ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

SECTION 16 OF THE MATRIMONIAL PROPERTY ACT

Report No. 57

March 1990

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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ACKNOWLEDGEMENTS

The impetus for this project was based on the indication of members of the profession that Section 16 had caused difficulties in practice. As a result of that information, a survey of the profession was conducted.

The responsibility for reviewing the operation of Section 16 fell to one of the Institute counsel, Janice Henderson-Lypkie. Not only has Ms. Henderson-Lypkie prepared the background research upon which these recommendations are based, but was also responsible for the analysis and interpretation of the responses to our questionnaire. The Board acknowledges, with gratitude, her industrious work on this project.

SECTION 16 OF THE MATRIMONIAL PROPERTY ACT

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PART I - SUMMARY OF REPORT

Introduction

The Alberta Law Reform Institute ("Institute") undertook a review of Section 16 of the *Matrimonial Property Act* because of the many criticisms of the section voiced by lawyers who practice matrimonial property law. Section 16 provides:

> 16. Notwithstanding the *Survival of Actions Act*, the rights conferred on a person by this Part do not survive the death of the person for the benefit of his estate.

The result is that there can be no division of matrimonial property under the Act if the plaintiff dies before completion of the action. This section reflects the policy that matrimonial property should be available for the benefit of the surviving spouse.

The Need for Reform

Section 16 causes several problems in practice. Of most concern is the unfortunate result that the health of the plaintiff materially affects the conduct of a matrimonial property action. When the plaintiff in a matrimonial property action is seriously ill, the defendant may delay the action in the morbid hope that the plaintiff will die before completion of the action. A survey of members of the Alberta bar showed that many lawyers had experienced delay in such circumstances.

The report examines existing legal avenues that can be used, with varying degrees of success, to minimize delay or remove the incentive for delay, including using the Alberta Rules of Court effectively, severing joint tenancies, and seeking a declaration of resulting trusts and constructive trusts. A review of the strengths and weaknesses of each legal avenue reveals that they are inadequate to deal with the problems occasioned by section 16. In many situations, the present law builds in an incentive for a defendant in a matrimonial property action to delay when the plaintiff is seriously ill.

Recommendations

The problem of delay can be solved in one of two ways. Section 16 could be repealed entirely and replaced with a section that would allow the cause of action to survive for the benefit of the estate of the deceased spouse. Then an estate could commence a matrimonial property action after the death of the spouse or could continue

a matrimonial property action commenced before death. Alternatively, section 16 could be amended to allow an estate to continue an action already commenced by the deceased spouse. However, the estate would be unable to commence an action. The Institute is attracted by the second solution because it overcomes the problem of delay without materially changing the nature of the matrimonial property regime now in existence.

The Institute recommends that the an estate be allowed to continue a matrimonial property action commenced by a deceased spouse. This is a deviation from the original policy that matrimonial property be available in all situations for the benefit of the surviving spouse. However, it can be justified on three bases. First, it is necessary to solve the problem of delay. Second, the decision to commence the action remains with the spouses of the marriage. Third, the division of property lies within the discretion of the Court subject to the presumption of equal division.

The *Matrimonial Property Act* provides that in most cases the court distribute the property acquired over the course of the marriage equally between the spouses. Division will be unequal only when the Court considers that it is not fair and equitable to divide the property equally after considering the factors in section 8 of the Act. If death of a spouse was a factor enumerated in section 8, the court could justify unequal division of matrimonial property in favour of the surviving spouse. The defendant would still gain if the plaintiff died before completion of the action. This would create an incentive for the defendant to delay a matrimonial property action. Therefore, the Institute recommends that death of a spouse should *not* be an enumerated factor in section 8. For this same reason and others enumerated in the Report, the Institute believes that the death of a spouse should not be seen as a "fact or circumstance that is relevant" under 8(m).

PART II - FINAL REPORT

CHAPTER 1 - INTRODUCTION

A. History of Section 16 of the *Matrimonial Property Act*

By 1971 the Alberta Legislature had recognized that the law of trust at that stage of its development[1] was an inadequate and sometimes unjust way to deal with matrimonial property disputes. In that year the Legislature asked the Alberta Law Reform Institute[2] ("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."[3] In 1975 the Institute published its Report 18 on *Matrimonial Property* ("Report 18"). Report 18 contained a majority and minority Board recommendation. After considering Report 18 and the many submissions made by concerned Albertans, the Legislature enacted the *Matrimonial Property Act*[4] ("the Act") in the spring of 1978. For the most part, the Legislature accepted the recommendations of the minority set out in Report 18.

For this discussion it is unnecessary to contrast the proposals of the majority and minority set out in Report 18. On the question of whether a matrimonial property action should survive for the benefit of the estate of the deceased spouse, both groups were in agreement: the action should not survive. Only the surviving spouse should have a right of action against the estate of the deceased. The majority and minority were aware that these recommendations would create an injustice for the deceased spouse's children of a former marriage. Therefore the Board unanimously recommended that the deceased spouse's children of a former marriage be given the right to commence action against the surviving spouse for adequate maintenance.[5]

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1 The development of the constructive trust to remedy unjust enrichment has gone a long way to overcome some of the inadequacies of trust law which existed in 1971. See M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 Alta. L. Rev. 407 and *Rawluk* v. *Rawluk* (25 January 1990) Ottawa 20736 (S.C.C.) at 8-14.

2 The Alberta Law Reform Institute was known formerly as The Institute of Law Research and Reform.

3 Institute of Law Research and Reform, *Matrimonial Property*, Report No. 18 (Edmonton: University of Alberta Printing Services, 1975).

4 Enacted as S.A. 1978, c. 22, now R.S.A. 1980, c. M-9.

5 Report 18, *supra*, note 3 at 98-9 and 134-36.

The Legislature accepted part of the Institute's recommendation on this issue. It enacted sections 11 and 16 of the Act. Section 11 provides that the surviving spouse can bring an action under the Act and imposed certain conditions on the bringing of such an action. Section 16 of the Act reads as follows:

> 16. Notwithstanding the *Survival of Actions Act*, the rights conferred on a person by this Part do not survive the death of that person for the benefit of his estate.

The Act does not confer any protection on the deceased spouse's children of a former marriage.

When examining whether a matrimonial property action should survive the death of a spouse, the Institute considered the following proposals:[6]

> 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 sharable 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 the 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 sharable 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.

In support of the majority recommendation, the Institute made these arguments:[7]

> 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.

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6 Report 18, *supra*, note 3 at 92.

7 Report 18, *supra*, note 3 at 92-3.

> 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 to be returned to the paying spouse.

At page 99 of Report 18 the Institute discusses the arguments that support the second proposal. These are:

> 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.

Those in favour of the third proposal argued that the present law makes reasonable provision for the surviving spouse and the children. In their view, there was no need to reform the law on this point.[8]

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[8] See discussion in Report 18 at 101-02.

B. Problems Created by Section 16 of the *Matrimonial Property Act*

Section 16 causes problems in practice. One unfortunate result is that the health of the plaintiff materially affects the conduct of a matrimonial property action. When the plaintiff in a matrimonial property action is seriously ill, the defendant often delays the action in the morbid hope that the plaintiff will die before completion of the action. Another problem with the law is that it leaves the deceased spouse's children of a former marriage in an untenable position. Also, section 16 of the Act leaves the estate of a deceased spouse no way of obtaining a share in the matrimonial property other than bringing an action for a declaration of trust. An estate does not have access to the comparatively simple procedures created by the Act.

C. Questionnaire

After many lawyers had voiced their criticisms of section 16, the Institute circulated a questionnaire to all practising members of the Alberta Bar. The questionnaire outlined the reasons for which section 16 was enacted and the difficulties caused by the section. The questionnaire summarized these difficulties as follows:

(1) Some argued that the provision encourages slow progress of the *Matrimonial Property Act* action if there is a possibility that the claimant spouse might predecease the determination of the action.

(2) Section 16 takes away a choice of remedies that is made available to the plaintiff before death. Prior to death the plaintiff may use either the *Matrimonial Property Act* or argue the trust remedies that are available. After death the only remedy available to the estate is a constructive or resulting trust argument. These are the remedies which the *Matrimonial Property Act* was intended to subsume in the majority of cases.

(3) If the general rules of the *Survival of Actions Act* were to operate the estate would be able to continue or bring an action on behalf of the deceased spouse. Merely allowing the right of action to be maintained does not remove the evidentiary concerns that would be applicable in such a case. It can be argued that the proper approach is not to remove the right of action altogether if the cause for concern is reliability of the available evidence. Other provisions would deal with that concern.

Three hundred and ninety-seven lawyers responded to the questionnaire. Of these 84% of the lawyers said that section 16 caused the difficulties described in the questionnaire. Seventy-three percent of the lawyers thought that the appropriate response was complete repeal of section 16. Nineteen percent of the lawyers who responded said they had personally experienced these difficulties.

D. Scope of the Discussion

In this Report, we will outline the existing law which lawyers can use to overcome the problems created by section 16 of the Act. We then shall make recommendations for reform.

CHAPTER 2 - EXISTING LAW

There are several existing legal avenues that, in varying degrees, alleviate the problems caused by section 16 of the Act. In this chapter we will review these legal avenues and examine the strengths and weaknesses of each. We conclude that the use of existing legal avenues is insufficient to overcome the problem of delay occasioned by section 16. The analysis of the effectiveness of each legal avenue comes at the end of the chapter and is not found in the discussion of general principles.

A. Alberta Rules of Court

(1) Introduction

We shall now give an overview of how lawyers can use the Alberta Rules of Court to expedite the conduct of an action. To many this will be trite law and of little comfort, because it necessarily takes time to compel defendants to act. However, the exercise of reviewing the Rules reveals their strengths and weaknesses. Of special interest are Rules 236, 251 and 548 which provide:

> R. 236 (1) When all parties have completed all pleadings, discoveries, admissions, undertakings and interlocutory proceedings that they propose to have, they may enter the action for trial by filing a certificate of readiness in a form approved by the Court of Queen's Bench.
> (3) If the parties do not agree to the filing of a certificate of readiness, any party may by notice of motion supported by his certificate of readiness, apply for an Order that the action be entered for trial.
>
> R. 251 A judge may postpone or adjourn a trial to such time and place and upon such terms as he thinks fit.
>
> R. 548(1) Unless there is an express provision that this Rule does not apply, the court may enlarge or abridge the time appointed by these Rules of any rules relating to time or fixed by any order for doing any act or taking any proceeding upon such terms as may be just.

The plaintiff can use these Rules and others to overcome the delay caused by section 16 of the Act.

(2) Expediting the Action

(a) Preparing for trial

(i) Pleadings, discoveries and production of documents

If the plaintiff in a matrimonial property action is terminally ill, the plaintiff's lawyer must proceed with the action as quickly as possible. This will not be an easy task because the defendant's lawyer will likely delay the action as much as possible. The defendant's lawyer will see delay as a tactic that could benefit his client if the plaintiff dies before trial.

The plaintiff's lawyer must make full use of the Alberta Rules of Court. He must take every step he can, as soon as he can. Also he must consider whether he can prove his case without the need to examine the defendant or for the production of documents. If he can, he should forgo these steps. In most cases these steps will be necessary.

In carrying on the action, he must not give any extensions of time for the filing of a statement of defence or the filing of an affidavit of documents. He must serve notices to produce and appointments for discoveries. He must bring timely applications to force production and answers to undertakings. As soon as he is able, he must make an application setting the matter down for trial. During such an application he must ask the court to set an early trial date and impose deadlines for the defendant to complete his case so that the trial may proceed.

The major tool for delay of litigation is the discovery process. In the normal course of events this process takes time. When the defendant refuses to attend discoveries or refuses to comply with undertakings without court order, the process becomes a quagmire. Timely use of the Rules by a plaintiff will not ensure normal progression of an action if a defendant adopts these tactics. It takes time to compel attendance at examination for discoveries and to compel answers to undertakings.

(ii) Abridging time: Rule 548

The plaintiff may also wish to apply under Rule 548 for an abridgement of time to file a statement of defence, affidavit of documents and other such deadlines. *Davis* v. *The City of Toronto*[9] is a case which interpreted a rule similar to our Rule 548. The court held that under the Ontario rule the court could abridge the time for taking any step in a proceeding on consent of the parties or as a term where indulgence is asked.[10] The court

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9 [1942] O.W.N. 23.

10 *Ibid.* at 23.

viewed the time fixed by the rules as a reasonable and proper length of time to take the various steps.

In deciding whether to abridge the time, the court will look at several factors. First, did the party asking for abridgement delay in bringing the application? Second, is the subject matter of the litigation difficult? Third, what prejudice would result if the court did not abridge the time? To get an order abridging time, the plaintiff must prove he will suffer prejudice if the matter is delayed and that a shortened period of time will still be sufficient for the defendant to prepare his case.

(b) Setting the matter down for trial

(i) Application under Rule 236(3)

In these circumstances, the defendant's lawyer will likely refuse to sign the certificate of readiness. Therefore, the plaintiff's lawyer must make an application under Rule 236(3) to set the action down for trial. Before doing so, the plaintiff's lawyer should speak to the trial coordinators office to get an early trial date. The trial co-ordinator will accommodate the plaintiff in these circumstances. Then the plaintiff's lawyer must make the application.

When one party seeks a postponement of the trial, the court's primary concern is that the trial be fair. Fairness is more important that a speedy trial.[11] When the plaintiff is terminally ill, fairness is served by a speedy trial. Of course this assumes that the defendant is given sufficient time to prepare for trial. This also assumes that the plaintiff is well enough to participate in the legal process.

(ii) Rescheduling trial date after certificate of readiness filed

One can imagine a situation where the parties to the action set the trial date by agreement and later the plaintiff discovers he or she is terminally ill. In this situation, what does the plaintiff do? Rule 251 deals with the postponement of trials, but there is no Rule dealing with rescheduling a trial at an earlier date. Does the court have jurisdiction to order an earlier trial date? Where Rules are silent, the court has the power to make any proper order to regulate practice and procedure.[12] The Rules are silent on whether a court can reschedule a trial date to an earlier time. This is a matter of practice and procedure. Therefore, the court has the jurisdiction to order a trial to be heard sooner.

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11 M.E. Ferguson, *Holmested and Gale on Ontario Judicature Act & Rules of Practice*, Vol 2, (Toronto: Carswell 1983) at 1531.

12 *Kulessa* v. *Borgman and Hawley* (1978) 6 B.C.L.R. 267 (B.C.S.C.).

It is unlikely the court will give this order if the plaintiff knew he was seriously ill when his lawyer signed the certificate of readiness.[13]

B. Severance of Joint Tenancies

(1) Introduction

If a husband and wife own all the matrimonial property as tenants in common, upon death of one of the spouses, his or her interest will be distributed according to the terms of his or her will or by intestacy. The distribution under will or by intestacy is subject to whatever rights the surviving spouse has under the Act or the *Family Relief Act*.[14] A spouse who is terminally ill and unlikely to obtain an order for division of property under the Act should sever the joint tenancy in any property owned with his or her spouse. The severance of joint tenancy creates a tenancy-in-common and prevents the property from passing to the surviving spouse upon death of the deceased spouse.

We shall now examine how a joint tenant can unilaterally sever a joint tenancy. For the purpose of this discussion, we shall assume that each tenant owns the legal and equitable title jointly. No resulting trust will arise upon severance of the joint tenancies.

(2) Joint Tenancies

A joint tenancy has two essential attributes: the right of survivorship and the existence of the four unities of possession, interest, title and time. The four unities exist when the joint tenants get title to identical interests in land at the same time from the same grant and each is entitled to enjoyment of the whole.[15]

(3) Severance of Joint Tenancies in Real Property

(a) At common law

At common law, a joint tenant could sever the tenancy in six different ways. One way was for the joint tenant to transfer his interest to a stranger. The effect of the transfer was to destroy unity of title because the stranger and the remaining joint tenants did not

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13 This attitude is reflected in *Kovary* v. *Heinrich* (1974) 5 O.R. (2d) 365 where the plaintiff sought leave to proceed with further discoveries after a certificate of readiness was filed.

14 R.S.A. 1980, c. F-2.

15 *Cheshire's & Burn's Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988) at 208-09.

hold title by the same instrument. The stranger and the rest of the joint tenants would hold as tenants in common.[16] To sever the joint tenancy and still retain beneficial ownership, the joint tenant could "sever the joint tenancy by a deed granting a moiety [ie. conveying one-half] in trust for himself".[17] Most of the Canadian authorities support the view that a joint tenant cannot sever the tenancy by a unilateral declaration of intent.[18]

(b) Under the *Land Titles Act*

Section 68.1 of the *Land Titles Act*, which was enacted in 1985, creates a statutory procedure which allows a joint tenant to sever unilaterally the joint tenancy. The section provides:

> 68.1 The Registrar shall not register a transfer that has the effect of severing a joint tenancy unless
>
> > (c) the Registrar is provided with evidence satisfactory to him that all the joint tenants who have not executed the transfer or given their written consent to the transfer have by
> >
> > > (i) personal service, or
> > >
> > > (ii) substitutional service pursuant to a court order,
> >
> > been given written notice of the intention to register the transfer.

A joint tenant can convey land to himself as tenant in common.[19] Registration of the transfer severs the joint tenancy.[20] The *Dower Act* is not applicable where a transaction is only altering an ownership arrangement amongst the same co-owners.[21]

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16 *Cheshire and Burn's Modern Law of Real Property, ibid.*, at 212; *Stonehouse* v. *A.G. of B.C.* (1961) 37 W.W.R. 62 (S.C.C.).

17 Megarry and Wade, *The Law of Real Property*, 5th ed. (London: Stevens & Sons, 1984) at 429.

18 A.J. McLean, "Severance of Joint Tenancies" (1979) 57 Can. Bar Rev. 1 at 28 and *Sorensen* v. *Sorensen* [1977] 2 W.W.R. 438 (Alta. C.A.).

19 *Law of Property Act*, R.S.A. 1980, c. L-8, s. 12(1)(d).

20 *Ibid.*, s. 12(3).

21 Land Titles Procedures Manual, Procedure Number TEN-2 at 3; *Dower Act*, R.S.A. 1980, c. D-38, s. 25(2); and *Scott and Cresswell* v. *Cresswell and Registrar for*

(continued...)

(4) Severance of Joint Tenancies in Personal Property

There is no authority in Canada for the view that severance of a joint tenancy in land differs from severance of a joint tenancy in personal property.[22] Therefore, a joint tenant of personal property cannot sever the tenancy by merely declaring his intention to do so. The joint tenant of personal property must severe the joint tenancy by conveying his interest in the property to a third party beneficially or in trust for himself.

C. Resulting Trust and Constructive Trust

(1) Does an Action for Declaration of a Resulting Trust or Constructive Trust Survive for the Benefit of the Estate of the Deceased Spouse?

In *Novick (Novick Estate)* v. *Miller (Lachuk Estate)*[23] the Saskatchewan Court of Appeal addressed the issue of whether the administrator of an estate could support a claim against an estate based on constructive trust, unjust enrichment or quantum meruit. Doreen Novick and Edward Lachuk had lived together for many years as husband and wife, but they had not married. Doreen Novick was the sole source of support for the couple during the last five years of her life. During this time Edward Lachuk was very ill and unable to work. After Doreen Novick died, her father, as administrator of her estate, sought a declaration that Edward Novick held property in trust for Doreen Novick because he had been unjustly enriched by her. After the action was commenced, Edward Lachuk died. Lachuk, and later his estate, raised the defence that the administrator of the estate of Doreen Novick could not support a claim in constructive trust, unjust enrichment or quantum meruit. The Saskatchewan Court of Appeal held that claims of this kind survived at common law and existing Saskatchewan legislation did not bar the action. It also held that the principles set out in *Pettkus* v. *Becker*[24] were not restricted to actions between

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[21](...continued)
N.A.L.R.D. [1975] 3 W.W.R. 193 at 222 (Alta. C.A.). The Alta. C.A. held that the *Dower Act*, 1948 applies to dispositions which defeat the right of the spouse of the transferor and thereby gives rise to a cause of action against the transferor. The 1948 Act is very similar to the present *Dower Act*. Based on the reasoning in this case, the *Dower Act* would not apply to a transfer whereby spouses who owned property as joint tenants became tenants in common. Each spouse would still have dower rights in the interest the other spouse owned in the homestead property. No cause of action under s. 11 of the *Dower Act* would be created by such a transfer.

[22] A.J. McLean, "Severance Of Joint Tenancies", *supra*, note 18 at 28.

[23] (1989) 58 D.L.R. (4th) 185, 20 R.F.L. (3d) 360 (Sask. C.A.), leave to appeal to the S.C.C. refused, Oct. 19, 1989.

[24] [1980] 2 S.C.R. 834.

living persons. The court found that Edward Lachuk had been unjustly enriched and ordered his estate to pay $25,000 to the estate of Doreen Novick. The court did not find that Doreen Novick had a direct interest in land.

The legislation interpreted by the Saskatchewan Court of Appeal was identical to legislation that was in force in Alberta from 1903 to 1978. [25] In 1978 this legislation was repealed and replaced by the *Survival of Actions Act*.[26] The *Survival of Actions Act* goes further than the legislation it replaced. It provides that a cause of action vested in a person who dies after January 1, 1979 survives for the benefit of the estate. "Cause of action" is defined as the right to bring a civil proceeding or a civil proceeding commenced before death. It does not include a prosecution for a contravention of an act, regulation or by-law. Therefore, a cause of action arising in trust or unjust enrichment would survive for the benefit of the estate of the deceased spouse.

Some might argue that, notwithstanding the *Survival of Actions Act*, section 17(1) of the *Matrimonial Property Act* precludes an action based on unjust enrichment or implied trust. This section provides:

> 17(1) If a question respecting property arises between spouses in any other matrimonial cause, the Court may decide the question as if it had been raised in proceedings under this Part.

The argument would be that by virtue of section 17(1) all matrimonial property disputes must be resolved under the regime created by the Act. Section 16 of the Act precludes actions by the estate of a deceased spouse. Therefore, the estate cannot proceed to bring an action for a declaration of implied trust or unjust enrichment.

This argument is not persuasive. The intent of this section is to preclude duplication of proceedings and to make it easy for a court to deal with property disputes between living spouses. It is not a section designed to interfere with other rights a deceased spouse's estate may have. Once a spouse dies, he or she has no rights under the Act. Therefore, section 17 has no application. Furthermore, this argument ignores the fact that the Act is superimposed upon existing property law and trust law. Section 36 of the Act makes this clear by recognizing resulting trusts. Last, but not least, the argument leads to a bizarre result, namely that the fact of marriage precludes rights which are available to people who live together as husband and wife but who have not married.

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25 In 1978 the provision was found in *The Administration of Estates Act*, R.S.A. 1970, c. 1, s. 51.

26 S.A. 1978, c. 35 now R.S.A. 1980, c. S-30.

We believe that a cause of action based on resulting trust or unjust enrichment which vested in the deceased spouse before his or her death would survive for the benefit of his or her estate.

(2) Resulting Trusts

In *Rathwell* v. *Rathwell*,[27] the Supreme Court of Canada discussed the law of resulting trusts as it applies in the context of matrimonial property disputes. Dickson J., as he then was, stated:[28]

> Resulting trusts are as firmly grounded in the settlor's intent as are express trusts, but with this difference--that the intent is inferred, or is presumed as a matter of law from the circumstances of the case. That is very old doctrine, stated by Lord Hardwicke in *Hill* v. *Bishop of London*. The law presumes that the holder of the legal title was not intended to take beneficially. There are certain situations--such as purchase in the name of another--where the law unfailingly raises the presumption of resulting trust: *Dyer v. Dyer*, *Barton v. Muir*, *The Venture*. The presumption has always been regarded as rebuttable: *Rider v. Kidder*.
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> If at the dissolution of a marriage one spouse alone holds title to property, it is relevant for the court to ask whether or not there was a common intention, or agreement, that the other spouse was to take a beneficial interest in the property and, if so, what interest? Such agreements, as I have indicated, can rarely be evidenced concretely. It is relevant and necessary for the courts to look to the facts and circumstances surrounding the acquisition, or improvement, of the property. If the wife without title has contributed, directly or indirectly, in money or money's worth, to acquisition or improvement, the doctrine of resulting trusts is engaged. An interest in the property is presumed to result to the one advancing the purchase moneys, or part of the purchase moneys. The principle is expressed thus in 19 Halsbury (3d. ed.) para. 1372:
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> 1372. **Property purchased wholly or partly with wife's money.** Where property is bought with money belonging to the wife and conveyed to her husband, there is a resulting trust in favour of the wife in the absence of proof by the husband of a contrary intention on her part.

Resulting trusts are straightforward when both spouses have contributed known amounts of money towards the purchase of assets. It becomes more confusing when the

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27 [1978] 2 S.C.R. 436 at 447-53.

28 *Ibid.* at 451-52.

contribution of one of the spouses is indirect. What if one spouse pays the household expenses thereby enabling the other spouse to pay the monthly mortgage payment? What if one spouse's contribution is in the form of labour? What if the labour is for housekeeping services only? In each case the court will struggle to determine if the spouse without title made a direct or indirect contribution towards the purchase of the assets. If so, the presumption of resulting trust will arise. Then the court must decide if the presumption has been rebutted.

Due to these problems and the development of the more flexible doctrine of constructive trust, resulting trusts are of less importance today.

(3) Constructive Trusts

(a) Unjust enrichment

The constructive trust, as a remedy to prevent unjust enrichment, has its origins in the dissenting opinion of Chief Justice Laskin in *Murdoch* v. *Murdoch*.[29] The Supreme Court of Canada developed the doctrine in *Rathwell* v. *Rathwell*,[30] *Pettkus* v. *Becker*[31] and *Sorochan* v. *Sorochan*.[32] *Pettkus* v. *Becker* was the first case in which the majority of the Court imposed a constructive trust in a situation in which a resulting trust did not arise. A comprehensive summary of the development of the doctrine is found in the majority decision of the Supreme Court of Canada in *Rawluk* v. *Rawluk*.[33]

The problem with the resulting trust in matrimonial relationships was expressed by Chief Justice Laskin in his dissenting opinion in *Murdoch* v. *Murdoch*. He said that a husband and wife often have formed no intention on whether the spouse with title holds the property in trust for the other spouse. At the time of the marriage breakdown the attribution of common intention and resort to resulting trust is artificial. In his view a constructive trust should be imposed "when unjust enrichment would result if the person having the property were permitted to retain it".[34] It matters not that there was no common intention that both spouses have a beneficial interest in the property.

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29 [1975] 1 S.C.R. 423 at 439.

30 *Supra*, note 27.

31 *Supra*, note 24.

32 [1986] 2 S.C.R. 38.

33 *Supra*, note 1 at 10-14.

34 *Supra*, note 29 at 455.

In *Rathwell* v. *Rathwell*, Dickson J. discussed the nature of constructive trusts as follows:[35]

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties: but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment. Thus, if the parties have agreed that the one holding legal title is to take beneficially an action in restitution cannot succeed:[authorities omitted]"

In *Pettkus* v. *Becker*[36] a man and a woman had lived together for close to 20 years as husband and wife, but they had not married. During this relationship, both worked diligently. For the first 5 years, the woman supported the couple thus enabling the man to save all his money. He used these savings to buy land and build a bee keeping business. For 14 years they both worked in this business. The woman believed that the savings were for both of them, but the man did not have this intention. He saved at the expense of the woman. Therefore, a resulting trust did not arise. However, the Court was willing to impose a constructive trust because there had been an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment.

The Court stated that the unjust enrichment principle does not apply unless there is some connection between the acquisition of property and the corresponding deprivation.[37] This states the obvious because there is no unjust enrichment without some contribution by the person without title.

The Court stressed that not every benefit conferred upon one spouse by the other spouse will trigger the doctrine. The facts must show that retention of the benefit would be unjust. The Court gave directions on how one would determine this as follows:[38]

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35 *Supra*, note 27 at 455.

36 *Supra*, note 24.

37 The S.C.C. has since qualified this statement in *Sorochan* v. *Sorochan*, *supra*, note 32.

38 *Supra*, note 24 at 849.

> As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

The Court also held that the fact that the Ontario matrimonial property legislation did not extend the presumption of equal sharing to common law spouses was no bar to the availability of equitable remedies.

(b) Remedies: monetary damages or constructive trust

A court can remedy unjust enrichment by imposing a constructive trust on certain property or by awarding monetary damages.[39] In *Sorochan* v. *Sorochan*[40] the Supreme Court of Canada considered when a court should remedy unjust enrichment by imposing a constructive trust. The Court said it would consider the following factors:

1. The longevity of the relationship.

2. Did the claimant have a reasonable expectation that he or she would obtain an actual interest in the property?

3. Was there a link between the contribution and the disputed asset? This link does not have to be a contribution towards purchase of the asset. The link can be contribution towards preservation, maintenance or improvement of the property. The test is whether the services provided have a "clear proprietary relationship".

In that case the couple had lived as husband and wife for 42 years, but had not married. Together they had six children. The woman raised the children, did the housekeeping and worked in the farming operation. The husband had owned the land they farmed before the relationship began. The Court ordered that the man transfer one-third of his land to the woman and pay $20,000.

(c) Housekeeping services

In *Rathwell* v. *Rathwell*, *Pettkus* v. *Becker* and *Sorochan* v. *Sorochan* the couples had worked together to build a family business. The contribution of the woman included, but

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[39] See for example, *Palachik* v. *Kiss* (1983) 33 R.F.L. (2d) 225 (S.C.C.).

[40] *Supra*, note 32.

was not limited to, the provision of housekeeping services. In *Sorochan* v. *Sorochan*[41] the Supreme Court of Canada made the statement that housekeeping services and domestic services were valuable services. However, the Supreme Court of Canada has yet to decide if the provision of such services alone will give rise to a claim for unjust enrichment.

This issue has arisen when couples who are not married to each other have broken up. The trial decisions across the country vary on this point. Some hold that the supply of housekeeping service cannot support a claim for unjust enrichment.[42] Other cases hold that the supply of housekeeping services can constitute an unjust enrichment.[43] These cases acknowledge that there is no connection between housekeeping services and the acquisition of property. However, even when a constructive trust does not arise, the courts can award monetary damages if unjust enrichment is established. In these cases the courts awarded monetary damages to remedy the unjust enrichment.

James Mcleod has questioned whether the retention of the benefit of housekeeping services provided by a spouse, as opposed to an unmarried person, is unjust. He argues:[44]

> What is interesting to note is that the right based on household services would not seem to extend to spouses generally on the reasons expressed in *Herman* v. *Smith*. The retention of the benefit was only "unjust" because the defendant had received the benefit of "marriage" at no cost. Since provincial law provides support and property rights inherent in marriage, there would seem to be no "unjust" enrichment. The law has viewed the relationship (see the preamble to the *Family Law Reform Act*) and provided the recompense (support and property). Thus within the confines of provincial law, a spouse has a juridical right to retain the benefit.

The weakness in this argument is that it assumes existing provincial law replaces the law of trusts in all situations involving a marriage. This it does not do.[45] There are times

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41 *Supra*, note 32 at 44-5.

42 See *Reeves* v. *LaRose* (1987) 8 R.F.L. (3d) 87 which involved an action brought many years after the couple had divorced. Also, see M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 Alta. L. Rev. 407 at 437.

43 See *Herman* v. *Smith* (1984) 42 R.F.L. (2d) 154 (Alta. Q.B.); *Everson* v. *Rich* (1987) 16 R.F.L. (3d) 337 (Sask. C.A.); *Meuse* v. *Cunningham* (1989) 20 R.F.L. (3d) 295 (N.B.Q.B.).

44 J.G. McLeod in his annotation on *Herman* v. *Smith*, 42 R.F.L. (2d) 154 at 157.

45 Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 341-42.

when the Act has no application. One cannot assume that the failure to legislate in a certain area means existing trust remedies are no longer applicable in those areas. The Legislature may be recognizing the efficiency of the existing law by not legislating in that area or may just not have addressed its minds to that area.

D. Analysis of the Effectiveness of Existing Remedies

(1) Rules of Court

In theory, the Alberta Rules of Court are designed to ensure expeditious litigation. In practice, the discovery process is used to delay the course of litigation. Nineteen percent of the lawyers who responded to our survey said that they had experienced delay because of section 16 of the Act. These lawyers are familiar with the Alberta Rules of Court. No doubt they used them to proceed to trial as quickly as possible. However, they still complained of the delay occasioned by section 16 of the Act. As a result, we do not believe that use of the Rules of Court provides an adequate solution to the problem of delay occasioned by section 16. The incentive to delay will be eliminated only if the estate has a cause of action it can pursue which will benefit the estate in a degree similar to the benefit to be derived upon completion of a matrimonial property action.

There is one other concern we have with exclusive reliance on the Alberta Rules of Court to eliminate the delay occasioned by section 16. The Alberta Rules of Court are designed to govern the procedure of the Alberta Court of Queen's Bench. They are not intended to determine legal rights. Yet presently, the operation of the Rules and the existence of section 16 work together to determine legal rights.

(2) Severance of Joint Tenancies

This remedy is very effective in situations where the husband and wife own all the property acquired over the course of the marriage in joint tenancy and equal division of property is equitable. If it is impossible to complete a matrimonial property action before the death of the plaintiff spouse, the plaintiff spouse can sever the joint tenancies before his or her death. Upon severance, each spouse has an undivided one-half interest in all property. This interest can be bequeathed or devised by will. The fact that judgment in the matrimonial property action was precluded by the death of the plaintiff would become irrelevant. Severance of the joint tenancies at an early stage in the action would also eliminate any incentive to delay the matrimonial action.

Contracts with third parties, such as banking institutions and brokers, may limit the use of this remedy. More important, the remedy does not solve the problems created by section 16 of the Act when one spouse has exclusive ownership of most of the property acquired over the course of the marriage.

(3) Resulting Trusts and Constructive Trusts

There is no incentive for a defendant in a matrimonial property action to delay the action if the estate could pursue a trust action and obtain the same result as a matrimonial property action. The issue is whether the threat of an action for a declaration of a resulting trust or an action for unjust enrichment brought by the estate removes the incentive to delay. *Murdoch* v. *Murdoch*[46] clearly illustrates that the doctrine of resulting trust will not bring about equal distribution of assets in many deserving situations. Therefore, in many situations it still would be in the defendant's interest to delay the matrimonial property action and defend any subsequent resulting trust action. The true issue is whether an action for unjust enrichment and the remedies of damages and constructive trust are adequate to remove the incentive for delay.

A cause of action for unjust enrichment provides an adequate remedy in long term marriages where both spouses have contributed to the raising of children and the building of a family business. Unfortunately, there is doubt whether the traditional roles of a wife, being that of housekeeper and mother, will be sufficient to support a claim for unjust enrichment. Also, in an action alleging unjust enrichment, there is no presumption of equal sharing. The unjust enrichment is proportional to the plaintiff's contribution.

The result is that in many situations, it will still be in the interest of a defendant in a matrimonial property action to delay. Even if the estate successfully pursues a claim for unjust enrichment, in many situations the defendant will be in a better position than if the Act applied. The experience of lawyers who responded to our survey supports this conclusion. One would not expect to find delay unless there was some benefit to the defendant in the matrimonial property action.

(4) Conclusion

In some situations, the present law builds in an incentive for defendants in a matrimonial property action to delay the action in the morbid hope that the plaintiff will die before completion of the action.

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46 *Supra*, note 29.

CHAPTER 3 - REFORM

A. Introduction

In this chapter we discuss the nature of the matrimonial property regime created by the Act and the purpose of section 16. We shall then discuss possible responses to the problem of delay occasioned by section 16. We seek a response which solves the problem of delay, but does not deviate substantially from the nature of the matrimonial property regime now in existence.

B. The *Matrimonial Property Act*

(1) Nature of the Matrimonial Property Regime: Division of Gains by Judicial Discretion

The Act creates a matrimonial property regime we shall call division of gains by judicial discretion with the presumption of equal sharing. Under this regime each spouse is separate as to property during the marriage. This means that during the marriage they can deal with their property as they wish, although they cannot divest themselves of property in order to defeat the claim of the other spouse upon marriage breakdown. Upon marriage breakdown,[47] the couple shares the economic gains made during the marriage. By virtue of section 7(4), most property acquired by either spouse during the marriage is divided equally unless it appears to the court it would not be just and equitable to do so, taking into consideration the factors listed in section 8.

The fact that the Act does not create property rights is illustrated by *Deloitte, Haskins & Sells Limited* v. *Graham and Graham*.[48] Two years after the husband made an assignment into bankruptcy, the couple divorced. During the marriage the wife became the owner of certain shares in a successful company. The husband had contributed to the acquisition of the shares in the wife's name. The trustee in bankruptcy sought a declaration that the rights of the husband under the Act vested in the trustee in bankruptcy.

The court held:[49]

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47 In this context marriage breakdown refers to any of the situations delineated in section 5 of the *Matrimonial Property Act*. One of these situations must exist before the Act has application.

48 (1983) 32 R.F.L. (2d) 356 (Alta. Q.B.).

49 *Ibid.* at 360 and 361.

> In my view the broad meaning assigned to "property" under the *Bankruptcy Act* does not encompass the right which a bankrupt spouse would have to apply to this court for an order making a distribution between the spouses under the *Matrimonial* [(sic) *Property*] *Act*. The spouse making the application has no "right" to matrimonial property. All he (in this case Mr. Graham) has is a right to ask the court for an order in its discretion, applying principles of justice and equity. The court has a discretion whether any portion of the matrimonial property shall be distributed to the applicant spouse. The applicant spouse has no right to any part of the matrimonial property . . . .
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> Although the definition of "property" found in s. 2 of the *Bankruptcy Act* is broad, at its broadest it includes "every description of property". The word "property" connotes a body of "rights" to ownership or possession or to claim to assert ownership or possession. Of the specifics referred to in the definition of "property", counsel for the trustee pointed to "things in action", which is an anglicization of the more usual and well-known common law expression "choses in action". A review of the discussion of "choses in action" and "things in action" in Stroud's Judicial Dictionary, 4th ed. (1971), Words and Phrases Legally Defined, 2nd ed. (1969), and an article by C. Sweet entitled "Choses in Action" (1894), 10 L.Q.R. 303, demonstrates that, whether one speaks of choses in action which are real, personal, or mixed, what the law contemplates is a *right* which is enforceable by action.

(2) The Policy behind Section 16

In the earlier discussion of the history of section 16, we noted that section 16 was designed to ensure that the matrimonial property would be available for the benefit of the surviving spouse. It was not anticipated that the section would create an incentive for defendants to delay the matrimonial property action in the morbid hope the plaintiff would die before completion of the action.

C. Possible Solutions

The problems arising from section 16 can be addressed in four different ways. These are:

1. Retain section 16.

2. Repeal section 16.

3. Allow the estate of the deceased person to continue an action commenced during the lifetime of the deceased person.

4. Retain section 16 but create a right for the deceased spouse's dependant children of a former marriage to claim adequate maintenance from the surviving spouse.

D. Retain Section 16

We believe that matrimonial property should be available for the benefit of the surviving spouse. Section 16 serves this policy. However, section 16 provides an incentive for defendants to obstruct and delay litigation which results in serious delay. This is of sufficient concern to justify deviation from this policy. Therefore, we would not recommend this course of action.

E. Repeal Section 16

The Alberta Legislature could repeal section 16 and replace it with a section that would allow the cause of action to survive for the benefit of the estate of the deceased spouse. The estate would have to commence the action within 6 months of the date of death.

Many lawyers who responded to our survey support this type of reform. They believe that the contribution made by the spouses during the marriage gives them the right to division of property upon marriage breakdown. By removing the right to distribution of property upon death, the Act does not truly acknowledge the contribution made during marriage. They see section 16 as inequitable because the surviving spouse reaps the benefits of the death of the spouse. They also argue that one cannot assume that the beneficiaries of the deceased spouse will be the same as those of the surviving spouse.

There is merit in the position taken by this group of lawyers. However, we are unwilling to recommend this course of action for two reasons. First, by adopting this position we would force a surviving spouse to share matrimonial property with the creditors and beneficiaries of the estate in every situation. This would totally override the policy underlying section 16 that matrimonial property should be available for the benefit of the surviving spouse. Second, we believe this position deviates too far from the nature of the matrimonial property regime which has been created by the Act. The Act does not create property rights, but only a right to ask for division of property in certain circumstances. The Act creates an expectation not an entitlement. However, lawyers are now so familiar with the Act that they can accurately predict how the courts will divide the property. Some lawyers have come to view the Act as creating an entitlement. This it does not do.

Theoretically, allowing an estate to commence an action will not change the nature of the matrimonial property regime created by the Act. The estate would only have a right to ask a court to exercise its discretion for division of property upon marriage breakdown. The estate would still have no right to any of the matrimonial property. However, traditionally the hallmark of a right arising from ownership of property was the ability of an estate to commence an action to enforce the right.[50] We fear that by allowing an estate to commence an action a court might then view the Act as creating something in the nature of property. This would change the nature of the matrimonial property regime created by the Act and this we are loathe to do. Therefore, we do not recommend this course of action.

F. Allow Estate to Continue Action

(1) General Discussion

There are several matrimonial property acts in other provinces which allow an estate to continue an action commenced by the deceased spouse.[51] This type of legislation removes the incentive for delay and at the same time leaves the decision to divide the property with the spouses of the marriage. We are attracted by this solution because the problem of delay is solved without dramatically changing the nature of the matrimonial property regime.

We justify the deviation from the policy that the matrimonial property be available for the benefit of the surviving spouse on three bases. First, it is necessary to solve the problem of delay that arises in practice because of section 16. Second, the decision to commence the action still lies with the spouses of the marriage. Third, the division of property lies within the discretion of the judge subject to the presumption of equal division in certain circumstances. Later on we shall discuss how the fact of death would affect the judicial exercise of this discretion.

Some members of our Board were concerned that allowing an estate to continue an action commenced before death would result in some actions being brought which would not otherwise be brought. For example, once this amendment was enacted, some self-serving rascal might pressure the vulnerable ill spouse into commencing an action that he

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50 This is no longer the case. Under the *Survival of Actions Act*, R.S.A. 1980, c. S-30 a cause of action vested in a person who dies after January 1, 1979 survives for the benefit of the estate. "Cause of Action" is defined to include a right to bring a civil proceeding or a civil proceeding commenced before death. No distinction is drawn between personal and proprietary actions.

51 See *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 5; *Family Law Act, 1986*, S.O. 1986, c. 4, s. 7; *Matrimonial Property Act*, S.S. 1979, c. m-6.1, s. 30(1).

truly did not wish to bring. These situations will not arise frequently for generally spouses bequeath or devise their property to the surviving spouse or the children of the marriage or their children of a former marriage. Where the ill spouse has children of a former marriage, it seems just that the assets be divided and the ill spouse be able to leave some assets to the children of a former marriage. There may be the occasional situation in which an undeserving non-family member is the beneficiary, but these situations will not be common.

(2) Evidentiary Concerns

Some lawyers believe that it will be difficult to defend a matrimonial property action continued by an estate of a deceased spouse. Their concern arises from section 12 of the *Alberta Evidence Act*[52] which provides:

> 12 In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

They believe that the requirement to corroborate the evidence of the defendant will make the action unfair.

We have considered this concern and conclude that this concern does not justify retention of section 16. Notwithstanding section 12, surviving spouses who commence an action under the Act do not have difficulty proving their case. We fail to see how the defendant would be in any different position than a plaintiff. Furthermore, there are many sources that a defendant can use to corroborate the contribution of a spouse to the marriage and acquisition of assets. There will be children of the family familiar with the financial and other contributions made by the spouses to the marriage. Former employers can provide evidence on income. Banking records and income tax returns will also provide information. Land title records will provide proof of title to land owned by either spouse at the time of marriage. Court records will provide copies of wills and probate documents which could corroborate testimony on receipt of an inheritance from a parent. There are certainly other ways to corroborate the defendant's evidence that we have not outlined here.

Problems will arise in situations where the spouses have orally agreed that property would be divided in a certain manner upon marriage breakdown. Yet such agreements are the exception and not the rule. Also, it may be difficult to corroborate a gift made early

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52 R.S.A. 1980, c. A-21.

in the marriage to the defendant spouse by his or her deceased parents. Accepting that these problems will occur, we do not think that they outweigh the benefits that will flow if an estate is allowed to continue an action commenced by the deceased spouse.

(3) The Fact of Death

If an estate is allowed to continue a matrimonial property action, we must consider whether the fact of death will justify unequal distribution of section 7(4) property.[53] The varying views on this issue are reflected in *Donkin* v. *Bugoy*.[54] This is a Supreme Court of Canada decision interpreting the *Matrimonial Property Act* of Saskatchewan. The Saskatchewan Act allows the personal representative of the deceased spouse to continue an action brought by a deceased spouse, but the personal representative cannot initiate the action. The wife commenced the matrimonial property action and later disinherited her husband and only son. At the time of her death the matrimonial property had not been distributed. Her estate continued the action. The trial judge awarded the husband the house and $122,000 worth of other property and awarded the estate $10,000. He justified unequal division of the matrimonial home and other property on the basis that the death of the wife and the terms of her will made an equal distribution of family property unfair and inequitable.

The issue was whether death of the wife and the terms of her will were extraordinary circumstances or relevant facts or circumstances to be considered when determining whether equal distribution was unfair and inequitable in the circumstances. The majority of the Supreme Court of Canada held that the death of the wife and the terms of her will were not factors that the trial judge could consider. The legislation reflected the Legislature's intention to respect the wishes of the deceased as expressed by his or her application to divide assets acquired in the course of the marriage. In an action continued by an estate of a deceased spouse, the personal representative of the deceased spouse is in the same position as though the application was made during the lifetime of the spouse. The minority of the Court thought that the Saskatchewan Act was designed to benefit the spouses personally and not their estates. In their opinion, the trial judge did not err in considering the death of the wife and the terms of her will when deciding how to distribute the property under the Saskatchewan Act.

We wish to eliminate any incentive a defendant has to delay a matrimonial property action. If the plaintiff's death would justify unequal division of section 7(4) property in

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53 "Section 7(4) property" refers to the property that is distributed equally under section 7(4) of the *Matrimonial Property Act* unless it would not be just and equitable to do so, taking into consideration the matters listed in section 8.

54 [1985] 2 S.C.R. 85.

favour of the defendant, there still would be an incentive for the defendant to delay. Therefore, we do not recommend that section 8 be amended to include death as a factor.

Even if death of a spouse is not a factor specifically listed in section 8, the issue will arise, as it did in *Donkin* v. *Bugoy*, as to whether death is a "fact or circumstance that is relevant" under section 8(m) of the Act. If it is, the court could give more of section 7(4) property to the surviving spouse. We shall set out both sides of the debate on this issue and then state which view is preferable. In presenting the debate, we assume that the Act has been amended to allow an estate to continue a matrimonial property action.

Arguments in support of the position that death is *not* a relevant fact include:

(i) The *Matrimonial Property Act* is not a support statute like the *Family Relief Act*.[55] The Act deals with property disputes between spouses in regards to property acquired by either spouse during the marriage. It leaves in place the *Intestate Succession Act*,[56] the *Wills Act*[57] and the *Family Relief Act*. To allow the court to justify unequal division of section 7(4) property because of the death of the plaintiff (or the defendant) is to confuse the purpose of the *Matrimonial Property Act* and the *Family Relief Act*. Section 18 of the Act states that "Nothing in this Act affects the right of a surviving spouse to make an application under the *Family Relief Act*." This shows that the two types of applications are distinct.

(ii) The power given to the estate to continue the action already commenced under the Act would be virtually meaningless if the court could consider the death of the plaintiff.

(iii) To allow the defendant to keep more assets because the plaintiff has died suggests that the plaintiff should be awarded more assets when the defendant dies. This conflicts with section 11(3) which allows the court to consider benefits received by the surviving spouse as a result of the death of the deceased spouse. Section 11(3) shows that the Legislature did not want the surviving spouse to benefit twice when suing an estate.

(iv) The amendments allowing the estate to continue the action have made our Act so similar to the Saskatchewan *Matrimonial Property Act* that *Donkin* v. *Bugoy* is determinative.

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55 *Supra*, note 14.

56 R.S.A. 1980, c. I-9.

57 R.S.A. 1980, c. W-11.

Arguments in support of the position that death is a relevant fact include:

(i) The Act is designed to benefit the spouses personally and not their estates.

(ii) The Act serves two policies. The first policy is that matrimonial property be available for the benefit of the surviving spouse. The second policy is that any incentive for a defendant to delay a matrimonial property action be eliminated. Allowing a court to consider death when deciding whether it would or would not be just or equitable to divide the property equally allows the court to balance these two policies.

(iii) *Donkin* v. *Bugoy* can be distinguished because it interprets the Saskatchewan *Matrimonial Property Act*. The Saskatchewan Act has always allowed an estate to continue an action started by the plaintiff. This reflects the Legislature's desire to respect the wishes of the spouses as shown in the bringing of the action. In Alberta, the Legislature's desire was to overcome the problem of delay. Admittedly, one of the justifications for allowing the estate to continue an action included the fact that the decision to bring the action was made by one of the spouses. However, the need to overcome delay occasioned by section 16 was the driving force and primary justification behind the amendment. The Legislature did not abandon its policy of having matrimonial property available for the benefit of the surviving spouse. It modified this policy to overcome the practical problem of delay.

In our opinion, death should *not* be a relevant fact when a court determines if section 7(4) property should be divided unequally between the estate and the surviving spouse. To give the surviving spouse more of the matrimonial property just because of the death of the plaintiff creates an incentive for the defendant to delay the matrimonial property action. The defendant will know that once the plaintiff dies and the estate continues with the action, the court could award more than half of the section 7(4) property to the defendant. Therefore, a defendant may delay in the hope the plaintiff will die before judgment is given. This will defeat the purpose of the proposed changes. Furthermore, the Act is not a support statute. The *Family Relief Act* serves this purpose and is available to the surviving spouse.

Once the court decides whether it will distribute section 7(4) property equally or unequally, it must effect the distribution of property by using its powers outlined in section 9 of the Act. When exercising these powers the court could consider the spouse's death. For example, the court could divide the property so that the surviving spouse's share of the property included the family home. The estate would receive other property of similar value. In other situations, the court could direct that title to the family home be registered

in the name of the surviving spouse, subject to a mortgage given in favour of the estate. Another possibility is that the court could give the surviving spouse a life estate in certain properties as opposed to directing immediate sale of the property.

G. Protect Deceased Spouse's Dependant Children of Former Marriage

At present, the deceased spouse's children from a former marriage have no protection. There is no justification for this. Where lies the solution?

One solution is to retain section 16 and enact Recommendation 36 of Report 18.[58] Recommendation 36 suggested that the matrimonial property legislation allow the deceased spouse's dependant children of a former marriage to obtain support from the surviving spouse. First, the court would determine the amount of the judgment the court would have given in favour of the deceased spouse if the deceased spouse had obtained judgment under the *Matrimonial Property Act*. Then the court could order the surviving spouse to pay the part of this amount necessary for adequate maintenance of the dependant child. However, the court could not require the surviving spouse to make the payment if it left the surviving spouse with inadequate provision for his or her maintenance.

Retaining section 16 and allowing such dependant children to obtain support from the surviving spouse would help such children. However, it would not solve the problem of delay occasioned by section 16. On the other hand, allowing the estate to continue an action commenced by the deceased spouse would allow the spouse to protect such children and would also solve the problem of delay. Upon marriage breakdown, a spouse who wished to leave property to children of a former marriage could simply commence the action. If the spouse died before judgment was given, the estate could continue the action. All property that would become part of the estate after division of the matrimonial property under the Act would be distributed to the beneficiaries of the deceased spouse. We assume that the deceased spouse would make the children of the former marriage beneficiaries of the estate.

H. Recommendations

In Chapter 1 of this Report we discussed the 3 problems occasioned by section 16 of the Act. These problems are delay, injustice to the deceased spouse's children of a former marriage and the fact that an estate does not have access to the comparatively simple procedures created by the Act. We wish to alleviate these problems while still maintaining the existing matrimonial property regime. Therefore, we make the following recommendations:

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58 Report 18, *supra*, note 3 at 98-9 and 174-75.

RECOMMENDATION 1:

Where a spouse dies after commencing an action under the *Matrimonial Property Act*, the action may be continued by the estate of the deceased spouse.

RECOMMENDATION 2:

Death should not be a factor specifically mentioned in section 8 of the *Matrimonial Property Act*.

These recommendations will alleviate the problem of delay. They will also allow a seriously ill spouse to commence a matrimonial property action upon marriage breakdown if the spouse wishes to have assets to bequeath to children of a former marriage. These recommendations will not completely solve the third problem. However, the recommendations provide a partial solution because any estate would be able to continue a matrimonial property action commenced by a deceased spouse before death. In those situations the estates would not have to rely on trust remedies. We cannot justify a drastic departure from the existing regime, which is working well, in order to solve the third problem entirely.

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