled under section 14, and

(c) the amount of balancing payment; and

(ii) give judgment for the balancing payment.

(2) The computation of shareable gains shall be made as follows

(i) the value of all property of each spouse shall be determined and the liabilities of that spouse shall be deducted therefrom, producing the net estate of each spouse,

(ii) from the net estate of each spouse shall be deducted the deductions to which each spouse is entitled,

(iii) the amount remaining is the shareable gains of the spouse.

(3) The court may exclude from the shareable gains of the spouse under this section

(i) any gain made while the spouses are separated, and

(ii) property excluded under section 19(1)(ii).

(4) The deductions to which each spouse is entitled are:

(i) the value of property owned by a spouse at the commencement of the statutory regime less his liabilities at the same date, and the value of the property is determined as of that date, and

(ii) the value of property received by a spouse from a third party during the statutory regime by gift or inheritance less any liabilities payable by the spouse with respect to it, and it is valued as of the time it was received.

(5) Notwithstanding anything contained in this Act a person making a gift of property to a spouse by an instrument in writing or by will may by express declaration made therein exclude the property and its income from the property of the spouse for the purposes of this Act.

(6) If a spouse's liabilities at the date of commencement of the statutory regime exceed the value of his property at the same date the amount of the excess shall be added to his net estate for the purposes of subsection (2).

(7) If each spouse has shareable gains the balancing payment is owed by the spouse whose shareable gains exceed his share of the shareable gains of the spouses as determined by the court and is the amount of the excess.

(8) If the computation of the shareable gains of a spouse under subsection (2) results in a negative amount

(i) his shareable gain is nil, and

(ii) he is entitled to claim from the other spouse such amount not exceeding the shareable gains of the other spouse as is necessary to pay liabilities incurred by the claimant spouse for the purpose of obtaining goods or services for the spouses of their family, and the shareable gains of the other spouse shall be reduced accordingly.

(9) If each spouse has a net loss there shall be no balancing payment.

16. The following rules apply to the determination of the value of the property of a spouse:

(1) "value" means fair actual value.

(2) Value shall be determined as at the date of termination of the statutory regime or, if the court so orders, at such later date as the court considers fair to the parties.

(3) Life insurance owned by a spouse shall be valued at its cash surrender value and shall be included in the property of a spouse who is able to realize that value.

(4) A pension plan or annuity

(i) shall be valued at its cash value to the spouse entitled to it, or

(ii) if it has no cash value shall be valued at the amount which the spouse paid for or into it.

(5) Notwithstanding anything in this Act damages paid to a spouse for personal injuries may be excluded from the property of the spouse for the purposes of this Part if it is established to the satisfaction of the court that they are not compensation for economic loss suffered by the married couple during the statutory regime.

(6) The court shall exclude from the value of property any tax liability which would be incurred in realizing upon property or in transferring property pursuant to an order of the court under this Act.

17. (1) Until the contrary is proved it shall be presumed that property owned by a spouse at the termination of a statutory regime resulted from gains made by the spouse during the statutory regime.

(2) Except as provided in subsection (1) the onus of proof of a fact lies upon the party asserting it.

18. (1) Upon termination of a statutory regime or in proceedings in which termination is claimed a spouse shall upon written notice from the other forthwith disclose in writing verified by affidavit all property owned by that spouse and all debts and particulars of all deductions claimed by him.

(2) In proceedings for or leading to termination the court may

(i) direct a spouse to supply the information provided for in subsection (1) and such other information as the court may deem fit,

(ii) allow a spouse to examine the other spouse under oath as to his property, the value thereof, the disposition of property

previously owned, and as to debts and deductions, and

(iii) give other and further directions in order to establish all material facts.

(3) Upon being satisfied

(i) that a spouse has intentionally or negligently omitted or misstated information which he was obliged to give under this section, and

(ii) that the neglect or omission has resulted in an increase in a balancing payment payable to the spouse or a decrease in a balancing payment payable by the spouse, whether the balancing payment is payable by agreement under section 27 or judgment under section 15,

the court may give judgment to the other spouse for the amount of the increase or decrease.

(4) Except in the case of fraud an application for judgment under subsection (3) shall be brought by originating notice returnable within one year after the execution of the agreement or the giving of the judgment.

19. (1) In exercising its powers under this Part, the court may:

(i) order a spouse to transfer property in satisfaction of part or all of the amount of a judgment under section 15;

(ii) exclude the value of property from the accounting under section 15 and order a spouse to transfer the property so as to be held by the spouses as tenants in common in the proportions in which each is entitled to share in the net gains of the spouses;

(iii) in lieu of an order under subparagraph (i) or subparagraph (ii) of this subsection, make a vesting order and give consequential directions;

(iv) order a spouse to pay the amount of a judgment under section 15 over a period of time with or without interest;

(v) order a spouse to give security;

(vi) charge property with the payment of the amount of a judgment under section 15 and provide for enforcement of the charge;

(vii) vary the terms of orders made under sub-paragraphs (iv), (v) and (vi) of this subsection;

(viii) order that property be sold and that the proceeds be divided between the spouses in such proportions as the court may direct;

(ix) stay proceedings by one spouse against another for partition or sale of property owned jointly or in common by the spouses;

(x) require a spouse as a condition of obtaining judgment to surrender all claim to property in the name of the other spouse;

(xi) award costs;

(xii) make consequential orders and directions.

(2) In deciding which order to make the court may have regard to

(i) any hardship or disruption which is likely to be caused to a spouse or his affairs,

(ii) the likely tax consequences of its order or of the transfer or ownership of property.

Balancing Payment Upon Termination of Statutory Regime by the Death of a Spouse

20. Where a statutory regime is terminated by the death of a spouse

(1) sections 21 to 26 inclusive apply, and

(2) sections 11 to 19 inclusive apply, save as provided in sections 21 to 26 inclusive.

21. (1) The surviving spouse may apply to the court for an order determining the rights of the parties under section 15.

(2) No application shall be made or maintained under this Part by or on behalf of and no judgment or order shall be made in favour of an estate or the personal representatives of a spouse or of a dependant.

22. (1) In this section words and phrases have the same meaning as in the Family Relief Act.

(2) This section applies if

(i) adequate provision has not been made for the proper maintenance of

(a) a dependant of a deceased spouse who is not a dependant of the surviving spouse,

(b) a dependant of either spouse who is not a dependant of the other spouse, if the spouses die in circumstances in which it is doubtful which survived the other, or

(c) a dependant of the surviving spouse who is not a dependant of the deceased spouse, if the surviving spouse dies without obtaining a judgment for a balancing payment against the estate of the deceased spouse, and

(ii) the provision would have been adequate or less inadequate if all or part of the balancing payment had been made to the estate of the deceased spouse.

(3) Upon application by a dependant referred to in subsection (2) the court may give judgment against the other spouse or his estate for such part of the balancing payment determined under section 15 as is necessary to make proper provision for the adequate maintenance of the dependant.

(4) The court may direct that the payment be made to the dependant or to the personal representatives of the deceased or a trustee in trust for the

dependant upon such terms and subject to such consequential directions as the court may deem fit.

(5) The court shall not require the surviving spouse to make a payment which will leave him without adequate provision for his proper maintenance.

23. The property of the surviving spouse for the purposes of sections 20 to 26 inclusive includes property acquired by the surviving spouse by reason of the death of the deceased by virtue of

(i) a right of survivorship,

(ii) the Dower Act,

(iii) a pension plan or other lump sum or periodic payment payable to the surviving spouse in his capacity as surviving spouse of the deceased spouse, and

(iv) the proceeds of a policy of life insurance on the life of the deceased spouse owned by either spouse which are payable to the surviving spouse.

24. The property of the deceased spouse for the purposes of sections 20 to 26 inclusive includes

(i) the property of the deceased spouse at the time of his death,

(ii) the proceeds of a policy of life insurance on the life of the deceased spouse and owned by either spouse which are payable to the estate, and

(iii) any other sum of money payable to the estate by reason of the death of the deceased spouse.

25. (1) An application under section 21 shall be brought within six months after the date of the death of the deceased spouse.

(2) An application under section 22 shall be brought within six months after the date of the death of the spouse who dies first.

26. (1) Nothing in sections 20 to 25 inclusive

(i) affects the application of the Intestate Succession Act or the will of a deceased spouse to the estate of the deceased spouse as it stands after the giving of a judgment or a balancing payment, or

(ii) the right of the surviving spouse to make an application under the Family Relief Act.

(2) An application under the Family Relief Act may be joined with an application under section 21.

(3) An application under section 21 takes precedence over an application under the Family Relief Act and for the purposes of sections 20 to 26 inclusive the court shall have regard to the property of the deceased spouse described in section 24.

Renunciation and Settlement

27. (1) At or after the termination of a statutory regime or in the course of proceedings leading thereto a spouse may

(i) renounce his right to receive a balancing payment, or

(ii) agree to accept property in full settlement of his right to receive a balancing payment.

(2) A renunciation or agreement under subsection (1) is of no effect unless it is approved by the court upon the application of either spouse.

PART IV

Couples Married Before Commencement of the Act

28. (1) Sections 29 to 38 inclusive do not apply to a married couple who at the commencement of this Act

(i) are living separate and apart under a judgment of judicial separation, or

(ii) have lived separate and apart for the period of three years immediately before the date of commencement of this Act.

(2) Except as provided in subsection (1) sections 29 to 38 inclusive apply to

(i) a married couple

(a) who were married prior to the date of the commencement of this Act, and

(b) whose common habitual residence is in Alberta or whose last common habitual residence was in Alberta, at the date of commencement of this Act, and

(ii) a couple who enter into an agreement under section 5(2)(iii).

Application During Lifetime of Both Spouses

29. Section 30 to 32 inclusive apply to an application made during the lifetime of both spouses.

30. (1) A spouse may make an application under this Part

(i) if the spouses have been living separate and apart for one year immediately prior to the making of the application and normal cohabitation appears to have terminated, or

(ii) if it appears that the other spouse has made or intends to make a substantial gift or transfer in contravention of section 39(1), or

(iii) if it appears that there is undue risk that the other spouse will dissipate or lose property to the detriment of the applicant, or

(iv) upon or after the granting of a decree nisi of divorce or nullity, a declaration of nullity, or a judgment of judicial separation.

(2) An application under subparagraphs (i), (ii) and (iii) of subsection (1) shall be made within one year from the date upon which the applicant becomes entitled to make it.

(3) An application under subparagraph (iv) of subsection (1) shall be made

(i) before the granting of the decree absolute or final judgment in the proceedings if the applicant has been served with a notice in Form 2 or to like effect with the petition or other process by which the proceedings are commenced or at such other time during the proceedings as the court may direct, or

(ii) in other cases, before the expiration of one year after the date of the making of the decree absolute or final judgment.

31. Upon an application under section 30 the court in order to distribute fairly between the spouses the shareable gains made by the spouses during marriage may

(1) give judgment against a spouse for the payment of money or the transfer of property to the other spouse;

(2) order a spouse to make payment under such a judgment over a period of time with or without interest;

(3) order a spouse to give security;

(4) charge property with the payment of money and provide for enforcement of the charge;

(5) vary the terms of orders made under subsections (2), (3) and (4);

(6) order that property be sold and that the proceeds be divided between the spouses in such proportions as the court may direct;

(7) require a spouse as a condition of obtaining judgment to surrender all claim to property in the name of the other spouse;

(8) award costs;

(9) make consequential orders and directions.

32. It shall be the duty of the court in deciding whether and how to exercise its powers under section 31 to have regard to all the circumstances of the case including the following matters that is to say:

(1) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(2) the income, earning capacity, property and other financial resources

(i) which each spouse had at the time of the marriage, and

(ii) which each spouse has or is likely to have in the foreseeable future;

(3) the financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future;

(4) the age of each party;

(5) any tax liability which may be incurred as a result of the transfer or sale of property;

(6) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to a marriage of any benefit which, by reason of the dissolution or annulment of a marriage, that party will lose the chance of acquiring;

(7) the health of each party including any physical or mental disability;

(8) the duration of the marriage;

(9) the conduct of each party;

(10) the time when property was acquired, whether after a decree of judicial separation or while the parties were living separate and apart due to marital difficulties;

(11) the manner in which the property was acquired, whether by the effort of one or both parties, or by gift or inheritance;

(12) the terms of any agreement between the parties;

(13) any previous distribution of property between the spouses by gift, agreement or order of any court;

(14) where the parties have not resided in Alberta throughout the marriage the law of the place or places in which the parties have had a common habitual residence and the length of such residence;

(15) the effect which the transfer of property or payment of money will have on the earning power and the value of the remaining property of a spouse.

Application on Death of a Spouse

33. (1) Upon the death of a spouse the surviving spouse may apply to the court for an order under this Part.

(2) An application under this section shall be brought within six months after the date of the death of the deceased spouse.

(3) No application may be made or maintained under this Part by or on behalf of an estate or the personal representatives of a spouse or of a dependant.

34. Upon an application under section 33 the court may make one or more of the orders provided for in section 31 in order to distribute fairly between the surviving spouse and the estate of the deceased spouse the shareable gains made by the spouses during marriage.

35. It shall be the duty of the court in deciding whether and how to exercise its powers under section 34 to have regard to all the circumstances of the case including such of the matters set forth in section 32 as the court deems relevant and including also the benefits to be received by the surviving spouse from the estate of the deceased spouse under the will of the deceased spouse or the Intestate Succession Act.

36. (1) Nothing in sections 33 to 35 inclusive affects the right of the surviving spouse to make an application under the Family Relief Act.

(2) An application under the Family Relief Act may be joined with an application under this Part.

(3) An application under section 33 takes precedence over an application under the Family Relief Act and for the purposes of this Part the court shall have regard to the property of the deceased spouse at the time of the death of the deceased spouse and to the property described in section 24.

37. (1) In this section words and phrases have the same meaning as in the Family Relief Act.

(2) This section applies if

(i) adequate provision has not been made for the proper maintenance of

(a) a dependant of a deceased spouse who is not a dependant of the surviving spouse,

(b) a dependant of either spouse who is not a dependant of the other spouse, if the spouses die in circumstances in which it is doubtful which survived the other, or

(c) a dependant of the surviving spouse who is not a dependant of the deceased spouse, if the surviving spouse dies without obtaining a judgment for a balancing payment against the estate of the deceased spouse, and

(ii) the provision would have been adequate or less inadequate if all or part of the balancing payment had been made to the estate of the deceased spouse.

(3) Upon application by a dependant referred to in subsection (2) the court may

(i) determine the amount of the judgment which the court would have given in

favour of the deceased spouse if the deceased spouse were living and entitled to apply under section 31, and

(ii) give judgment against the surviving spouse for such part of the said amount as is necessary to make proper provision for the adequate maintenance of the dependant.

(4) The court may direct that the payment be made to the dependant or to the personal representatives of the deceased or a trustee in trust for the dependant upon such terms and subject to such consequential directions as the court may deem fit.

(5) The court shall not require the surviving spouse to make a payment which will leave him without adequate provision for his proper maintenance.

38. An application under section 37 shall be brought within six months after the date of the death of the spouse who dies first.

PART V

General Provisions

Dissipation of Property

39. (1) A spouse who is subject to statutory regime or who is one of a married couple described in section 28(2) shall not without the consent of the other spouse make

(i) a substantial gift of property, or

(ii) a substantial transfer of property for no consideration or for a consideration which is inadequate.

(2) The value of any gift or transfer made in contravention of subsection (1)

(i) within six years before the termination of a statutory regime or application for an order under section 31, or

(ii) at any time while a statutory regime is in force, if made with the intention of affecting the amount of the balancing payment or preventing recovery thereof,

shall be added to the value of the property of the spouse who made it.

(3) Upon being satisfied that a spouse has made or intends to make a gift or transfer in contravention of subsection (1) the court may make any or all of the following orders:

(i) an order restraining such gift or transfer, and

(ii) if the donee or transferee received the gift or transfer with the intention of preventing collection of the claim of the other spouse, an order requiring the donee or transferee to pay to the other spouse the amount of the loss suffered by reason of the gift or transfer.

(4) Until the contrary is proven, the donee or transferee is presumed to have the intention referred to in subsection (3)(ii) with regard to any gift or transfer made within three years before the commencement of proceedings by the other spouse.

Rights of Third Parties

40. Unless otherwise provided this Act does not affect the rights of parties other than a husband and wife and their personal representatives.

41. A judgment for a balancing payment or a judgment under section 31 ranks equally with a judgment in favour of another judgment creditor and the provisions of the Execution Creditors Act apply.

42. Security provided or a charge imposed under this Act takes priority as a secured claim.

43. Until judgment is obtained a right to receive a balancing payment or a right to apply for a discretionary order under section 31 is not assignable or subject to attachment by a third party.

Proceedings

44. (1) Proceedings under this Act may be brought by

(i) Statement of Claim,

(ii) originating notice, or

(iii) application in an action between the spouses.

(2) The court may dispose of any application in a summary way.

Form 1

(Section 5(4))

CERTIFICATE OF ACKNOWLEDGMENT BY SPOUSE

1. This document was acknowledged before me by .... apart from her husband (or his wife, or her prospective husband, or his prospective wife).

2. ..... acknowledged to me that she (or he)

(a) is aware of the nature and effect of the agreement,

(b) is aware that the Matrimonial Property Act gives her (or him) the right to a balancing payment upon termination of their statutory matrimonial property regime and that she (or he) intends to give up that right to the extent necessary to give effect to the agreement, and

(c) is executing the agreement freely and voluntarily without any compulsion on the part of her husband (or his wife, or her prospective husband, or his prospective wife).

DATED AT ..... in the Province of ..... this ..... day of ..... A.D., 19..

_____

Title of Officiating Officer

FORM 2

(Sections 10(2), 30(3))

NOTICE TO TAKE PROCEEDINGS

Take notice that you are entitled to apply to the court under section 15 of the Matrimonial Property Act to determine whether or not money should be paid to you or property transferred by your husband (or your wife) in order to share accumulations made during your marriage (or you are entitled to apply to the court under section 30 of the Matrimonial Property Act for money to be paid or property transferred to you by your husband (or your wife) in order to distribute fairly between you the shareable gains made during your marriage).

And further take notice that you will lose that right unless you apply before the making of the decree absolute (or final judgment) in the proceedings for divorce (or judicial separation) which he (or she) has commenced.

You should immediately obtain legal advice in order to protect any right which you may have.

This notice is given by your husband (or your wife) as required by the Matrimonial Property Act.

DATED AT ..... in the Province of Alberta this ..... day of ..... A.D., 19..

_____

Name of party giving notice or his Solicitor

Bill No. 2

(Minority Proposal)

MATRIMONIAL PROPERTY ACT

PART I

Definitions

1. In this Act, unless the context otherwise requires, "court" means the Trial Division of the Supreme Court of Alberta.

PART II

Application of Act

2. This Act applies to:

(1) a married couple

(i) each of whom at the time of the marriage was resident in Alberta, and

(ii) who have not established a common habitual residence;

(2) a married couple whose common habitual residence is in Alberta; and

(3) a married couple whose last common habitual residence was in Alberta.

3. (1) This Act applies to a marriage notwithstanding that it is

(i) void,

(ii) voidable, or

(iii) entered into by two unmarried persons under a system of law permitting polygamous marriages.

(2) For the purposes of this Act,

(i) "marriage", "husband", "wife", "spouse" and "married couple" include a marriage described in subsection (1) or a party or parties thereto, and

(ii) the date of a marriage described in subsection (1) is the date of the day upon which the couple went through a form of marriage.

(3) Nothing in this Act confers a right upon a spouse who at the time of a form of marriage knew that it was void or knew of a fact which made it void.

PART III

Distribution of Property During Lifetime of Both Spouses

4. (1) The court may exercise its powers under this section

(i) upon or after granting a decree nisi of divorce, a decree nisi of nullity of marriage, a declaration of nullity of marriage or a decree of judicial separation,

(ii) upon being satisfied that the spouses have been living separate and apart for one year immediately prior to the making of the application and that normal cohabitation has been terminated,

(iii) upon being satisfied that a spouse has made or intends to make a substantial gift or transfer of property for insufficient consideration in order to prevent the other spouse from obtaining or enforcing an order under this section, or

(iv) upon being satisfied that there is undue risk that a spouse will dissipate or lose property to the detriment of the other spouse.

(2) For the purpose of distributing all the property of the married couple or of either of them fairly between the married couple the court may

(i) give judgment against a spouse for the payment of money or the transfer of property to the other spouse,

(ii) order a spouse to make payment under such a judgment over a period of time with or without interest,

(iii) order a spouse to give security for all or part of such judgment,

(iv) charge property with the payment of all or part of such judgment and provide for enforcement of the charge,

(v) vary the terms of orders made under sub-paragraphs (i), (iii) and (iv) of this subsection,

(vi) order that property be sold and that the proceeds be divided between the spouses in such proportions as the court may direct,

(vii) require a spouse as a condition of obtaining judgment to surrender all claim to property in the name of the other spouse.

(viii) award costs,

(ix) make consequential orders and directions.

(3) An application for an order under this section shall be made

(i) in cases under subparagraph (i) of subsection (1), within one year after the date of the making of the decree absolute or final judgment, or

(ii) in other cases, within one year after the date of the gift or transfer or the anniversary of the separation.

5. It shall be the duty of the court in deciding whether and how to exercise its powers under section 4 to have regard to all the circumstances of the case including the following matters that is to say:

(i) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family,

(ii) the income, earning capacity, property and other financial resources

(a) which each spouse had at the time of the marriage, and

(b) which each spouse has or is likely to have in the foreseeable future,

(iii) the financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future,

(iv) the age of each party,

(v) the effect which the transfer of property or payment of money will have on the earning power and the value of the remaining property of a spouse,

(vi) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to a marriage of any benefit which, by reason of the dissolution or annulment of a marriage, that party will lose the chance of acquiring,

(vii) the health of each party including any physical or mental disability,

(viii) the duration of the marriage,

(ix) the conduct of each party,

(x) the time when property was acquired, whether after a decree of judicial separation or while the parties were living separate and apart due to marital difficulties,

(xi) the manner in which the property was acquired, whether by the effort of one or both parties, or by gift or inheritance,

(xii) the terms of any agreement between the parties,

(xiii) any previous distribution of property between the spouses by gift, agreement or order of any court,

(xiv) a substantial gift or transfer of property made by a spouse for insufficient consideration in order to prevent the other spouse from obtaining or enforcing an order under section 4,

(xv) where the parties have not resided in Alberta throughout the marriage the law of the place or places in which the parties have had a common habitual residence.

(xvi) any tax liability which may be incurred as a result of the transfer or sale of property.

PART IV

Application Upon Death of a Spouse

6. The spouse of a deceased person may make application under this Part.

7. Upon application under section 6 the court in order to distribute property fairly between the spouses may exercise the powers conferred upon it by subsection (2) of section 4 and may give any judgment or make any order against the personal representatives of the deceased spouse which it could give or make under that subsection.

8. It shall be the duty of the court in deciding whether and how to exercise its powers under section 7 to have regard to all the circumstances of the case including such of the matters set forth in section 5 as the court deems relevant and including also the benefits to be received by the surviving spouse from the estate of the deceased spouse under the will of the deceased spouse or the Intestate Succession Act.

9. (1) An application under section 6 shall be brought within six months after the date of the death of the deceased spouse.

(2) No application may be made or maintained under this Part by or on behalf of an estate or the personal representatives of a spouse or of a dependant.

10. (1) Nothing in this Part affects the surviving spouse's right to make an application under the Family Relief Act.

(2) An application under the Family Relief Act may be joined with an application under this Part.

(3) An application under this Part takes precedence over an application under the Family Relief Act and the court shall have regard to the property of the deceased spouse at the time of death and the proceeds of any policy of life insurance payable to the estate and any other sum of money payable to the estate by reason of the death of the deceased spouse.

11. (1) In this section words and phrases have the same meaning as in the Family Relief Act.

(2) This section applies if

(i) adequate provision has not been made for the proper maintenance of

(a) a dependant of a deceased spouse who is not a dependant of the surviving spouse,

(b) a dependant of either spouse who is not a dependant of the other spouse, if the spouses die in circumstances in which it is doubtful which survived the other, or

(c) a dependant of the surviving spouse who is not a dependant of the deceased spouse, if the surviving spouse dies without obtaining a judgment for a balancing payment against the estate of the deceased spouse, and

(ii) the provision would have been adequate or less inadequate if all or part of the balancing payment had been made to the estate of the deceased spouse.

(3) Upon application by a dependant referred to in subsection (2) the court may

(i) determine the amount of the judgment which the court would have given in favour of the deceased spouse if the deceased spouse were living and entitled to apply under section 4(2), and

(ii) give judgment against the surviving spouse for such part of the said amount as is necessary to make proper provision for the adequate maintenance of the dependant.

(4) The court may direct that the payment be made to the dependant or to the personal representatives of the deceased or a trustee in trust for the dependant upon such terms and subject to such consequential directions as the court may deem fit.

(5) The court shall not require the surviving spouse to make a payment which will leave him without adequate provision for his proper maintenance.

12. An application under section 11 shall be brought within six months after the date of the death of the spouse who dies first.

PART V

13. (1) Upon being satisfied that a spouse in order to prevent the other spouse from obtaining or enforcing a judgment under section 4 is about to make any substantial gift or transfer of property for insufficient consideration the court may make such order as it thinks fit restraining the spouse from so doing and otherwise protecting the claim of the other spouse.

(2) Upon being satisfied that within one year preceding an application under section 4 a spouse has made a substantial gift or transfer of property for insufficient consideration in order to prevent the other spouse from obtaining or enforcing an order under section 4 the court in its discretion may

(i) order the donee or transferee to pay or transfer all or part of the property to the other spouse, or

(ii) give judgment in favour of the applicant spouse against the donee or transferee for a sum not exceeding the amount by

which the value of the property transferred exceeded the value of the consideration given by the donee or transferee therefor.

(3) It shall be presumed until the contrary is proven that a substantial gift or transfer of property for insufficient consideration which has the effect of defeating in whole or in part the claim of the other spouse under an order under section 4 was made in order to achieve that effect.

14. (1) Proceedings under this Act may be brought by

(i) Statement of Claim,

(ii) originating notice, or

(iii) application in an action between the spouses.

(2) The court may dispose of any application in a summary way.

Bill No. 3

Matrimonial Home Possession Act

1. In this Act:

(1) "Homestead" has the same meaning as in the Dower Act.

(2) "Spouse" includes a former husband or wife.

2. (1) The court may

(i) grant a spouse the right to live in a homestead owned by either or both spouses or such part thereof as it may deem appropriate with or without

(a) the right of exclusive possession of the homestead, and

(b) the right of exclusive possession and use of household goods and chattels owned by either or both spouses,

(ii) exclude the other spouse from living in the homestead,

(iii) restrain a spouse from entering upon or attending at or near the homestead, and

(iv) vary or discharge an order made under this section.

(2) The court may make an order under subsection (1) pending trial of an action or for an indefinite period or for a fixed period of time.

(3) If the spouses are joint tenants of the homestead the court may by order sever the joint tenancy and the spouses shall upon registration of the order at the Land Titles Office be tenants in common.

(4) In exercising its powers under this section, the court shall have regard to

(i) the availability of other accommodation within the means of the spouses,

(ii) the needs of the children of the marriage, and

(iii) the financial position of the spouses.

(5) The court may make an order under this section ex parte upon being satisfied that there is danger of injury to the applicant spouse or the children of the family.

3. An order under this Act

(1) Takes effect notwithstanding an order under the Matrimonial Property Act or an order for partition or sale of the property,

(2) May be registered at the Land Titles Office against the title to the matrimonial home, and

(3) Upon such registration remains in force notwithstanding any partition, sale or disposition of the property unless the applicant spouse consents to or participates in any such partition, sale or disposition.

4. If the spouse to whom the court grants possession under section 2 becomes entitled to a life estate of the homestead an order under section 2 ceases to have effect.

APPENDIX A

LIST OF PEOPLE MAKING SUBMISSIONS

1. National Farmers' Union
2. Westlock Association for Better Government
3. Mrs. D.J. Fremont
4. Russell Oughtred
5. Miss Patricia Moscaluk
6. Mrs. A.F. Meriam
7. Mr. and Mrs. Leonard Wold
8. Marguerite J. Trussler
9. Kirkcaldy Women's Institute
10. Mrs. Rose Crowther
11. Lois Brown
12. Faye and Rudolf Knitel
13. Mr. Justice C.W. Clement
14. Ms. C.A. Fraser
15. Wm. A. Leitch (Legislative Draftsman, Northern Ireland)
16. New Democratic Party (Alberta Section)
17. Women's Institute, Bow Island Branch
18. Women's Christian Temperance Union
19. V. Bochanesky
20. Mrs. Elizabeth Martin
21. Local Council of Women, Edmonton
22. Calder Union of the Women's Christian Temperance Union
23. The Edmonton Home for Ex-Servicemen's Children
24. Edmonton Hadassan-Wizo Council
25. Canadian Daughters League No. 18

26. Greek Canadian Ladies Philoptochos Society
27. Mrs. Mary Kostash
28. Ukrainian Women's Association of Alberta
29. Zonta Club of Edmonton
30. Mrs. P.J. Lazarowich
31. Canadian Policy Women Foundation, Chapter No. 3
32. Norwood Legion Ladies Auxiliary
33. Ukrainian Women's Association of Canada, St. John's Parish
34. McDougall United Church Women
35. Ukrainian Women's Association of Canada, O. Pchilka Branch
36. Ukrainian Orthodox Women's Association, Vegreville
37. Alberta Women's Institute, District No. 4, Langdon
38. Alberta Women's Institute, Warner
39. Alberta Women's Institute, Lethbridge
40. Alberta Women's Institute, Warner Constituency
41. Alberta Women's Institute, Little Bow Constituency
42. Alberta Women's Institute, Kinniburgh Constituency
43. Alberta Women's Institute, Westoe Constituency
44. Alberta Women's Institute, Calgary Constituency
45. Alberta Women's Institute, Bow Island Constituency
46. Alberta Women's Institute, Taber
47. Alberta Women's Institute, Langdon
48. Alberta Women's Institute, Turner Valley
49. Jean McBean
50. Local Council of Women, Calgary
51. Calgary Status of Women Action Committee
52. Mrs. C.M. Ziebarth
53. Mrs. Menil Hallstein
54. Ms. Maria Eriksen
55. Mrs. R.A. Akitt

56. Lethbridge University Women's Club
57. Young Women's Christian Association of Edmonton
58. Alberta Human Rights and Civil Liberties Association
59. Mrs. Carol Kimmett
60. Ferintosh United Church Women
61. United Church Women of Parkdale United Church
62. Mrs. Wm. Ziegler
63. Ester Hansen
64. Mrs. Rita Scobie
65. Lynne Tyler
66. Lynn Harrington and Donald Moch
67. Mrs. Wm. Plaizier
68. Mrs. Nina Kloppenberg
69. Ms. Erica Bell and Ms. Vera Radio
70. Highwood Women's Institute
71. Grace United Church Women
72. Mrs. B. Wright
73. University Women's Club of Calgary
74. Mrs. K.L. Thomas
75. Alberta Women's Institute, Medicine Hat Constituency, District IV
76. Ms. Patricia Doerksen
77. United Church Women's Rally, Kitscoty
78. Lee Hedley
79. P.A. Robison, Esq.
80. Mrs. Wm. Will, Irvine Women's Institute
81. M.A. Loets
82. The Honourable Mr. Justice Zelling (Australia)
83. Martial Berube, Esq.
84. H.R. Hahlo
85. South Alberta Presbyterial United Council of Women

86. K.P. Lindsay
87. Mr. Stanley R. Price
88. Home Economics Branch, Department of Agriculture, Stettler
89. Mrs. I. Drewin
90. Voice of Alberta Native Women's Society
91. Mrs. Mae Regan
92. Mrs. B. Schmidt
93. Mrs. Hedwig Erickson

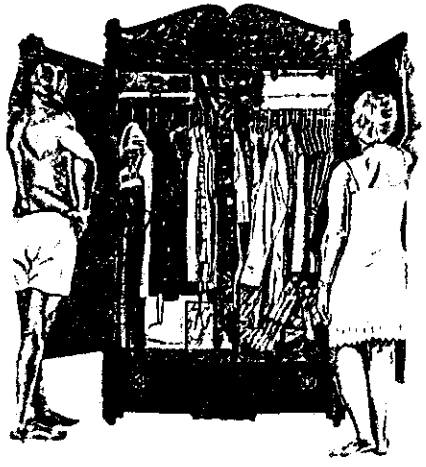
* The Institute also received a substantial and considered statement from the Alberta Human Rights Commission.

APPENDIX B

SUMMARY OF RESULTS OF QUESTIONNAIRE

Appendix B is a summary of the results obtained from the questionnaire prepared by the Institute and printed, published and circulated by the Alberta Women's Bureau, and of the procedure followed.

THE "MARSHA AND JOHN" QUESTIONNAIRE



. . . an opportunity for you to help set the guidelines for a fair legal distribution of property between husband and wife.

The "Marsha and John" questionnaire came about through co-operation between the Alberta Women's Bureau and the Institute. The Women's Bureau financed production of the questionnaire and distributed the questionnaire and complementary posters throughout the province; the Institute provided the questions. The campaign was designed to give wide publicity to the Institute's Working Paper on Matrimonial Property and to evoke public reaction to the proposals contained in the Working Paper.

THE SAMPLE

One thousand four hundred and seventy-two completed questionnaires were returned to the Institute by December 31, 1974. The results of these questionnaires are recorded below.

This sample is a self-selecting one. That is to say, the views reflected cannot be taken as representative of the views of Albertans. It is important to keep this in mind when assessing the significance of the results.

Husbands comprised 19% of all respondents, and wives comprised 62.4%. The sample also picked up unmarried men (3.9%) and unmarried women (10.1%). The tables below break down the respondents on this basis and on the basis of other variables.

	Absolute Number of Respondents	Percentage of all Respondents
Marital Status and Sex		
Husbands	280	19.0%
Wives	919	62.4%
Unmarried Men	58	3.9%
Unmarried Women	148	10.1%
Length of Marriage		
5 years or less	289	19.6%
6-10 years	246	16.7%
11-15 years	151	10.3%
15-20 years	169	11.5%
more than 20 years	387	26.3%

	Absolute Number of Respondents	Percentage of all Respondents
Place of Residence		
Farm	210	14.3%
Town	361	24.5%
City	794	53.9%
Acreage	70	4.8%
Value of Property Owned by Respondent		
Up to $10,000	421	28.6%
$10,000 to $25,000	254	17.3%
$25,000 to $50,000	282	19.2%
$50,000 to $100,000	212	14.4%
More than $100,000	131	8.9%
Value of Property Owned by Respondent's Spouse		
Up to $10,000	214	14.5%
$10,000 to $25,000	205	13.9%
$25,000 to $50,000	277	18.8%
$50,000 to $100,000	204	13.9%
More than $100,000	156	10.7%

RESULTS

Results of the questionnaire are set out below. A chart giving the response, by percentage, of husbands, wives, and all respondents to the question follows each question. The percentages recorded do not total 100% in every case because (1) all respondents did not answer all questions and (2) some respondents qualified their answers (by altering or adding to the choices in the questionnaire) and these responses are not tabulated. In addition to the views of husbands, wives and all respondents, differences in view based on other variables are charted where the difference may be noteworthy.

Marsha and John could be a couple in your neighbourhood. During their marriage they both work hard to make a good life for themselves and their children. Marsha is the homemaker, while John earns the money to pay for family expenses. Together Marsha and John gradually build up property - furniture, appliances, a car, perhaps a house, or even a parcel of land. All the family use and enjoy this property.

A time comes when Marsha and John no longer get along well. They decide to part ways. Marsha wants some of the property they have acquired. John says it belongs to him because he earned the money to pay for it. Under the law John is right. Marsha finds this unfair. What do you think? (Whatever happens to the property, John may have to pay to look after Marsha and the children.)

If you agree that all the property should belong to John, put a check mark (✓) in this box.

If you think Marsha should get a share, help us decide how to make the law fairer by answering this questionnaire. For each question put a check mark (✓) in the box beside the best answer. Feel free, as well to add your own comments.

QUESTIONNAIRE

The law could make both Marsha and John owners of property as soon as they get it. (Remember that John paid.)

Question 1.

Would you give Marsha a share in all the property?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	75.0%	90.8%	85.4%
No	18.6%	4.5%	9.1%

It is interesting to compare the responses of single persons with those of married persons. The percentages suggest that unmarried men are less inclined to favour sharing than husbands and that husbands tend to trail unmarried women and wives. This pattern prevails throughout questions 1 to 10 of the questionnaire as shown in the tables which follow.

	Unmarried Men	Unmarried Women
Yes	60.3%	83.1%
No	32.8%	10.1%

Question 2.

Would you give Marsha a share in a bank account?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	82.5%	93.9%	89.5%
No	12.5%	2.9%	5.6%

	Unmarried Men	Unmarried Women
Yes	69.0%	86.5%
No	15.5%	6.8%

Question 3.

Would you give Marsha a share in a farm?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	79.3%	94.5%	89.5%
No	13.9%	2.0%	5.6%

	Unmarried Men	Unmarried Women
Yes	70.7%	87.2%
No	19.0%	7.4%

Question 4.

Would you give Marsha a share in profits from investments?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	72.1%	87.8%	82.9%
No	21.1%	6.5%	10.7%

	Unmarried Men	Unmarried Women
Yes	58.0%	82.4%
No	27.6%	11.5%

Question 5.

Would you give Marsha a share in savings from housekeeping?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	91.4%	96.2%	94.6%
No	3.6%	0.8%	1.2%

Question 6.

Would you give Marsha a share in furniture?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	94.3%	98.3%	96.7%
No	2.5%	0.3%	0.9%

	Unmarried Men	Unmarried Women
Yes	84.5%	97.3%
No	5.2%	0.0%

Question 7.

Would you give Marsha a share in appliances?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	92.9%	97.7%	95.7%
No	2.9%	.4%	1.0%

Question 8.

Would you give Marsha a share in a car?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	74.6%	85.7%	82.2%
No	18.9%	8.4%	11.1%

Question 9.

Would you give Marsha a share in a house?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	90.4%	97.2%	94.2%
No	5.4%	.5%	2.5%

	Unmarried Men	Unmarried Women
Yes	72.4%	94.6%
No	19.0%	2.0%

Question 10.

Would you give Marsha a share in a summer cottage?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	82.5%	90.4%	87.4%
No	11.4%	5.2%	7.1%

	Unmarried Men	Unmarried Women
Yes	67.2%	87.8%
No	17.2%	6.8%

Question 10 also demonstrated some variation in response from farm to city.

	Farm	Town	City	Acreage
Yes	81.0%	86.1%	89.3%	91.4%
No	19.0%	8.0%	6.2%	5.7%

Question 11.

Where you have checked "yes" in any of the boxes above, what should Marsha's share be?

(1) half ☐

(2) quarter ☐

(3) third ☐

(4) all ☐

(5) some other proportion ☐

	Husbands	Wives	All
Half	68.9%	82.9%	78.0%
Quarter	1.4%	0.5%	1.0%
Third	4.6%	3.5%	3.9%
All	2.1%	0.4%	1.0%
Some other proportion	9.3%	3.0%	5.0%

In this question as in many of the succeeding questions, unmarried men were not in accord with the average response. Unmarried women are included for comparison in every case where the responses of unmarried men are recorded.

	Unmarried Men	Unmarried Women
Half	48.3%	75.0%
Quarter	3.4%	2.7%
Third	8.6%	4.7%
All	5.2%	0.7%
Some other proportion	12.1%	5.4%

The rural-urban response also shows variation from the norm.

	Farm	Town	City	Acreage
Half	64.3%	75.9%	81.1%	88.6%
Quarter	2.4%	0.6%	1.0%	0.0%
Third	7.6%	5.0%	2.6%	1.4%
All	1.9%	0.6%	1.0%	0.0%
Some other proportion	5.2%	5.8%	5.0%	1.4%

Question 12.

If Marsha is given a share in John's car, would you let John sell it without Marsha's okay?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	22.9%	11.0%	14.2%
No	65.0%	80.0%	76.2%

	Unmarried Men	Unmarried Women
Yes	29.3%	12.2%
No	60.3%	81.1%

Question 13.

Suppose that Marsha is given a share in John's car but the car is only partly paid for. Should the car dealer be able to make Marsha help pay for it?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	77.1%	71.6%	73.0%
No	15.0%	14.0%	13.7%

	Unmarried Men	Unmarried Women
Yes	81.0%	73.0%
No	12.1%	10.1%

Question 14.

If the marriage break-up was Marsha's fault, would you change your answers to questions 1 to 12?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	23.2%	14.6%	16.2%
No	68.2%	75.4%	73.1%

Unmarried persons were more extreme than husbands and wives in their responses to question 14.

	Unmarried Men	Unmarried Women
Yes	31.0%	6.8%
No	56.9%	81.1%

The rural-urban response varied somewhat in that persons living on a farm tended to be more concerned with fault as a factor in determining property division.

	Farm	Town	City	Acreage
Yes	23.8%	15.0%	15.0%	17.1%
No	60.0%	76.2%	75.2%	71.4%

The law could say that John is still the owner of the property, but he must pay Marsha part of its money value because she helped as a homemaker.

Question 15.

Would you make John pay Marsha

(1) half the value of all the property, or ☐

(2) it depends how hard Marsha has worked, or ☐

(3) what the judge thinks is fair. ☐

	Husbands	Wives	All
	[illegible]	[illegible]	61.2%

Once again, unmarried men were out of step with the majority.

	Unmarried Men	Unmarried Women
Half	37.9%	64.9%
Contribution	31.0%	14.9%
Discretion	22.4%	13.5%

The rural-urban breakdown is also noteworthy.

	Farm	Town	City	Acreage
Half	43.3%	57.3%	66.6%	70.0%
Contribution	27.1%	15.2%	11.8%	17.1%
Discretion	14.3%	14.7%	12.7%	5.7%

Assume that Marsha gets something.

Question 16.

*Which is better - property or money**

(1) property or ☐

(2) money ☐

	Husbands	Wives	All
Yes	32.1%	42.7%	40.9%
No	37.1%	25.5%	28.0%

*A very large percentage of persons in each category (24.4% of [illegible] qualified their answers to this question. [illegible]

	Unmarried Men	Unmarried Women
Yes	36.2%	49.3%
No	43.1%	24.3%

In the example, John owns the family home. The marriage has broken down and John and Marsha have separated. Suppose that John now wants to sell the family home, but Marsha wants to keep on living in it with the children.

Question 17.

Should Marsha and the children be allowed to stay in the family home if a house like it is up for rent nearby?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	45.0%	60.6%	56.9%
No	39.3%	25.8%	29.0%

	Unmarried Men	Unmarried Women
Yes	41.4%	62.2%
No	46.6%	25.0%

There is some indication of a trend based on length of marriage, those married for a shorter length of time tending to say "no" and those married for a longer length of time tending to say "yes".

	5 years or less	6-10 years	11-15 years	16-20 years	more than 20 years
Yes	51.6%	52.8%	54.3%	69.2%	60.5%
No	37.0%	36.2%	25.8%	20.7%	22.5%

There is also an indication of a trend based on the value of property owned by the spouse of the respondent, those with spouses owning property of lower value tending to say "no" and those with spouses owning property of higher value tending to say "yes".

	Up to $10,000	$10,000-$25,000	$25,000-$50,000	$50,000-$100,000	more than $100,000
Yes	48.1%	58.5%	56.0%	61.8%	66.5%
No	38.3%	28.8%	30.0%	27.5%	21.5%

Question 18.

Should Marsha and the children be allowed to stay in the family home if they can NOT rent a house like it nearby?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	68.6%	76.5%	74.5%
No	20.0%	9.6%	12.1%

Question 19.

Should Marsha be allowed to stay in the family home after the children are grown up?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	31.1%	39.9%	38.0%
No	50.0%	35.7%	39.3%

Now suppose that John and Marsha together are owners of the family home. John wants to sell it but Marsha wants to keep living in it.

Question 20.

Should Marsha and the children be allowed to stay in the family home if a house like it is up for rent nearby?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	54.3%	71.7%	67.9%
No	30.4%	14.8%	18.7%

	Unmarried Men	Unmarried Women
Yes	51.7%	76.4%
No	36.2%	14.9%

Question 21.

Should Marsha and the children be allowed to stay in the family home if they can not rent a house like it nearby?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	67.5%	79.1%	76.2%
No	18.6%	7.5%	10.3%

	Unmarried Men	Unmarried Women
	[illegible]	81.8%

There is a slight indication that persons owning property of lower value tend to answer "yes" more frequently than persons owning property of higher value.

	Up to $10,000	$10,000-$25,000	$25,000-$50,000	$50,000-$100,000	more than $100,000
Yes	81.7%	78.7%	72.0%	74.1%	71.0%
No	6.9%	10.2%	14.9%	11.8%	12.2%

Question 22.

Should Marsha be allowed to stay in the family home after the children are grown up?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	36.8%	50.2%	47.1%
No	41.4%	25.9%	29.3%

	Unmarried Men	Unmarried Women
Yes	34.5%	54.1%
No	39.7%	25.7%

Again there is a slight indication that persons owning property of lesser value tend to answer "yes" more often than persons owning property of greater value.

	Up to $10,000	$10,000-$25,000	$25,000-$50,000	$50,000-$100,000	more than $100,000
Yes	52.7%	49.6%	44.3%	44.8%	40.5%
No	24.2%	31.9%	33.3%	31.6%	35.9%

Let us say that the family home is a farm and Marsha is to get half.

Question 23.

Should Marsha get half of

(1) the home quarter ☐

(2) the whole farm, or ☐

(3) the house and yard only. ☐

	Husbands	Wives	All
Home Quarter	14.3%	8.2%	9.3%
Whole Farm	58.2%	75.4%	71.1%
House and Yard	10.0%	4.0%	6.2%

	Unmarried Men	Unmarried Women
Home Quarter	6.9%	8.8%
Whole Farm	60.3%	76.4%
House and Yard	17.2%	6.1%

The views of persons living on farms are particularly relevant to this question. Compared with the average a smaller proportion of persons living on farms would give a wife half of the whole farm and a larger porportion would give her half of the home quarter. Very few would give the house and yard only.

Farm

The law could make John and Marsha share the furniture, appliances and other household goods half and half.

Question 24.

If the law did this

(1) should each half be the same (e.g. a chair to Marsha, a chair to John, etc.) or, ☐

(2) should John pay Marsha half the money value of these goods, or, ☐

(3) should Marsha get the things she used the most and John the things he used the most, up to half (in $ value). ☐

	Husbands	Wives	All
Each half the same	8.9%	8.8%	9.0%
Half the money value	21.8%	19.9%	20.0%
Division according to use	49.6%	55.0%	54.0%

There is a tendency for persons owning property of lower value to show a preference for a division based on use compared with persons owning property of higher value. This difference in attitude does not exhibit itself in the first and second responses to question 24.

	Up to $10,000	$10,000-$25,000	$25,000-$50,000	$50,000-$100,000	more than $100,000
Each half					

A similar trend is reflected on the basis of the value of property owned by the spouse of the respondent. Persons with spouses owning property of lesser value tend to prefer division based on use more than persons with spouses owning property of greater value, but no differences are indicated for the other two responses.

	Up to $10,000	$10,000-$25,000	$25,000-$50,000	$50,000-$100,000	more than $100,000
Each half the same	7.5%	11.2%	5.4%	9.3%	10.8%
Half the money value	19.6%	19.0%	20.6%	23.0%	18.4%
Division according to use	59.8%	57.1%	56.7%	52.0%	50.6%

Suppose that John owned a car before he and Marsha were married. Both John and Marsha used the car during the marriage.

Question 25.

Should the car be included in the property which is shared with Marsha after the break-up?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	45.0%	35.3%	36.3%
No	50.7%	58.0%	57.4%

	Unmarried Men	Unmarried Women
Yes	34.5%	29.7%
No	63.8%	64.2%

Persons owning property of lesser value tend to answer "no" more frequently than persons owning property of greater value.

	Up to $10,000	$10,000-$25,000	$25,000-$50,000	$50,000-$100,000	more than $100,000
Yes	28.5%	35.0%	37.9%	44.8%	42.7%
No	66.3%	58.7%	57.1%	49.5%	49.6%

The same differences show up on the basis of the value of property owned by the respondent's spouse.

	Up to $10,000	$10,000-$25,000	$25,000-$50,000	$50,000-$100,000	more than $100,000
Yes	33.6%	38.0%	33.9%	43.1%	43.7%
No	63.6%	56.6%	58.8%	50.0%	49.4%

Now let's say that John had an old wooden rocking chair worth $10 on the wedding day. When John and Marsha break up it is worth $100.

Question 26.

Should Marsha get part of the $90 difference?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	47.1%	36.1%	37.1%
No	46.4%	55.3%	55.0%

The responses of unmarried women to this question vary considerably from the norm.

	Unmarried Men	Unmarried Women
Yes	43.1%	24.3%
No	50.0%	72.3%

There are also differences based on the value of property owned by the respondent, those with property of lower value tending to answer "no" more often than those with property of higher value.

	Up to $10,000	$10,000-$25,000	$25,000-$50,000	$50,000-$100,000	more than $100,000
Yes	31.8%	35.0%	37.9%	45.3%	43.5%
No	59.1%	57.9%	58.5%	47.2%	48.1%

Let's change things again. Suppose that during the marriage Marsha had a part-time job clerking in a local store. She saved her pay.

Question 27.

Should Marsha have to share her savings with John?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	73.6%	69.0%	68.3%
No	20.0%	20.0%	20.7%

	Unmarried Men	Unmarried Women
Yes	60.3%	65.5%
No	27.6%	21.6%

There was considerable difference between the answers of persons living on farms and persons living elsewhere.

	Farm	Town	City	Acreage
Yes	56.7%	71.7%	70.4%	72.9%
No	27.6%	18.8%	19.9%	21.4%

While they were married, Marsha's aunt gave her a gift of $500. Marsha still has it when they break-up.

Question 28.

Should Marsha have to share this $500 with John?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	38.2%	30.6%	32.1%
No	56.4%	63.3%	61.2%

	Unmarried Men	Unmarried Women
Yes	39.7%	27.0%
No	51.7%	66.2%

Assume the law is changed to give Marsha part of John's property, but John and Marsha don't like the new rules.

Question 29.

Should they be able to make a different agreement about who owns the property?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	82.9%	81.3%	81.6%
No	10.7%	8.8%	9.0%

In the example, Marsha and John have split up because they can no longer get along. Their marriage could come to an end in another way--one of them could die. Assume that John has died.

Question 30.

Should Marsha get

(1) all John's property ☐

(2) whatever John decides to leave her in his will (if John does not have a will, the law now says what Marsha gets ☐

(3) the same share of John's property as she would get if they had broken up. ☐

	Husbands	Wives	All
Survivorship	43.2%	60.8%	53.6%
Existing Law	28.9%	18.8%	23.5%
Matrimonial Regime	16.8%	11.6%	12.7%

The responses of unmarried persons were very different from those of married persons.

	Unmarried Men	Unmarried Women
Survivorship	31.0%	39.9%
Existing Law	43.1%	36.5%
Matrimonial Regime	15.5%	12.8%

There was a slight tendency for persons married for a short period of time to prefer the existing law more than persons married for a longer time.

	5 years or less	6-10 years	11-15 years	16-20 years	more than 20
Survivorship	54.3%	52.0%	59.6%	51.5%	60.2%
Existing Law	26.6%	27.6%	20.5%	23.1%	13.4%
Matrimonial Regime	11.4%	11.8%	11.3%	13.6%	15.8%

Question 31.

*If Marsha's share is not enough, should a judge be able to give her more? (Answer this question only if you checked (2) or (3) in question 30.)**

Yes ☐

No ☐

	Husbands	Wives	All
Yes	32.9%	27.9%	30.9%
No	7.5%	3.4%	4.8%

	Unmarried Men	Unmarried Women
Yes	41.4%	43.2%
No	15.5%	4.7%

*A very high percentage of persons, that is 63.5%, did not answer this question at all. The responses must be evaluated in light of this fact.

Try turning John and Marsha around so that John becomes Marsha, and Marsha becomes John.

Question 32.

Would you change your answers to any of the questions?

Yes ☐

No ☐

	Husbands	Wives	All
Yes	3.9%	5.8%	5.8%
No	91.1%	89.4%	88.9%

	Unmarried Men	Unmarried Women
Yes	10.3%	8.1%
No	81.0%	89.2%

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