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DIVISION OF MATRIMONIAL PROPERTY ON DEATH

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The subject matter of this report raises complex and far-ranging issues, and it is appropriate to record our thanks and acknowledgment to those who have assisted the Institute in reaching its final recommendations in this area. The report covers areas both of matrimonial property law and succession law, requiring a working knowledge of both, and particular knowledge of the interplay between these two normally discrete areas of law. We have had the benefit of the response and advice of a very hardworking and knowledgeable Project Committee and we thank them for the significant amount of time which they have given to the Institute, and more particularly, for the benefit of their knowledge and analysis which has been shared with the Institute. The members of that Committee are:

Anne de Villars, Q.C.
R.B. (Bob) Drew
Suzanne C. McAfee
Dino M. McLaughlin
Madam Justice Bonnie L. Rawlins
Phil Renaud

In particular, we would like to thank Dino McLaughlin for his availability for and response to our many requests for practical information relating to the operation of the *Matrimonial Property Act*.

We have also received comments from a broader range of people, and those comments have assisted us in understanding the issues and in coming to our recommendations. We have listed those respondents in the Appendix, and we acknowledge with gratitude their input into this project.

We have also had the assistance of Mr. Earl Evaniew from the Office of Legislative Counsel who has been particularly helpful in assisting us in translating our recommendations into legislative draft.

Finally, and primarily, I wish to record the Institute's gratitude to the counsel who had charge of this project, Ms. Janice Henderson-Lypkie. Through her comprehensive research and organization of the issues, she has kept the project on track, and knowledgeably guided the Institute through to the resolution of the policy issues. It is due to her hard work and skill that the Institute is able to make the comprehensive proposals that are put forward in this report.

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PART I — EXECUTIVE SUMMARY

Nature of the Problem and General Direction for Reform

The problem addressed in this report arises because different principles govern matrimonial property law and succession law. The right to share matrimonial property upon marriage breakdown is rooted in the view of marriage as a partnership. It is presumed that each spouse contributes equally and independently to the marriage and to the acquisition of property and is, therefore, entitled to an equal share of the assets acquired during the course of marriage. One consequence of the presumption of equal sharing is that as between the spouses it does not matter who holds title to the matrimonial property. In contrast, succession law is concerned with testamentary freedom of the individual in respect of the property he or she owns. The testator's intention rules supreme, and if the testator does not wish to recognize the spouse's contribution to the marriage, succession law respects this right. Title to property becomes very important. The principle of testamentary freedom is tempered somewhat by the right of the spouse to seek family relief, but until recently, family relief looked more to the need of the surviving spouse and not to his or her contribution to the accumulation of the deceased's assets.

It is this conflict between the underlying principles of matrimonial property law and succession law that causes unfair results for a surviving spouse who under the existing law does not have a cause of action under the *Matrimonial Property Act* ("MPA") upon the death of the spouse. Until 1994, a surviving spouse who had remained in the marriage could receive less under the *Family Relief Act* than he or she would have received upon marriage breakdown. The Supreme Court of Canada sought to address this problem in its 1994 decision in *Tataryn* v. *Tataryn Estate* that dealt with legislation that is similar to Alberta's *Family Relief Act*. In that case, the Court interpreted provision for the surviving spouse that is "adequate, just and equitable" as including, at a minimum, what the surviving spouse would be given upon marriage breakdown. In coming to this conclusion, the Court was influenced by two ideas. First, the Act must be read in light of modern values and expectations. Second, it is desirable that the rights that may be

asserted against the testator before death be symmetrical with those that may be asserted against the estate after his or her death.

We think the policy expressed in this decision is sound. The surviving spouse of a marriage terminated by death should not have less remedies than the spouse in a marriage terminated by divorce. The contribution of a spouse to a marriage should be recognized either on marriage breakdown or on death. There are three ways to ensure that the surviving spouse gets his or her fair share of the matrimonial property: (1) election of a fixed share, (2) expanded judicial discretion under the *Family Relief Act*, of which *Tataryn* is an example, and (3) deferred sharing of matrimonial property upon death. In our opinion, *Tataryn* presents only a partial solution to the problem and not the best solution. The third option is the preferred method of reform.

The reform we envisage is for the benefit of the surviving spouse and not for the benefit of the estate of the deceased spouse. Consequently, while the surviving spouse can commence an action against the estate of the deceased spouse, the estate cannot commence an action against the surviving spouse. The only exceptions to this rule occur when an action has been commenced by either spouse during their joint lives. If the deceased spouse commenced the action before his or her death, the estate can continue the action. If the surviving spouse commenced the action before the death of the deceased spouse, the estate can file a statement of defence and counterclaim. Furthermore, the surviving spouse should not be able to discontinue the action without the consent of the personal representative of the deceased spouse, or leave of the court.

Overview of existing *Matrimonial Property Act*

To understand the recommendations made in the report, the reader will need to have a basic understanding of the MPA as it now operates. Therefore, Chapter 3 contains a brief summary of this area of the law. This discussion will be of value to wills and estates lawyers who do not practice extensively in the area of family law. It will also be of value to lawyers who have such experience but who are interested in how the MPA operates when the action is commenced after the death of one of the spouses.

Division of matrimonial property on death

Our recommendations for change to the MPA, which are found in Chapter 4, are summarized as follows. Presently, the surviving spouse can bring a matrimonial property action upon the death of the deceased spouse only when marriage breakdown occurred during the joint lives of the spouses. The MPA should be amended so that marriage breakdown is no longer a precondition to bringing the action. Upon death of a spouse, the surviving spouse should be able to seek division of property acquired over the course of the marriage no matter how harmonious or inharmonious the relationship. Previous division of the matrimonial property according to a matrimonial property order or settlement agreement would be a bar to an action on death unless the couple had reconciled in the interim. The existing limitation period of six months from the grant of probate or letters of administration would apply.

Subject to certain changes, division of property on death will take place as it now does. The general law regarding exempt, distributable and divisible property would remain unchanged as would the court's ability to deviate from equal sharing in the appropriate circumstances. Also, the law regarding valuation date and the treatment of debts and liabilities would remain unchanged. This means that in most cases the valuation date will be the date of trial and the court will consider all of the property and debts of either spouse as of that date. Our recommendations would bring about change in respect of what is brought into account on death. The MPA should be amended to ensure that all property that passes outside the estate to the surviving spouse is treated as property of the surviving spouse for the purposes of the accounting under the Act. This changes the law as stated in *Dunn Estate* v. *Dunn*. In addition, life insurance proceeds paid to the surviving spouse by reason of a policy owned by the deceased spouse will be treated as property of the surviving spouse. Such property will no longer be exempt property. Also, funeral and testamentary expenses will be treated as a debt of the deceased spouse.

In Chapter 5, we examine the interaction between the proposed right to seek division of matrimonial property on death and rights presently available to the surviving spouse on death of the deceased spouse. The latter rights include the right to receive property by way of will or intestacy and rights that arise under the

Dower Act and the *Family Relief Act*. We recommend that the surviving spouse be entitled to his or her rights under the MPA in addition to any property that would flow to the surviving spouse by way of will or intestacy after satisfaction of debts of the estate and the matrimonial property order. In an earlier report, we have recommended that the dower life estate be replaced with a right to occupation under Part 2 of the MPA. The right of occupation would exist until varied by court order. The recommendations concerning reform of dower rights fit well with the recommendations made in this report. In the event of an application to vary the occupation right, the court should consider the assets available for the support of the surviving spouse including the matrimonial property entitlement. The proposed matrimonial property rights would also coexist with the rights of the surviving spouse under the *Family Relief Act*. As is now the case, the matrimonial property action may be joined with an application for family relief.

Administration of the estate

Chapter 6 deals with the issues that arise in the administration of an estate faced with a matrimonial property claim. Presently, a combination of matters will determine how beneficiaries are affected by a matrimonial property order: the terms of the matrimonial property order itself; the marshalling rules that govern the order in which assets are used to satisfy debts; the composition of the estate; and the terms of the will. We recommend that this system be replaced. In the absence of directions in a will, the burden of the matrimonial property order should fall ratably on all beneficiaries of the estate in proportion to the value of their respective interests after payment of all funeral and testamentary expenses, and debts and liabilities.

We also make recommendations governing the priority of payment of claims against the estate. Subject to payment of secured creditors and the federal Crown, the proposed order is as follows: (1) reasonable funeral expenses, (2) reasonable testamentary expenses, (3) all unsecured debts (including debts due to the provincial Crown) and liabilities in existence at the time of death, if any, (4) family relief order, if any and (5) distribution of the estate under the will or intestacy. Maintenance orders would rank equally with a money judgment made in a matrimonial property order and other unsecured debtors.

The remainder of the recommendations in Chapter 6 deal with the notice given to the surviving spouse by virtue of section 7 of the *Administration of Estates Act* and the timing of the distribution of the estate. The circumstances in which the personal representative must serve the section 7 notice should be broadened to accommodate recommendations we make in respect of assets that pass outside the estate. The personal representative can distribute the estate no earlier than 6 months from the grant of probate or administration. Furthermore, where an action is commenced during this period, the personal representative of the deceased spouse must hold the estate subject to any matrimonial property order that is made.

Will Substitutes

Chapter 7 deals with the thorny question of will substitutes that pass to third parties. The term "will substitutes" describes assets that pass outside the estate and includes property held in joint tenancy, property that passes by way of beneficiary designation, *donatio mortis causa*, inter vivos trusts by which the settlor keeps the benefit and control of the assets until death, and life insurance. Several judicial decisions demonstrate that will substitutes are an effective means to deplete the estate and thereby diminish or defeat any claim that can be brought only against the estate. To ensure that division of matrimonial property on death cannot be easily circumvented, we recommend that for the purposes of calculating the entitlement of the surviving spouse, will substitutes that pass to third parties be treated as property of the deceased. We also recommend that certain will substitutes fall into the category of exempt property. Exempt property would include any will substitute that is used to satisfy an existing debt or liability of the deceased spouse and any will substitute that serves a legitimate business purpose. If the estate is insufficient to satisfy the matrimonial property order, the surviving spouse would then be entitled to seek satisfaction of the deficiency from the recipients of the will substitutes. The recipients would have to contribute proportionately to satisfaction of the claim. See Chapter 7 for the actual recommendations and supporting reasoning.

Transition

We recommend that these recommendations apply to:

(a) all individuals who die intestate after the date the amendments come into force,
(b) all individuals who die with a will wherein it is expressly stated that the will is made in contemplation of the proposed amendments, and
(c) all individuals who die on or after a certain date, that date being two years from the date the amendments come into force.
This would give testators two years to respond to the change in the law.

Conclusion

Tataryn already gives the surviving spouse the ability to seek division of matrimonial property under the umbrella of a family relief application, and wills are presently being drafted with this in mind. This is an awkward way of bringing about division of matrimonial property on death. Our recommendations would serve the same policy, but do it directly under the MPA, and deal with the consequential issues that arise in the administration of an estate faced with such a claim.

PART II — LIST OF RECOMMENDATIONS

RECOMMENDATION No. 21

(a) If the will of the deceased spouse specifically provides for the manner in which the interests of the beneficiaries are to be used to satisfy a matrimonial property order, the provisions of the will shall apply.

(b) In the absence of a direction in the will, the burden of a matrimonial property order will fall ratably on beneficiaries of the estate in proportion to the value of their respective interests after payment of all funeral expenses, testamentary expenses, debts and liabilities.

(c) The fact that the matrimonial property order directs transfer of a specific asset to the surviving spouse does not prevent the beneficiary who would otherwise have received that asset from receiving the value of the asset less the proportionate burden of the matrimonial property order. 141

RECOMMENDATION No. 22

(a) This recommendation applies when the surviving spouse seeks division of matrimonial property on the death of his or her spouse.

(b) Subject to the claims of the federal Crown and secured creditors, the estate of the deceased spouse should be distributed in the following order:

(i) reasonable funeral expenses,

(ii) reasonable testamentary expenses,

(iii)debts and liabilities in existence at the time of death, whether considered in the matrimonial property action or not, including:

- debts payable in full as of death, including debts owed to the provincial Crown;
- debts for future payment that bind the estate, such as spousal support, child support or loan repayment that does not become payable by reason of death;
- contingent liabilities such as guarantees or claims under the *Fatal Accidents Act*; and
- a money judgment created by a matrimonial property order;

(iv) family relief order, if any, and, finally,

(v) distribution of estate under will or upon intestacy. 163

RECOMMENDATION No. 23

(a) For the purposes of the preceding recommendation, when a deceased spouse

(i) has, in his or her lifetime, in good faith and for valuable consideration entered into a contract to devise or bequeath any property real or personal, and

(ii) has by will devised or bequeathed that property in accordance with the contract,

the recipient of that property shall be treated as a creditor of the deceased spouse to the extent of the value of the consideration given for the contract.

immediately before death and which became the property of a third party on death is deemed to be property of the deceased spouse, including but not limited to:

(i) a gift *mortis causa* by the deceased spouse to a person other than the surviving spouse;

(ii) property that, at the time of the death of the deceased spouse, was held by the deceased spouse and a person other than the surviving spouse, with a right of survivorship;

(iii) a retirement savings plan, retirement income fund or annuity payable to a person other than the surviving spouse on the death of the deceased spouse where the beneficial interest in the asset passed to the third party upon the death of the deceased spouse;

(iv) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees or former employees, payable to a person other than the surviving spouse on the death of the deceased spouse;

(iv) proceeds payable to a third party upon the death of the deceased spouse under a life insurance policy owned by the deceased spouse or under a policy taken out on the lives of a group of which the deceased is a member;

(v) assets that were disposed of by the deceased spouse in trust or otherwise, to the extent that the deceased spouse retained during his or her lifetime, either alone or in conjunction with others, a power to revoke such a disposition or a power to consume or dispose of the principal thereof for his or her own benefit.

(Hereafter, the assets listed above will be referred to as will substitutes.)

(b) Where a deceased spouse at the time of his or her death held real property or personal property, jointly with a person other than the surviving spouse, the property shall be included in the statement of property of the deceased spouse,

(i) in the case of funds in a bank account, to the extent that the funds were the property of the deceased spouse immediately before the funds were deposited; and

(ii) in the case of other property, to the extent of the ratio of the contribution of the deceased spouse to the contribution of all joint tenants, multiplied by the fair market value of the property on the day the spouse died.

(c) Contribution includes maintenance and repair costs as well as acquisition costs and may take the form of valuable services as well as money contributions.

(d) The Statement of Property filed by the estate in the matrimonial property action should contain a list of all property described in subsection (a) that is deemed to be property of the surviving spouse. A distinction should be drawn in the Statement of Property between the property that is in the estate and that which is deemed to be part of the estate. 194

PART III — REPORT

CHAPTER 1. INTRODUCTION

A. Nature and Scope of Project

[1] This project grew from our concern with the plight of a surviving spouse who resides with the deceased spouse until death and receives nothing under the will of the deceased spouse. Since there are no grounds upon which to bring an action under the *Matrimonial Property Act*[1] ("MPA"), the surviving spouse must look to his or her rights under the *Family Relief Act*.[2] The concern arose from the fact that, until recently,[3] a spouse could have received less under the *Family Relief Act* than he or she would have received under the MPA. This led to the result that a spouse who stayed in a marriage and was disinherited could be in a worse position than a spouse who ended the marriage during the joint lives of the couple.

[2] After further reflection, it becomes apparent that the disinherited spouse is just one example of a larger problem. The real problem to be addressed is the fact that different principles govern division of property upon marriage breakdown and upon death of a spouse. The disinherited spouse is the most extreme example of this problem, but the problem encompasses all spouses who receive upon death something less than they would have received if matrimonial property principles governed division of property. In fact, it goes as far as raising the question of whether a surviving spouse has to accept a spousal trust or a life estate instead of equal division of the matrimonial property.

[3] If the principles that underlie matrimonial property division are sound, they should be available for the benefit of the surviving spouse. It comes down to making the law of succession fit with the law of matrimonial property. At first blush, the task seems a little daunting. But one can take comfort in the fact that six

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[1] R.S.A. 1980, c. M-9.

[2] R.S.A. 1980, c. F-2.

[3] The Supreme Court of Canada decision in *Tataryn* v. *Tataryn Estate*, [1994] 2 S.C.R. 807 has changed the law. This decision will be discussed in detail later in this report.

provinces have already done exactly this, although some have done it better than others. Furthermore, if matrimonial property principles apply upon death, then family relief becomes a matter of need only. This is the purpose family relief should serve, and it will remove some of the difficulty one now sees in this area when the courts recognize the spouse's contribution to the marriage under the pretence of meeting the needs of the spouse.

[4] The Supreme Court of Canada decision in *Tataryn* v. *Tataryn Estate*[4] went some way to solving this problem, but it is only a partial solution and is not the best solution. In this report, we examine the *Tataryn* solution, among others, and are of the opinion that amendment of the MPA is the proper place for creating a better fit between matrimonial property law and succession law.

B. History of Project

[5] In March 1998, the Alberta Law Reform Institute issued Report for Discussion No. 17, *Division of Matrimonial Property on Death*.[5] The fifteen individuals listed in the Appendix to this report provided comment on some or all of the tentative recommendations made in Report for Discussion No. 17. These thoughtful comments have been most useful in the formulation of our final recommendations. We wish to thank those who expended their time and effort in providing these comments.

C. Outline of the Report

[6] Chapter 2 outlines the nature of the problem and its various solutions and suggests a general approach to reform. Chapter 3 provides an overview of the MPA as it now operates. Chapter 4 suggests changes to the MPA that would enable the surviving spouse to seek division of matrimonial property upon death of the deceased spouse, and Chapter 5 examines the interrelation between the proposed reform and existing rights the surviving spouse may have in other areas of the law. Chapter 6 deals with the issues that will arise in the administration of the estate by reason of the matrimonial property claim. Finally, Chapter 7 deals

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[4] *Ibid.*

[5] Alberta Law Reform Institute, *Division of Matrimonial Property on Death* (Report for Discussion No. 17, 1998) [" RFD No. 17"].

with the thorny question of what to do with assets that pass outside the estate to a third party, and transition.

D. Terminology

[7] When comparing the law in the various provinces, we have followed the terminology adopted by that province. This gives rise to the use of different terms that describe similar concepts, such as matrimonial property versus marital property. Accuracy requires the use of the different terms because they (while similar) have meanings that are specific to the various statutes. Nonetheless, differences in meaning of similar terms is brought to the reader's attention only when such information is necessary in order to understand the discussion of the point in question.

CHAPTER 2. NATURE OF THE PROBLEM AND GENERAL DIRECTION FOR REFORM

A. Nature of the Problem

[8] As alluded to in the introduction, different principles govern matrimonial property law and succession law. The right to share matrimonial property upon marriage breakdown is rooted in the view of marriage as a partnership. It is presumed that each spouse contributes equally and independently to the marriage and to the acquisition of property and is, therefore, entitled to an equal share of the assets acquired during the course of the marriage.[6] Subsection 7(4) of the MPA reflects this view of marriage. That subsection provides that all property acquired by the spouses during the course of the marriage, except that mentioned in subsections 7(2) and (3), is to be divided equally unless it would not be just and equitable to do so. In practice, the courts adhere to the principle of equal division of matrimonial property and deviate therefrom only when there is some real imbalance in the contribution of the parties having regard to the factors in section 8 of the MPA.[7] One consequence of this principle of sharing is that it does not matter who holds title to the matrimonial property.

[9] In contrast, succession law is concerned with testamentary freedom of the individual in respect of the property he or she owns. The testator's intention rules supreme, and if that testator does not wish to recognize the spouse's contribution to the marriage, succession law respects this right. Title to property becomes very important. The principle of testamentary freedom is tempered somewhat by the right of the spouse to seek family relief, but until recently, family relief looked more to the need of the surviving spouse and not to his or her contribution to the accumulation of the deceased's assets. As will be discussed later, the Supreme Court of Canada decision in *Tataryn* v. *Tataryn Estate*[8] has brought matrimonial property law into consideration in the granting of family relief.

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[6] Manitoba Law Reform Commission, *Report on An Examination of The Dower Act, 1984* ("Manitoba Report") at 32. See also, Lawrence W. Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code" (1991) 76 Iowa L. Rev. 223 at 236-8.

[7] *Mazurenko* v. *Mazurenko* (1981), 23 R.F.L. (2d) 113 (Alta. C.A.).

[8] *Supra* note 3.

[10] It is this conflict between the underlying principles of the two areas of law that causes unfair results for a surviving spouse who under the existing law does not have a cause of action under the MPA when his or her spouse dies. Although *Tataryn* offers a partial solution, it is not the best solution to the problem.

B. Frequency of the Problem

[11] Having stated the problem, we must be quick to recognize that most spouses who prepare a will do recognize the contribution of the surviving spouse to the marriage and accumulation of assets. As we learned in a previous project,[9] the surviving spouse is usually the primary beneficiary of the deceased spouse. In a first marriage situation where the children of the deceased spouse are also the children of the surviving spouse, the surviving spouse will receive the entire estate in a substantial majority of estates involving wills. Where the deceased spouse has children of another relationship, the surviving spouse will not receive the entire estate as often, but the surviving spouse is still treated generously by the deceased spouse.[10]

[12] Nevertheless, the problem of the surviving spouse who ends up with less than his or her fair share of the matrimonial property upon the death of the deceased spouse does arise.[11] The severity of the situation will depend upon the circumstances of a particular case. The surviving spouse may be plunged into poverty if title to all the property acquired during the marriage was registered in the name of the deceased spouse and that spouse disinherited the surviving spouse by will. In other cases, the surviving spouse may have some of the matrimonial

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[9] Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report for Discussion No. 16, 1996). Hereinafter, the Alberta Law Reform Institute shall be referred to as "ALRI" and this report shall be referred to as the "Intestate Succession Report."

[10] *Ibid.* at 37-44.

[11] In the Alberta study of 800 wills we conducted in the intestacy project, 291 testators were married at the time of death. Of these 291 testators, 65.3% gave everything to the surviving spouse, 11.3% gave nothing to the surviving spouse and 23.4% gave some, but not all, of the estate to the surviving spouse. Eleven of the 33 surviving spouses who received nothing from the testator were living separate and apart from the testator at the time of death. Some of the disinherited spouses may already have owned their fair share of the matrimonial property, but others will have no matrimonial property or something less than their fair share. There will also be situations in which the surviving spouse receives something, but something less than what they would receive after a division of matrimonial property. For more information, see Intestate Succession Report, *ibid.*, Appendix B at B-2 and B-4.

property but not what he or she would have received if there had been a division of matrimonial property under the MPA.

C. Is the Problem in Need of a Solution?

[13] Infrequency of the problem is an argument for leaving the law as it is. The problem with this solution is that, while pragmatic, it lacks principle. The principle of sharing embodied in matrimonial property law should be equally applicable to the surviving spouse upon the death of the deceased spouse. There is no justification for treating the surviving spouse differently the moment after the death of his or her spouse. Furthermore, there is a fundamental difference between the right to equal sharing recognized by the MPA and the right to seek adequate maintenance under the *Family Relief Act*. This difference should be recognized and addressed. We agree with the following statement of the Manitoba Law Reform Commission ("MLRC"):[12]

> Survivors should not be left to depend upon the good will of the predeceasing spouse. A surviving spouse who has persisted happily or unhappily in a marriage only to be disinherited, should be entitled to seek an allocation of property on death in order that his/her efforts and contributions to the marriage will be recognized.

RECOMMENDATION No. 1
A surviving spouse should not have to depend upon the generosity of his or her spouse to bring about equitable sharing of matrimonial property upon death of that spouse.

[14] The majority of commentators (13 of 15) support Recommendation 1. In their opinion, the existing law is unsatisfactory and the contribution of the surviving spouse to the marriage should be recognized on the death of the deceased spouse. Two commentators, however, are of the view that there is no problem in need of a solution. The main arguments given in support of this position are:
(1) Recommendation 1 is counter intuitive to public sentiment and expectation, and (2) we are repairing something that is not broken.[13] Other arguments

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[12] Manitoba Report, *supra* note 6 at 47.

[13] Other arguments are made criticizing the solution we propose, but these will be dealt with later in the chapter. These arguments are as follows: (i) the proposals will fundamentally alter the nature of the MPA as it now exists, (ii) the proposals are unjust because they will override testamentary freedom when it is unwarranted to do so, (iii) the proposals will be too disruptive to the private lives

criticizing a deferred-sharing regime operative on death will be dealt with later in this chapter.

[15] Our response to the two main arguments is as follows. We are of the opinion that the principles that underlie the MPA receive broad support from Albertans. In all likelihood, most Albertans would be surprised to know that under the existing MPA, the position of a spouse on marriage breakdown is better than that of the position of the spouse whose marriage ends upon death of his or her spouse. In our opinion, Recommendation 1 reflects public sentiment and expectation. To say that the existing system is not broken ignores the plight of the surviving spouses who receive on death less than they would have received on marriage breakdown. While we recognize that most deceased spouses treat their surviving spouse very generously on death, this offers no protection to those surviving spouses who are not so treated. As stated above, infrequency of the problem is no answer to the injustice found in the existing law. The principle of sharing embodied in matrimonial property law should be equally applicable to the surviving spouse upon death of the deceased spouse.

D. Possible Solutions to the Problem

[16] As one would expect, a variety of methods can be employed to bring about equitable division of matrimonial property upon death. In this part, we examine three of these methods and identify the advantages and disadvantages of each method. Each method is currently in use in one or more jurisdictions in North America.

1. Election of a fixed share

[17] One of the first methods used by legislatures to protect a spouse from disinheritance was fixed-share legislation. This type of legislation allowed the surviving spouse to claim a fixed share[14] of the estate of the deceased spouse if by the terms of the will the surviving spouse received nothing or something less than the fixed share. Sometimes this fixed share was what the spouse would have received under the intestacy rules; sometimes it was one-third or one-half of the

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of Albertans, and (iv) the proposals underestimate the practical difficulties of estate litigation.

[14] Some statutes left the amount in the discretion of the court but subject to a maximum share in the estate.

estate. Initially, this type of legislation created protection for widows but in some jurisdictions the protection was later extended to include widowers.

a. The Canadian experience

[18] In the early 1900s, Alberta, Saskatchewan and Manitoba enacted legislation of this type. In 1910, Alberta enacted *The Married Women's Relief Act*[15], which was later renamed as *The Widows Relief Act.*[16] This Act enabled the surviving wife to apply for an allowance out of her husband's estate where by the terms of his will she received less than she would have received had he died intestate. In such applications, the court had the power to make an allowance for the wife that was just and equitable in the circumstances. The maximum award was the amount she would have received upon intestacy,[17] but the court could award the widow less than this. In 1947, this legislation was repealed and replaced with the *Family Relief Act*.[18] A similar pattern is observed in Saskatchewan.

[19] Manitoba, on the other hand, introduced the fixed-share legislation in 1918 and, notwithstanding the introduction of family relief legislation, retained the fixed-share legislation until August 15, 1993. This legislation, known as the *Dower Act*,[19] gave benefits to both husbands and wives. In the beginning, the surviving spouse was entitled to a fixed one-third share of the net property of the deceased spouse, but later this share was increased to one-half of the net property.[20] On August 15, 1993, Part IV of *The Marital Property Act* came into force and the *Dower Act* was repealed. Part IV gave the surviving spouse the right to seek division of marital property upon the death of his or her spouse.

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[15] S.A. 1910 (2d Sess.), c. 18.

[16] R.S.A. 1922, c. 145.

[17] *McBratney* v. *McBratney* (1919), 59 S.C.R. 550.

[18] S.A. 1947, c. 12.

[19] R.S.M. 1987, c. D100 which was repealed by S.M. 1992, c. 46, s. 67 as am. by S.M. 1993, c. 48, s. 19.

[20] One-half of the net estate is a simplification of the formula set out in the Act, but is sufficient for the purposes of this discussion. See the Manitoba Report, *supra* note 6, Chapter 1 for a detailed discussion of the history of the legislation and its strengths and weaknesses.

b. The American experience

[20] Most American states have rejected the concept of family relief rooted in judicial discretion and protect the surviving spouse through fixed-share legislation, also known as forced-share legislation. Most of these statutes give the spouse the right to elect to receive one-third of the estate. Until 1991, the elective share of the surviving spouse proposed by the Uniform Probate Code ("UPC") also gave the surviving spouse one-third of the estate.

[21] The disadvantage of the typical fixed-share system found in the common-law American states is that the surviving spouse may or may not get a fair share of the matrimonial property. The result depends upon how the spouses hold title to their assets. If the surviving spouse has no assets, one-third of the estate will not bring about equal sharing where the estate consists entirely of marital assets. If the surviving spouse has half of the marital assets, a claim of one-third of the estate is merely a windfall for the surviving spouse. The problem is exacerbated if the surviving spouse has almost all of the marital assets.

[22] In 1991, the National Conference of Commissioners on Uniform State Laws redesigned its elective-share model and adopted an accrual-type elective share. Their goal was to bring the elective-share model in line with the partnership theory of marriage. The redesigned model has three essential features.[21] First, the elective share grows with the length of the marriage until it reaches a maximum of 50%. For example, after two years of marriage, the elective-share percentage is 6% of the augmented estate; after five years, the percentage is 15%; after ten years, the percentage is 30%; and after fifteen years, the percentage reaches the maximum of 50%. Second, the elective-share percentage is applied to the augmented estate, which includes the assets of **both** spouses as well as certain non-probate transfers and certain *inter vivos* transfers of both spouses. Third, all or a portion of the surviving spouse's assets are counted first when determining if he or she has their share of the augmented estate.

[23] By approximation, the model equates the elective-share percentage of the couple's combined assets with 50% of the couple's marital assets. So, if the couple

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[21] Waggoner, *supra* note 6. Similar comments are also found in Uniform Probate Code, 11th ed., Official 1993 Text with Comments at 57-66.

has been married for five years and the elective-share percentage is 15%, the model assumes that 30% of the value of the combined assets of the couple is marital assets and 70% is assets exempt from equalization. Also, the model assumes that each spouse owns assets in the same ratio.

[24] Some examples will illustrate how this system works.[22] Elaine and Ben married in their early twenties; they were never divorced. Ben died at the age of 62 and for whatever reason disinherited Elaine by the terms of his will. Over the course of the marriage, they accumulated $600,000 worth of assets. If title to all of the assets was in the name of Ben, Elaine would be entitled to 50% of the augmented estate, which in this case would be $300,000. If Elaine owned assets valued at $100,000 and Ben owned the remaining assets, Elaine's claim against the estate would be for $200,000. If ownership of the assets was divided equally, Elaine would have no claim against the estate.

[25] Now assume Elaine and Ben were married to each other more than five but less than six years. Ben died, survived by Elaine,[23] and he left nothing to Elaine in his will. He also made no non-probate transfers to Elaine or to anyone else. At the time of his death, Ben owned assets valued at $400,000 and Elaine owned assets valued at $200,000. The elective-share percentage for a five-year marriage is 15%. This means that Elaine's elective-share amount is $90,000 (15% of $600,000). To say that Elaine's elective-share amount is $90,000 assumes that the spouses acquired $180,000 (30% of $600,00) worth of assets over the course of the marriage and have exempt assets worth $420,000 (70% of $600,000). It is also assumed that Elaine and Ben own assets in the same ratio of marital property to exempt property. The assumption is that Elaine owns marital property valued at $60,000 (30% of $200,000) and exempt property valued at $140,000 (70% of $200,000), and Ben owns marital property valued at $120,000 (30% of $400,000) and exempt property valued at $280,000 (70% of $400,000). The elective-share amount is satisfied first by the marital property Elaine is assumed to own, which in this case is $60,000. (This is calculated by using the formula: 2 × 0.15 × value of

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[22] This example comes from Lawrence Waggoner's article entitled , "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code", *supra* note 6 at 249.

[23] This example is discussed at pages 63-4 of Uniform Probate Code, 11th ed., 1993 Official Text with Comments.

her assets.) Any deficiency will be paid by Ben's estate. The result is that in this example, the estate would have to pay Elaine $30,000 ($90,000 - $60,000). Ben's estate would retain $90,000 in marital property ($120,000 - $30,000) and $280,000 (exempt property).

[26] The drafters of the UPC preferred this system to making marital property laws apply upon death for the following reasons.[24] First, they wanted certainty and uniformity in probate law. It was almost impossible to accomplish this if marital property law is extended into the elective-share area because in the common-law American states there are three major types of equitable distribution systems in use. Each differs as to definition of the property that is divisible and to the factors the court must consider in determining what is equitable division of matrimonial property. Second, the drafters also wanted to avoid the tracing-to-source and other problems associated with identifying divisible and exempt property. These problems become more difficult to solve when one of the parties to the marriage has died.

[27] Of course, the disadvantage of an accrual-type system is that it will produce inequities whenever reality does not match the assumptions upon which the system is premised. It also fails to produce harmony and consistency between the principles that govern division of property upon marriage breakdown and upon death.

2. Expanded judicial discretion under the *Family Relief Act*

[28] Another method of ensuring equitable distribution of matrimonial property upon death is to give the court expanded powers under family relief such that it can go beyond adequate support and provide the spouse with an equitable share of the matrimonial property. This can be accomplished in one of two ways: (1) direct the court to consider the contribution of the spouse to the marriage and accumulation of matrimonial assets when making an order under the *Family Relief Act*, or (2) ensure that the spouse will receive under family relief at minimum what he or she would have received under the MPA.[25] The English family relief

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[24] Waggoner, *supra* note 6 at 242-3.

[25] Section 9(2) of the *Dependants Relief Act*, R.S.S. 1978, s. D-25 provided that if an allowance was awarded to the surviving spouse, it must be at least the amount the surviving spouse would have

legislation is an example of the first method and the Supreme Court of Canada decision in *Tataryn* v. *Tataryn Estate* is an example of the second method.

a. The English model

[29] Under the *Inheritance (Provision for Family and Dependants) Act, 1975* (U.K.),[26] a spouse may seek relief where his or her deceased spouse did not make reasonable financial provision for the surviving spouse by the terms of the will or in the event of intestacy. In the case of an application by a husband or wife, reasonable financial provision is that which is reasonable in the circumstances whether or not the surviving spouse requires the provision for maintenance.[27] The Act lists certain factors the court must consider in determining whether reasonable financial provision has been made for a spouse, including:[28]

(1) age of the applicant and duration of marriage,

(2) the contribution made by a spouse to the welfare of the family, including child care and work in the home, and

(3) what the spouse might reasonably have expected to receive if on the day on which the deceased died, the marriage—instead of being terminated by death—was terminated by a decree of divorce.

The Act does not establish any minimum share the surviving spouse should receive; it merely allows the court to consider what the spouse would have received if the marriage had ended upon divorce instead of death.

b. The Canadian model: Tataryn v. Tataryn Estate

[30] The Supreme Court of Canada in *Tataryn* v. *Tataryn Estate*,[29] is an example of the second option. In this unanimous decision, the Court interpreted proper maintenance for a spouse as being, at minimum, what the spouse would have received upon marriage breakdown. As this case is now being followed in

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received upon intestacy. This section was repealed by S.S. 1990-91, c. 15, s. 4.

[26] 1975, c. 63.

[27] *Ibid*., s. 1(2)(a).

[28] *Ibid*., s. 3(1) and (2).

[29] *Supra* note 3.

Alberta[30], we will review the decision in detail, examine the consequences of the decision for Albertans and note some of the unresolved issues.

i. The facts

[31] Mrs. Tataryn, one of the plaintiffs, was the spouse of the deceased. The couple had been married for 43 years. There were two sons of the marriage. Through the efforts of both spouses, the couple amassed an estate valued at $315,000 consisting of a house, a rental property and cash. The husband had title to all the real estate and most of the money. He intensely disliked his son John and was afraid that if he left property to his wife, in her own right, she would pass it on to John. By his will, therefore, the husband created a life estate in the home for his wife and made her the beneficiary of a discretionary trust of the income from the residue of the estate. The other son received the entire estate, subject to the life estate and discretionary trust. The surviving wife and son, John, claimed against the estate under the *Wills Variation Act*[31] of British Columbia.

[32] The trial judge gave the wife a life estate in the home and rental property and ordered an immediate gift of $10,000 to each son. When the wife died, one-third of the residue was to go to John and the remaining two-thirds to the other son. The Court of Appeal dismissed the appeal.

ii. Section 2(1) of the *Wills Variation Act*

[33] The case involves interpretation of s. 2(1) of the *Wills Variation Act*,[32] which reads as follows:

> 2(1) Notwithstanding any law or statute, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.

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[30] *Siegel* v. *Siegel Estate* (1995), 177 A.R. 282 (Alta. Q.B.), *Webb* v. *Webb Estate* (1995), 28 Alta. L.R. (3d) 110 (Surr. Ct.) and cases cited at para. 41 of this chapter.

[31] R.S.B.C. 1979, c. 435. This statute has been re-enacted as the *Wills Variation Act*, R.S.B.C. 1996, c. 490.

[32] R.S.B.C. 1979, c. 435. This subsection has been re-enacted as s. 2 of the *Wills Variation Act*, R.S.B.C. 1996, c. 490.

[34] From 1916 until 1931, the British Columbia courts equated what was "adequate, just and equitable in the circumstances" with what was required to support or maintain the spouse and children. In its 1931 decision in *Walker* v. *McDermott*,[33] the Supreme Court of Canada rejected this need-maintenance approach to the Act. In that case, the Court held that a court should give effect to the *Wills Variation Act* by adopting the point of view of the judicious father of a family seeking to discharge his marital and parental duty. This allows a court to consider the situation of the surviving spouse and children and the standard of living they were, or should have been, experiencing before death of the testator. Scholars refer to this as the "moral duty" approach.

iii. The decision

[35] The estate of the husband urged the Court to overturn the moral duty approach set out in *Walker* v. *McDermott* and return to the need-maintenance approach which prevailed in the beginning of the century. For several reasons, the Court rejected this argument. First, the wording of the Act does not suggest a needs-based approach. Also if need were the touchstone, failure to exclude independent adult children from the ambit of the Act presents problems. Second, the history of the Act does not suggest that the only purpose of the statute was to prevent dependants from becoming charges on society. Third, the moral duty approach does not introduce intolerable uncertainty.

[36] The Court did, however, agree that there must be some yardstick for measuring what is "adequate, just and equitable." In coming up with this yardstick, it was influenced by two ideas. First, the Act must be read in light of modern values and expectations. Second, it is desirable that the rights that may be asserted against the testator before death be symmetrical with those that may be asserted against the estate after his or her death.[34]

[37] The Court held that the words "adequate, just and equitable" must be viewed in light of current societal norms: legal obligations and moral obligations. Legal obligations are those that might be asserted against a testator during his or her life.

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[33] [1931] S.C.R. 94.

[34] On this point, the Court cites with approval Arthur Close's dissent found in British Columbia Law Reform Commission, *Report on Statutory Succession Rights* (Report No. 70, 1983).

As between spouses, they may be found in the *Divorce Act*, family property legislation and the law of constructive trust. Moral duties must be considered in light of societal expectations. The Court thought most people would agree that:

(1) even though the law may not require the deceased to make provision for the surviving spouse, a strong moral obligation to do so exists,

(2) an adult dependent child is entitled to such consideration as the size of the estate will allow, and

(3) if the size of the estate permits, and in absence of circumstances that negate the existence of such an obligation, some provision for such children should be made.

[38] The Court then applied these principles to the case at hand and turned first to the legal responsibilities. At pages 18-19, McLachlin J., speaking for the entire Court, wrote:

> I turn first to the legal responsibilities which lay on the testator during his life. His only legal obligations were toward Mrs. Tataryn. While they had not crystallized, since the parties were living together at the time of death, they nevertheless existed. The testator's first obligation was to provide maintenance for Mrs. Tataryn. But his legal obligation did not stop here. The marriage was a long one. Mrs. Tataryn had worked hard and contributed much to the assets she and her husband acquired. There are no factors such as incompetence, negating her entitlement. Under the *Divorce Act* and the *Family Relations Act* she would have been entitled to maintenance and a share in the family assets had the parties separated. **At a minimum, she must be given this much upon the death of her spouse**. [Emphasis added.]

[39] What then is the husband's moral duty to his wife and two sons in this case? When considering the moral claims towards the wife, McLachlin J. wrote at page 19:

> The highest moral claim arises from the fact that Mrs. Tataryn has outlived her husband and must be provided for in the "extra years" which fate has accorded her. This is not a legal claim in the sense of a claim which the law would have enforced during the testator's lifetime. It is, however, a moral claim of a high order on the facts of this case. Mr. and Mrs. Tataryn regarded their estate as being there to provide for their old age. It cannot be just and equitable to deprive Mrs. Tataryn of that benefit simply because her husband died first. To confine her to such sums as her son may see fit to give her, as the testator proposed, fails to recognize her deserved and desirable independence and constitutes inadequate recognition of her moral claim.

The Court also concluded that the moral claims of the two grown and independent sons were not very high because neither had contributed to the accumulation of the estate.

[40] The Court held that the legal and moral claim of Mrs. Tataryn indicated that an "adequate, just and equitable" provision for her required giving her the bulk of the estate. It allowed the appeal and ordered that Mrs. Tataryn receive title to the matrimonial home, a life interest in the rental property, and the entire residue of the estate after payment of an immediate gift of $10,000 to each son. Upon the death of the wife, the rental property will be divided with one-third of the property going to John and two-thirds of the property going to Edward. Costs were to be paid from the estate.

iv. Will this decision be followed in Alberta?

[41] Since 1951,[35] Alberta courts have adopted the moral duty approach that was established in *Walker* v. *McDermott* and reaffirmed in *Tataryn* v. *Tataryn Estate*. It, therefore, comes as no surprise that Alberta courts have adopted the reasoning in *Tataryn* notwithstanding the differences between the Alberta and British Columbia family relief legislation.[36] In *Siegel* v. *Siegel Estate*,[37] Justice Moreau held:

> I am of the view that the principles in **Tataryn** do apply to applications under the **Family Relief Act** and that the words "proper maintenance and support"

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[35] See *Re Willan Estate* (1951), 4 W.W.R. (N.S.) 114 (Alta. S.C.).

[36] Section 3(1) of the *Family Relief Act*, R.S.A. 1980, c. F-2 is the Alberta equivalent of s. 2 of the *Wills Variation Act*, R.S.B.C. 1996, c. 490. Section 3(1) of the Alberta Act reads as follows:

> 3(1) If a person
>
> (a) dies testate without making in his will adequate provision for the proper maintenance and support of his dependants or any of them, or
>
> (b) dies intestate and the share under the *Intestate Succession Act* of the intestate's dependants or of any of them in the estate is inadequate for their proper maintenance and support,
>
> a judge, on application by or on behalf of the dependants or any of them, may in his discretion, notwithstanding the provisions of the will or the *Intestate Succession Act*, order that such provision as he considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

Both the Alberta and British Columbia section require the court to determine if the testator died without making in his will "adequate provision for the proper maintenance and support of his dependants or any of them". The Alberta section then empowers the court to "make such provision as he considers adequate . . . for the proper maintenance and support of the dependants". The British Columbia section empowers the court to order that the provision that it thinks "adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children".

The Alberta legislation is different in two other material aspects. First, the Alberta statute applies to both testacies and intestacies, whereas the British Columbia statute applies only to testacies. Second, Alberta does not consider independent adult children to be dependants, whereas in British Columbia all children, whatever age, are dependants.

[37] *Supra* note 30 at 293.

> in s. 3(1) of the **Act** permit the court to determine what is adequate in light of the standard of living to which the spouse is entitled, and proper in light of the obligations which the law would impose on the deceased in his life if the question of the claim was to arise. The use of the word "proper" also requires a reflection on society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. . . . As stated by McLachlin, J. at p. 615: "The search is for contemporary justice." In that sense, symmetry is established between the rights which might be asserted against the testator before death and those which might be asserted against his estate after death, due regard, however, being paid to the intentions of the testator.

Tataryn was also cited with approval in *Webb* v. *Webb Estate*,[38] *Re Gow Estate*,[39] *Re Sheremata Estate*,[40] *Moravec* v. *Moravec*,[41] and *Stang* v. *DeDock and Stang*.[42]

v. The significance of the decision

[42] *Tataryn* will cause no great stir in the six common-law provinces where death is an event that enables the surviving spouse to seek division of matrimonial property.[43] It will cause a great stir in Alberta, British Columbia and Prince Edward Island, where the matrimonial property legislation does not contain such a provision. In British Columbia, death of one spouse ends any rights that the spouses may have had under the *Family Relations Act*,[44] except where prior to death the court had declared that there was no possibility of reconciliation.[45] Without such a declaration, a surviving spouse is not able to sue the estate of the deceased spouse for a matrimonial property division. This is the case even if

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[38] *Supra* note 30.

[39] (1998), 238 A.R. 39, [1998] A.J. No. 1396 (Q.B.), online: QL (AJ).

[40] (1998), 23 E.T.R. (2d) 107, [1998] A.J. No. 344 (Q.B.), online: QL (AJ).

[41] (1998), 21 A.R. 82, [1998] A.J. No. 392 (Q.B.), online: QL (AJ).

[42] [1998] 7 W.W.R. 551, [1998] A.J. No. 261 (Q.B.), online: QL (AJ).

[43] The six provinces are Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario and Saskatchewan.

[44] R.S.B.C. 1996, c. 128.

[45] If before the death of the spouse a court had declared that there was no reasonable possibility of reconciliation, the surviving spouse can proceed with the action. The action cannot proceed if this declaration has not been made, even when the action had already been commenced. There are many cases to this effect. See for example, *Adamcewicz* v. *Adamcewicz Estate* (1991), 32 R.F.L. (3d) 155 (B.C.C.A.).

marriage breakdown occurred before the death.[46] In Alberta, a surviving spouse can commence an action after death of the spouse only if marriage breakdown has occurred before the date of death.[47] The estate of the deceased spouse can, however, continue an action that was commenced by the deceased spouse before death.[48]

[43] The decision in *Tataryn* makes a family relief application a device to obtain, at a minimum, what the surviving spouse would have obtained if there had been a marriage breakdown during the joint lives of the couple. This should, at least in Alberta and British Columbia, go a long way to ensuring that a spouse who is still married at the time of the death does not receive less than a spouse who has sought a matrimonial property division before the death.

vi. What issues are left unanswered by *Tataryn*?

[44] Although *Tataryn* will help many disinherited spouses, it is incomplete because it does not deal with many important issues that should be dealt within a matrimonial property regime that allows for division of matrimonial property upon death. Such issues include the following:

(1) Should matrimonial property include property that passes to the surviving spouse by right of survivorship or under an insurance policy, pension plan, annuity or registered retirement savings plan? Should funeral costs and testamentary expenses[49] be considered debts of the deceased spouse for the purposes of calculating the matrimonial property claim?

(2) How does the right to seek division of matrimonial property affect the spouse's right to receive property under a will or upon intestacy?

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[46] *Ibid.*

[47] MPA, R.S.A. 1980, c. M-9, s. 11(2).

[48] *Ibid.*, s. 16.

[49] Testamentary expenses are "the expenses necessarily incurred in the proper performance of their duties by personal representatives": Woodman, *Administration of Assets*, 2d ed. (Sydney: Law Book Company, 1978) at 10. Practically speaking, testamentary expenses includes the compensation awarded to the personal representative, expenses of the personal representative, court fees, property taxes, and legal and accounting fees incurred by the personal representative. See *Re Bertram Estate* (1972), 30 D.L.R. (3d) 46 (Ont. S.C. in Bankruptcy) in which the court held that testamentary expenses includes compensation payable to the administrator of the estate prior to bankruptcy, as well as compensation for legal services provided by their solicitors.

(3) How should the estate be administered in face of a matrimonial property order? Who loses out under the will? There are several possible answers to these questions. The court could:

- direct that the effect of the order will fall ratably on the whole of the estate, subject to the power to relieve portions of the estate from this burden. (This is the method dictated by section 9 of the *Family Relief Act*).
- divide the matrimonial property so that as far as possible the express wishes of the testator may be honoured in respect of specific devises and bequests.[50]
- treat the matrimonial property order as a debt and have the rules of marshalling determine which assets will bear the burden of satisfaction of the order.

(4) Should safeguards against avoidance be reviewed so as to give the surviving spouse protection against depletion of the matrimonial property by use of will substitutes? Will substitutes are techniques that ensure that certain assets pass to a third party outside the estate. Such techniques include the following: (i) property held in joint tenancy by the deceased spouse and a third party, (ii) property that passes by way of beneficiary designation, (iii) *donatio mortis causa*, and (iv) life insurance. Some provinces have taken steps to ensure that will substitutes cannot be used to defeat or reduce the claim of the surviving spouse.

(5) In the administration of estates, which claims would take priority over the claim of the surviving spouse and which would take subject to the claim of the surviving spouse?

vii. The advantages and disadvantages of expanded judicial discretion in the granting of family relief

[45] One advantage of the family relief option[51] is that it provides the greatest flexibility to meet the circumstances of each individual. Within one action, equitable division of matrimonial property and adequate maintenance can be addressed. The other advantage is that a court can implement this change!

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[50] For example, *see* s. 4(5) of *Marital Property Act*, S.N.B. 1980, c. M-1.1, as am.

[51] For a more detailed discussion, see the Manitoba Report, *supra* note 6 at 40.

[46] With these advantages come certain disadvantages.[52] First, the judicial discretion option may, in practice, lack certainty and predictability. Second, it does not properly recognize "the right of a spouse to a fair share in the couple's economic gain as differentiated from a mere opportunity to ask for a share under a discretionary scheme."[53] Third, only a judge can determine the rights of the spouse because family relief is available only upon court order and not by agreement of the parties. Fourth, it makes no sense to blur the principles of equitable division of matrimonial property with adequate maintenance. It is best to leave matrimonial property issues to matrimonial property law and address any additional need of the surviving spouse under family relief legislation. Fifth, litigating matrimonial property issues within a family relief application is inefficient. The parties will not have access to the disclosure requirements and procedural rules that are tailor-made for matrimonial property disputes. It is inefficient to create such procedural rules in the context of the *Family Relief Act* when they already exist under the MPA. Sixth, division of matrimonial property upon death, while similar, is not identical to division of matrimonial property upon marriage breakdown. All of the issues that are left unanswered by *Tataryn* should be addressed. It is better if these issues are addressed comprehensively by statute, rather than developed piecemeal through judicial interpretation.

3. Deferred sharing of matrimonial property upon death

[47] Having reviewed the options of fixed-share legislation and expansion of judicial discretion in the granting of family relief, we now turn to the third option. This option is to make death a triggering event under the MPA for the benefit of the surviving spouse. Under this option, the spouses remain separate as to property during their lives, but on the death of one spouse, the surviving spouse could seek division of matrimonial property. This right would apply to all surviving spouses and would not be premised, as it now is, on marriage breakdown before death. Of course, the right to seek division of matrimonial property would not necessarily mean that the surviving spouse would be entitled to more than he or she already owns. Whether the estate would have to pay anything to the surviving spouse will

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[52] The first 5 disadvantages are discussed in more detail in the Manitoba Report, *supra* note 6 at 40-41.

[53] *Ibid*. at 41.

depend upon many things, including how title to property is held and the value of the assets that pass on death to the surviving spouse.

[48] A deferred sharing scheme operative on death does not interfere with vesting of property in the surviving spouse upon death. Assets would pass by way of survivorship or beneficiary designation. It is only when the surviving spouse does not receive his or her share of the matrimonial property that the right to seek division of matrimonial property becomes important.

[49] The advantages to this option are numerous.[54] First, the principle that each spouse contributes equally and independently to the marriage and to the accumulation of assets and, is therefore, entitled to an equal share of the assets acquired during the course of marriage, is equally forceful before and after death. There is no logical reason for having different principles apply to division of assets before death and after death. Second, a deferred-sharing regime operative on death will achieve a fairer result than a fixed-share regime. In our multiple-marriage society, it is particularly important that property division take into account the length of the marriage, the property owned by each spouse before marriage, and the source of the property. A fixed-share regime will over-compensate the surviving spouse whenever the estate consists mainly of assets that were acquired by the deceased spouse before the marriage or inherited from relatives. Third, the *Tataryn* approach forces the court to consider matrimonial property issues within the context of a family relief application but without the statutory rules created for matrimonial property division. This is inefficient. Finally, a deferred-sharing regime operative on death would give the surviving spouse a greater measure of security and certainty than would a discretionary system. The presumption of equal sharing is of greater value than the very broad exercise of discretion under the *Family Relief Act*.

[50] Some may argue that the deferred-sharing regime operative upon death will interfere with testamentary freedom of the deceased spouse. This is true. It will. Yet, this statement really hides the true issue: what does the deceased spouse have to give away? If Alberta society accepts the partnership theory of marriage and the concept of equal sharing of property acquired over the course of the marriage, then

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[54] *Ibid*. at 44-46.

the deceased spouse should not be able to give away more than his or her share of those assets. In effect, the principle of testamentary freedom has been used for a long time to enrich the estate of the deceased spouse by failing to recognize the contribution of the surviving spouse to the accumulation of those assets. Certainly, one can envision situations in which the surviving spouse could successfully sue the estate of the deceased spouse for a declaration of resulting trust or constructive trust in respect of estate assets. It makes no sense to resort to trust principles when the MPA could easily apply to division of matrimonial assets both upon marriage breakdown and upon death.

[51] Other objections to a deferred-sharing regime operative upon death were raised by commentators. One argued that such a regime would fundamentally alter the nature of the MPA as it now operates and, in effect, impose a community of property regime. It is difficult to see how this can be the case when the existing MPA already allows for division on death where marriage breakdown precedes the death of the spouse. Our proposals would only expand the number of spouses who could bring an action on death. Furthermore, as is now the case, neither spouse would have a property interest in the assets of the other at the time the asset was acquired, which is the hallmark of a community of property regime.

[52] Another objection put forward was that a deferred-sharing regime operative upon death would be too disruptive to the private lives of Albertans. While such a regime will cause some disruption, in our opinion, it will be minimal. In most lifelong marriages, the deceased spouse gives all of his or her estate to the surviving spouse. Clearly, the proposals would not disrupt the lives of these Albertans. And it is not likely to significantly disrupt the lives of those in second marriages either, given that the majority of spouses in these circumstances also treat their surviving spouse generously. Nor do we think that any disruption that will occur will be unjustified. The litigation and delay in administration of estates that will occur because of these proposals are necessary if the principles that underlie the MPA are to be served. Moreover, a deferred-sharing regime operative upon death has existed in four Canadian provinces for more than twenty years, and in two Canadian provinces for a lesser period.[55] Aside from the necessary period of

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[55] Death has been a triggering event since the enactment of the matrimonial property legislation of Saskatchewan, Newfoundland, Nova Scotia and New Brunswick in the late 1970s and early 1980s. Death became a triggering event under the Ontario legislation in 1986 and under the Manitoba

adaptation to a new regime, nothing suggests that such regimes have been unduly disruptive to the lives of the Canadians in those provinces. Finally, one must not forget that *Tataryn* v. *Tataryn Estate* is being applied in Alberta presently. This means that lawyers presently advise testators that on death the surviving spouse can bring a family relief action and the surviving spouse is entitled, as a minimum, to what he or she would have received on marriage breakdown. Any disruption that our proposals might bring about already exists to a large extent.

[53] Another criticism put forth is that a deferred-sharing regime operative on death underestimates the practical difficulties of estate litigation. While we recognize that any litigation involving an estate is more difficult by reason of the passing of one of the key witnesses, the law does provide some protection in this situation. Section 12 of the *Alberta Evidence Act*[56] provides that no party shall obtain a judgment against an estate unless the evidence is corroborated by other material evidence. The other concern was that it would be very difficult to trace exemptions in a long-term relationship where one of the spouses has died. Since this problem exists even when both parties to such a relationship are alive, it is an insufficient reason to retain the existing law.

[54] Two commentators have voiced concerns that children of the surviving spouse may pressure the surviving spouse to commence a matrimonial property action so that the surviving spouse will have more of an estate to pass on to his or her children. The surviving spouse may be elderly and little able to resist such pressure. This is, in our view, a red herring. Nowhere does the law deny a legal right to a group merely because some members of the group may be pressured into asserting it. If fairness and sound principle require, as we think they do, that a surviving spouse should receive a share of the couple's matrimonial property, the spouse should receive it. The law should not use speculation about the use the surviving spouse may make of property to deprive the surviving spouse of property that rightfully belongs to that spouse.

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legislation in 1993.

[56] R.S.A. 1980, c. A-21.

E. Analysis

[55] We would be wise to recognize that in bringing about a better fit between matrimonial property law and succession law, we must serve several *conflicting* principles. These are as follows:[57]

- the entitlement of the surviving spouse to an equitable division of matrimonial property,
- testamentary freedom, and
- the proper maintenance of certain dependants of the deceased spouse.

These interests are not compatible and it will be our task to balance the competing interests in an effort to create a fair system of division of property upon death.

[56] The best way to serve these conflicting principles is to give the surviving spouse the right to seek matrimonial property division upon death and, if after such a division the surviving spouse is still in need of maintenance, the spouse can look to family relief. This solution properly recognizes the partnership theory of marriage. What is left in the estate of the deceased spouse will then be available for the support of that spouse's dependants, including the surviving spouse. Where, however, the matrimonial property claim provides the surviving spouse with sufficient assets to provide proper maintenance and support, the surviving spouse will have no claim for family relief and the assets that are properly left in the estate can pass as the deceased spouse directs.

[57] For the reasons noted above,[58] the best method of effecting division of matrimonial property is under the MPA. The fixed-share solution, while giving certainty and ease of administration, is only an approximation of equitable division of matrimonial property. It is best to apply the rules governing matrimonial property division. In a society that experiences high rates of divorce and remarriage, it is important to exclude from division property that either spouse acquired before marriage and property either spouse received by way of inheritance or gift. Although it may be more difficult to deal with issues of exemptions when one of the spouses has died, it is obviously not impossible to do. Six Canadian provinces do exactly that. The *Tataryn* approach, while a good

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[57] Manitoba Report, *supra* note 6 at 32-33.

[58] See the discussion at paras. 49-54 of this chapter.

beginning, is not the best solution. Family relief is not the place to deal with matrimonial property issues. Furthermore, *Tataryn* leaves several unresolved issues that are best dealt with under the MPA. Finally, there was far more support among commentators for the matrimonial property solution as compared to the family relief solution. There was no support for the fixed-share solution.

RECOMMENDATION No. 2
The *Matrimonial Property Act* should be amended so that upon death of a spouse, the surviving spouse can seek division of property acquired over the course of the marriage. This cause of action would arise even if the spouses continued to reside together until the death of one of them.

F. Scope of proposed reform

[58] All of the matrimonial property statutes in the common law provinces of Canada reflect the principle that each spouse contributes equally and independently to the marriage and to the accumulation of assets and is, therefore, entitled to an equal share of the assets acquired during the course of marriage. Nevertheless, these statutes do NOT allow the estate of the deceased spouse to commence an action for division of matrimonial property. Two rationales support this result, which at first blush seems at odds with the primary principle reflected in these statutes. The first rationale was set out by the ALRI in an earlier report as follows:[59]

> 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 to be returned to the paying spouse.

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[59] ALRI, *Matrimonial Property* (Report No. 18, 1975) at 92-3.

[59] The second rationale reflected in the current law is that the decision to seek division of matrimonial property should be left to the spouses of the marriage and should be exercised by either spouse during his or her lifetime. Neither a trustee in bankruptcy nor the executor of the estate should be allowed to commence an action for division of matrimonial property. Such an action was created to benefit the spouses to the marriage, and not their creditors or beneficiaries.

[60] The opinion of the commentators[60] was divided on this issue, as was the opinion of Board members of the Alberta Law Reform Institute. The minority of the Board members are of the view that the action should survive for the benefit of the estate of the deceased spouse so that an estate could commence an action after death of the deceased spouse. This is the logical extension of the partnership theory that underlies the MPA. Moreover, the matrimonial property regime has evolved over time to a stage where it is treated by Albertans very much like a property right, as opposed to an ability to apply for a division of property.

[61] The majority of the Board members remain of the view that, for the reasons given above, the estate should not be able to commence an action upon the death of the deceased spouse. As a general rule, the rights created by the MPA should not survive for the benefit of the estate of the deceased spouse. Where, however, the deceased spouse has commenced an action during the joint lives of the spouses, the estate can continue the action after the death of the deceased spouse.[61] The ability of the estate to continue an action commenced by the deceased respects the decision of the deceased spouse made during the joint lives of the spouses and prevents the morbid delay experienced when the surviving spouse learned that his or her spouse was terminally ill.[62]

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[60] Six commentators support Recommendation 3, six commentators oppose the recommendation and would allow an estate to commence an action after death, and one commentator suggests a middle ground. That person would allow an estate to commence an action after death where the spouses died in a common accident or where one spouse has murdered the other spouse. These two suggestions will be dealt with in Chapter 4.

[61] MPA, R.S.A. 1980, c. M-9, s. 16.

[62] See ALRI, *Section 16 of the Matrimonial Property Act* (Report No. 57, 1990) which gave rise to the 1992 amendment of section 16 that allowed the estate to continue an action commenced by the deceased spouse before death. Prior to this amendment, a cause of action did not survive for the benefit of the estate of the deceased plaintiff. It followed that a matrimonial property action commenced before death would cease upon the death of the plaintiff if the matter had not reached trial

[62] The consequence of this recommendation is that the surviving spouse will only have to make a payment to the estate if the action was commenced during the joint lives of the spouses. If the surviving spouse commences an action after the death of the deceased spouse and the accounting reveals that the surviving spouse has more than his or her share of the matrimonial property, the action should be dismissed. The estate of the deceased spouse cannot benefit from an action commenced by the surviving spouse after death because the rights of the deceased spouse do not survive for the benefit of the estate in this circumstance.[63]

RECOMMENDATION No. 3

The scope of the proposed reform will not confer rights on the estate of the deceased spouse. Subject to certain exceptions, the rights created by the *Matrimonial Property Act* will not survive for the benefit of the estate of the deceased spouse. Where, however, the deceased spouse had commenced an action before his or her death, the estate should be able to continue the action after the death of the deceased spouse.

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before the death. This caused some defendants to delay proceedings when they learned of the terminal illness of their spouse. This "morbid delay" was addressed in Report No. 57.

[63] *Edward* v. *Edward Estate and Skolrood* (1987), 8 R.F.L. (3d) 370 (Sask. C.A.).

CHAPTER 3. OVERVIEWS OF THE *MATRIMONIAL PROPERTY ACT*

A. Introduction

[63] Before proceeding with specific proposals for reform, we examine the current law as it relates to the MPA.[64] Particular emphasis is given to areas that will be of importance in bringing about equitable division of matrimonial property upon death of a spouse.

B. Who may seek division of matrimonial property under the Act?

1. Upon a marriage breakdown

[64] The MPA is designed to bring about division of matrimonial property after a marriage breakdown. Only those spouses who have experienced a marriage breakdown and meet the residency requirements (or who have commenced a divorce petition[65]) can bring an action under the Act. The concept of a marriage breakdown is introduced through section 5. This section makes the occurrence of one of a number of events, all of which signal marriage breakdown, a condition precedent to the making of a matrimonial property order. Those events include the following:[66]

> (i) a divorce judgment, or
> (ii) a declaration of nullity, or
> (iii) an order of judicial separation, or
> (iv) the spouses have been separated for a period of one year, or less if there is no possibility of reconciliation, or
> (v) the spouses are living apart and one intends to or has transferred property intending to defeat the claim of the other, or
> (vi) the spouses are living apart and one is dissipating property.

[65] The residency requirements are established by section 3 of the Act, which reads as follows:

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[64] R.S.A. 1980, c. M-9.

[65] In *Hubar* v. *Barron* (1993), 45 R.F.L. (3d) 224 at 224, the Alberta Court of Appeal held that: "[O]nce a valid petition for divorce has been issued in Alberta, s. 3(2) of the *Matrimonial Property Act* permits the commencement of a matrimonial property action. . . . The subsequent striking out of the petition for divorce . . . does not in our view prevent the respondent from proceeding with her matrimonial property action."

[66] This list is a quote from McLeod & Mamo, *Matrimonial Property Law in Canada* (Toronto: Carswell) at A-5.

> 3(1) A spouse may apply to the Court for a matrimonial property order only if
> (a) the habitual residence of both spouses is in Alberta, whether or not the spouses are living together,
> (b) the last joint habitual residence of the spouses was in Alberta, or
> (c) the spouses have not established a joint habitual residence since the time of marriage but the habitual residence of each of them at the time of marriage was in Alberta.
> (2) Notwithstanding subsection (1), if a petition is issued under the *Divorce Act* (Canada) in Alberta, the petitioner or the respondent may apply for a matrimonial property order.

Since most situations involve a petition for divorce and a matrimonial property action, the residency requirements have limited practical effect.[67]

2. Upon death

[66] On the death of one of the spouses, the surviving spouse can commence an action under the MPA if such an action could have been commenced immediately before the death of the spouse.[68] If the surviving spouse had commenced the action before death, he or she can continue the action after the death of the deceased spouse.[69] A surviving spouse who is living with his or her spouse at the time of death could not have commenced an action immediately before death and, therefore, does **not** have the right to commence an action under the Act.[70]

[67] The estate of a deceased spouse does **not** have the right to commence an action against the surviving spouse for division of matrimonial property.[71] Where, however, the spouse has commenced an action under the Act before his or her death, the estate of the deceased spouse can continue the action.[72]

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[67] They would become more important if the Act was to apply to all marriages that end upon death.

[68] MPA, R.S.A. 1980, c. M-9, s. 11(1).

[69] *Ibid*.

[70] It is possible for a couple to be living separate and apart even though they still reside in the same residence: MPA, R.S.A. 1980, c. M-9, s. 5(3). However, since this is rare, we will assume that spouses who are still residing together at the time of death are not living separate and apart.

[71] Section 16 used to state this more clearly than it now does. See *Zubiss* v. *Moulson Estate* (1987), 54 Alta. L.R. (2d) 167 (Q.B.) which interpreted the MPA before the s. 16 MPA amendment.

[72] MPA, R.S.A. 1980, c. M-9, s. 16. This section was amended in 1992 to prevent the morbid delay experienced when the cause of action did not survive the death of the spouse who commenced the action.

C. When must the action be commenced?

1. Upon a marriage breakdown

[68] If an action is brought on the basis that a court has granted a decree nisi of divorce, a declaration of nullity or a judgment of judicial separation, the action must be commenced within two years of the court order.[73] Note that the limitation period runs from the granting of the order and not the filing of the order.[74] If the cause of action is based on separation, the spouse must bring the action within two years of separation.[75] Yet, since section 5(1)(c) requires at least one year of separation before the action can be commenced, the actual limitation period is one year from when the cause of action arose. If the action is brought because one of the spouses has made a significant gift or transferred assets to someone who is not a bona fide purchaser for value, the action must be commenced within two years after the couple separated or within one year after the property was transferred or given, whichever occurs first.[76]

[69] But what happens in a situation in which the spouses have been separated for many years and then one of the spouses commences a divorce petition? The Act expressly provides that, notwithstanding that a cause of action based on separation may have expired, a spouse who commences divorce proceedings has the right to bring a matrimonial property action.[77] This action can be brought immediately upon the filing of the divorce petition or at any time up to two years from the granting of the decree nisi of divorce.[78] (Since the judgment of divorce has replaced the decree nisi of divorce, this must refer to the judgment of divorce.) This means that the two-year limitation period that runs from the date of separation is of little effect during the joint lives of the spouses.

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[73] *Ibid*., s. 6(1)(b).

[74] *Saxby* v. *Richardson Estate* (1994), 164 A.R. 196 (Q.B.).

[75] MPA, R.S.A. 1980, c. M-9, s. 6(2) and *Weicker* v. *Weicker* (1985), 46 R.F.L. (2d) 243 (Alta. C.A.).

[76] *Ibid*., s. 6(3).

[77] MPA, R.S.A. 1980, c. M-9, s. 6(1)(a) and *Weicker* v. *Weicker, supra* note 75.

[78] Section 6(1)(a) of the MPA as interpreted in *Weicker* v. *Weicker, ibid*.

[70] *Weicker* v. *Weicker*[79] illustrates how commencement of divorce proceedings revives a cause of action under the Act. In this case, the couple separated in 1969. The wife obtained a decree of judicial separation on December 6, 1979 and commenced divorce proceedings about two and one-half years later. The Alberta Court of Appeal held that, although the limitation period expired two years after the granting of the decree of judicial separation, the commencement of the divorce proceedings revived the cause of action.

2. Upon death

[71] As indicated above, the surviving spouse can bring an action if an action could have been commenced immediately before the death of the other spouse. This means that immediately before death, the surviving spouse must meet the "jurisdictional, time and other prerequisites contained elsewhere in the Act."[80] Section 11 does not create greater rights than those created by sections 5 and 6 of Act. So where the parties had been separated for many years and the decree nisi of divorce had been granted more than two years before the death of the spouse, the surviving spouse's cause of action is time barred.[81]

[72] A surviving spouse cannot bring an action later than six months after the date of the issue of a grant of probate or administration of the estate of the deceased spouse.[82] However, the limitation periods prescribed by section 6 of the MPA may require a spouse to commence action **before** the six-month period has lapsed.[83]

[73] Spouses who have been separated from their spouse for more than two years before the death of their spouse may have no cause of action under the existing

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[79] *Supra* note 75.

[80] *Saxby* v. *Richardson Estate*, *supra* note 74 at para 7. But compare *Baker* v. *Baker Estate* (1992), 136 A.R. 94, suppl. reasons (1993), 138 A.R. 1 (Q.B.). In *Baker*, the couple had only been separated for 3 months at the time of the husband's death. The action was commenced one year after separation. The court held that the surviving spouse had the right to bring an action on the basis of one year of separation and included the period after death as being part of this one year. It also held that at the time of death there was no possibility of reconciliation and, therefore, a shorter period of separation was sufficient.

[81] *Saxby* v. *Richardson Estate*, *supra* note 74.

[82] MPA, R.S.A. 1980, c. M-9, s. 11(4).

[83] See Barbara Krahn, "Property Claims Before and After Death", LESA, 1996 Spring Refresher.

law. The action could not be brought on the basis of separation because the limitation period will have expired.[84] The question then becomes whether the court would interpret section 11 as allowing the spouse to bring an action because immediately before the death the surviving spouse could have commenced divorce proceedings and thereby revived the cause of action. This is an unlikely interpretation because section 6(1) allows the action to be commenced "at or after the commencement for a decree of divorce." This suggests that the spouse must commence the divorce proceedings before the cause of action under the MPA revives.

D. Matrimonial property

1. Definition of property

[74] In Alberta all property owned by the spouses is distributable under the MPA. Section 7(1) of the Act, provides as follows:

> 7(1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.

Unlike some other provinces, our Act does not differentiate between family assets and business assets.

[75] Although the Act does not define the term "property", Alberta courts have given a broad interpretation to the term. In *McAlister* v. *McAlister*, the court noted the following:[85]

> It is "property" which is the subject of the legislation. And, without more, that includes real and personal, corporeal and incorporeal, full and partial interests. The only restriction—and it is not a restriction at all in the sense that the term may be applied to other provincial legislation—is that property be owned by the parties or one of them.

If neither spouse has a beneficial interest in an asset, it is not matrimonial property. Therefore, matrimonial property does not include a life insurance policy held in trust for a child[86] or a life insurance policy in which a third party has been

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[84] *Weicker* v. *Weicker, supra* note 75.

[85] (1982), 41 A.R. 277 (Q.B.) at 299.

[86] *Roenisch* v. *Roenisch* (1990), 103 A.R. 30 (Q.B.), rev'd on another issue at (1991), 32 R.F.L. (3d) 233 (Alta. C.A.).

irrevocably designated as beneficiary.[87] The importance of this point will be revealed in the policy discussion concerning avoidance techniques.

[76] Notwithstanding the lack of a definition of "property", a body of case law has developed at both the trial and appellate level that considers whether various interests are "property" for the purposes the MPA. This body of case law has concluded that "property" includes the following:

- joint property,[88]
- employment pensions,[89]
- registered retirement savings plans,[90]
- Canada Pension Plan,[91]
- choses in action, which encompass (1) all contractual and quasi-contractual rights, including pensions, accounts receivable, debentures, policies of insurance and (2) equitable rights, including trust and trust funds,[92]
- a vested interest under the terms of a will,[93]
- irrevocably vested right to survivorship benefits under a pension,[94]
- airline travel points,[95]
- portion of severance allowance that is compensation for past service,[96]

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[87] *Bracewell* v. *Bracewell* (1994), 4 R.F.L. (4th) 183 (Q.B.) and *Inverarity* v. *Inverarity* (1996), 182 A.R. 1 (Q.B.).

[88] *Quigg* v. *Quigg*, [1983] 2 W.W.R. 509 (Alta. C.A.), *Bandurak* v. *Bandurak* (1983), 24 Alta. L.R. (2d) 157 (Q.B.).

[89] *Herchuk* v. *Herchuk* (1983), 35 R.F.L. (2d) 327 (Alta. C.A.) and the many cases following this decision including *Bracewell* v. *Bracewell supra*, note 87 and *Podemski* v. *Podemski* (1994), 6 R.F.L. (4th) 183 (Q.B.).

[90] *Podemski* v. *Podemski*, *ibid.* and *Frost* v. *Frost* (1994), 2 R.F.L. (4th) 227 (Alta. Q.B.).

[91] *Podemski* v. *Podemski*, *ibid.*

[92] *Roenisch* v. *Roenisch*, *supra* note 86.

[93] *Weicker* v. *Weicker* (1986), 4 R.F.L. (3d) 1 (Alta. Q.B.) and *McLeod* v. *McLeod* (1990), 28 R.F.L. (3d) 64 (Alta. C.A.). In *McLeod*, the Alberta Court of Appeal held that a vested life interest in property held in trust for the wife was property within the meaning of the Act. The market value of the life interest on the date it was acquired was exempt under section 7(2).

[94] *Bracewell* v. *Bracewell*, *supra* note 87.

[95] *Ibid.*

[96] *Scott* v. *Scott* (1996), 183 A.R. 81 (Q.B.).

- supplementary pension, stock-options and senior incentive programs but not bonuses.[97]

[77] This body of case law also suggests that the following interests do not fall within the meaning of "property" as used in the MPA:

- a contingent interest in a will that has not vested as of the date of trial,[98]
- a survivor's benefit under a pension plan that has NOT vested irrevocably in the spouse by the time of trial, [99]
- life insurance and extended health and dental coverage provided by an employer under a pension plan,[100]
- Old Age Pension,[101]
- disability pension,[102]
- portion of severance allowance that was compensation for future loss of income,[103]
- attendance allowance paid to a disabled veteran under the Veteran's Pension Plan.[104]

[78] At this point, we will examine in detail the decision in *Dunn Estate* v. *Dunn*.[105] This decision is of particular relevance to this project because it examines whether an interest that would be treated as property during the joint lives of the

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[97] *Gardiner* v. *Gardiner*, [1996] A.J. No. 919 (Q.B.), online: QL (AJ).

[98] *Weicker* v. *Weicker*, *supra* note 93.

[99] *Bracewell* v. *Bracewell*, *supra* note 87.

[100] *Ibid.*

[101] *Podemski* v. *Podemski*, *supra* note 89.

[102] *Murray* v. *Murray* (1994), 157 A.R. 224 (Alta. C.A.) but compare with *Hughes* v. *Hughes* (1998), 43 R.F.L. (4th) 319 (Alta. C.A.). Perhaps the difference between these two decisions is that *Murray* deals with future benefits and *Hughes* deals with benefits received during the marriage.

[103] *Scott* v. *Scott*, *supra* note 96. But it is important to note that if income "is earned and saved within the term of the marriage then it is property subject to distribution": *Sutton* v. *Davidson* (1999), 244 A.R.129 at para. 30. So a severance allowance paid early in the marriage that is deposited into a joint bank account will be treated as matrimonial property: *Sutton* v. *Davidson*, *ibid.*

[104] *Elliott* v. *Elliott* (1997), 195 A.R. 76 (Q.B.).

[105] (1994) 2 R.F.L. (4th) 106 (Alta. Q.B.).

spouses should be treated differently upon death of one of the spouses. The couple purchased a home as joint tenants shortly before they were married. They paid $105,000 for the home by way of a down payment of $27,000 and mortgage financing of $78,000. The couple had life insurance on the mortgage that was payable to the mortgage company on the death of either joint tenant. The marriage ran into difficulties quickly with the result that couple lived together for only a few years. In May 1990 they separated for the last time, and in January 1991, the husband petitioned for divorce and commenced a matrimonial property action. On April 18, 1991, a judge granted a judgment for divorce. The husband died on December 28, 1992 before the matter proceeded to trial. At the request of the wife, the insurance company paid the life insurance proceeds to the mortgagee leaving the home free and clear of the mortgage. After death, the title remained in the name of both spouses because the Public Trustee filed a Certificate of Lis Pendens on the title thereby preventing the wife from taking title in her name alone by right of survivorship.

[79] The estate argued that notwithstanding the right of survivorship, the matrimonial home was still matrimonial property subject to distribution under the MPA. The court rejected this argument on two grounds. First, this argument can at best be made only in respect of the equity that existed in the home before the husband died. On this point, the court held:[106]

> The matrimonial home is now free from any encumbrances. The mortgage was paid as a result of Ms. Dunn applying for payment under the policy of mortgage insurance. That policy was a joint policy and under the circumstances of this case, payment was made because of Ms. Dunn's right to a benefit. Neither Mr. Dunn, while alive, nor his estate, has a right to claim a benefit under the policy. As a result, only the equity in the estate prior to Mr. Dunn's death would be eligible for distribution.

Second, since the house passed by right of survivorship to Mrs. Dunn, the house no longer formed part of the matrimonial property at the date of trial. The court reasoned that since section 11(3) directs the court to consider "any benefit received by the surviving spouse as a result of the death of a deceased spouse" when exercising its discretion under section 8 of MPA, such benefits are not matrimonial property.

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[106] *Ibid*. at para 11.

[80] It is respectfully submitted that this case is wrongfully decided because it distorts the principle of equal division of matrimonial property. The fact of death should not be an invitation to divide property unequally[107] and it should not be an invitation to exclude what would have otherwise been matrimonial property. The proper analysis of the facts presented in this case would follow the Saskatchewan body of case law that deals with division of matrimonial property upon death. By this body of case law, one values the matrimonial property of both spouses as of the valuation date and then determines if either spouse is entitled to any exemptions. In Alberta, the valuation date is the date of trial.[108] At that date, the husband owned nothing and the wife, by right of survivorship, was the beneficial owner of the home free and clear of any mortgage. The insurance proceeds have been transformed into additional equity in the home.

[81] The only issue should be whether the wife was entitled to an exemption in respect of the insurance proceeds paid to the mortgagee. By virtue of section 7(2)(e),[109] the wife would have been able to claim an exemption for the insurance proceeds if they had been paid directly to her. This would be the case even if she used them to satisfy the mortgage debt. Does the fact the proceeds were paid to the mortgagee for her benefit mean that the exemption is lost? One possible argument is that section 7(2)(e) only applies when the life insurance proceeds were paid to the surviving spouse. Therefore, since the insurance proceeds were paid to the mortgagee, the surviving spouse cannot claim an exemption in respect of these proceeds. A contrary argument is that the proper interpretation of section 7(2)(e) would ensure that the form of the transaction does not defeat the purpose served by the subsection. By this reasoning, an exemption should exist for life insurance proceeds paid directly to the surviving spouse or indirectly but for the benefit of the surviving spouse. This goes beyond the literal wording of section 7(2)(e) but recognizes that the equity resulting in the home from the pay out of the mortgage can be traced to insurance proceeds that were paid for the ultimate benefit of the surviving spouse.

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[107] *Donkin* v. *Bugoy*, [1985] 2. S.C.R. 85.

[108] In Saskatchewan, the valuation date would be the date the application was brought, which is sometime after death.

[109] See detailed discussion of exemptions beginning at para. 85 of this chapter.

[82] The result of the Saskatchewan approach is that if the exemption is allowed, the estate should be entitled to share in the equity in the home that existed before the death of the husband. If the exemption is disallowed, the estate should be entitled to share in unencumbered value of the home. Of course, whether a court will deviate from the norm of equal division depends on the particular facts of a case.

[83] After division of the matrimonial property, the surviving spouse may have insufficient assets for her support. In that case, she would bring a claim under the *Family Relief Act*. Applying the analysis suggested above to the facts in *Dunn*, the estate of the deceased husband would receive the husband's fair share of the matrimonial property but would be faced with a family relief claim by the wife. Given the small value of the estate and the limited assets of the wife, it is likely the court would exercise its discretion under the *Family Relief Act* by making the entire estate available for the proper maintenance of the wife. This leads to the same result as reached in *Dunn Estate* v. *Dunn*, but the means of getting there is very different.

2. Types of property

[84] The MPA draws a distinction between three types of property: exempt property [s. 7(2)], distributable property [s. 7(3)] and divisible property [s. 7(4)].[110] Since different rules apply to distribution of each category of property, we will identify each and then discuss the rules regarding distribution of each category. The key difference in treatment is that divisible property is subject to a presumption of equal sharing while distributable property is **not** subject to such a presumption.

a. Exempt property

[85] Section 7(2) exempts certain property from distribution. It reads as follows:

> (2) If the property is
>
> (a) property acquired by a spouse by gift from a third party,[111]
>
> (b) property acquired by a spouse by inheritance,

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[110] McLeod & Mamo, *supra* note 66 at A-15 to A-31.

[111] But where a gift is made for the benefit of both spouses it is not exempt property. See for example, *Bandurak* v. *Bandurak*, *supra* note 88, *Stewart* v. *Stewart* (1992), 130 A.R. 293 (Q.B.), *Allen* v. *Allen* (1996), 183 A.R. 366 (Q.B.).

> (c) property acquired by a spouse before the marriage,
> (d) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
> (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,[112]
> the market value of that property
> (f) at the time of marriage, or
> (g) on the date on which the property was acquired by the spouse,
> whichever is later, is exempted from a distribution under this section.

[86] This subsection read in conjunction with subsection 7(3) exempts from distribution the assets themselves, up to a certain value, not the value of the assets. This means that if there is a decrease in value of an exempt asset, the asset remains exempt but the decrease in value is not allowed as an exemption. The MPA does **not** treat exempt property as the equivalent of contributed capital to a business partnership that must be repaid upon termination.[113]

[87] The exemptions created by subsection 7(2) are not absolute entitlements regardless of the ultimate disposition of property. Exempt property must either be still owned or be traceable into other still owned property.[114] For example, the exemption will be lost if a spouse has consumed or dissipated the exempt property.[115] While this result may encourage a spouse to hoard exempt assets and, thereby, deprive the family unit of the benefit thereof, it is the inevitable result of the compromise between allowing no exemption and allowing an exemption without regard to what has happened to the exempt property.[116]

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[112] The proceeds of an insurance policy include private disability insurance benefits (*Murray* v. *Murray*, *supra* note 102) and life insurance proceeds (*Dunn Estate* v. *Dunn*, *supra* note 105) but does not include WCB disability benefits (*Hughes* v. *Hughes*, *supra* note 102). In *Hughes*, the Alberta Court of Appeal interpreted section 7(2)(e) of MPA as referring to private policies of insurance.

[113] *Harrower* v. *Harrower* (1989), 21 R.F.L. (3d) 369 (Alta. C.A.).

[114] *Harrower* v. *Harrower*, *ibid*., *Jackson* v. *Jackson* (1989), 21 R.F.L. (3d) 442 (Alta. C.A.). In the context of the MPA, tracing is a term used to "describe the effect of identifying property by source": *Harrower* at 378. It is not to be confused with the definition of tracing that has been developed by the courts of equity and that has become a term of art.

[115] *Harrower* v. *Harrower*, *ibid*.; *Roenisch* v. *Roenisch*, *supra* note 86; *Brokopp* v. *Brokopp* (1996), 181 A.R. 91 (C.A.).

[116] *Jackson* v. *Jackson*, *supra* note 114 at 446.

[88] The mingling of exempt and non-exempt assets does not automatically destroy the exemption but it can raise a question of whether the court can identify the source of the asset.[117] The exemption is lost when the source of the asset can no longer be identified.[118] Moreover, commingling of funds may cause a court to conclude that the spouse has made a gift of exempt property to the other spouse.[119] Gifts of property made by one spouse to another are distributed under subsection 7(3)(d) and are not exempt from distribution. The issues of tracing and gifting are separate and spouses do not always carefully differentiate these issues.[120]

[89] One-half of an exemption can be lost when a spouse transfers an exempt asset into joint tenancy with the other spouse and does not rebut the presumption raised by section 36 of the MPA. Subsection 36(2)(a) provides that placement of property in the name of both spouses as joint tenants is prima facie proof that joint ownership of the beneficial interest is intended. The presumption is rebuttable.[121] The effect of creating such a beneficial interest is that one-half of the exemption under subsection 7(2) is retained by the donor spouse and one-half of the exemption is treated as a gift received by the other spouse. The gifted half of the exemption becomes matrimonial property that is distributed under subsection 7(3)(d).[122] If the presumption is rebutted, the spouse retains the full exemption.[123]

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[117] *McLeod* v. *McLeod*, *supra* note 93 and *Roenisch* v. *Roenisch*, *supra* note 86.

[118] See for example *McLeod* v. *McLeod*, *supra* note 93; *Roenisch* v. *Roenisch*, *ibid.* at 260; *MacMinn* v. *MacMinn* (1995), 17 R.F.L. (4th) 88 (Alta. C.A.).

[119] *Roenisch* v. *Roenisch*, *ibid.* at 260.

[120] *Roenisch* v. *Roenisch*, *ibid.*

[121] *Jackson* v. *Jackson*, *supra* note 114.

[122] *Harrower* v. *Harrower*, *supra* note 113; *Jackson* v. *Jackson*, *ibid.*; *Katay* v. *Katay* (1995), 168 A.R. 31 (Q.B.); *Krolick* v. *Krolick* (1996) 24 R.F.L. (4th) 205 (Alta. C.A.). There are many decisions that follow these principles. The only case that deviates from this position is *Borys* v. *Borys* (1994), 154 A.R. 41 (Q.B.).

[123] For cases in which the presumption was rebutted see: *Hudyma* v. *Hudyma* (1981), 20 R.F.L. (2d) 298 (Alta. Q.B.); *Quigg* v. *Quigg*, *supra* note 88; *Trenchie* v. *Trenchie* (1987), 12 R.F.L. (3d) 357 (Alta. Q.B.); *Welch* v. *Welch* (1988), 84 A.R. 307 (Q.B.); *Yukes* v. *Yukes* (1988), 13 R.F.L. (3d) 196 (Alta. Q.B.); *Rosin* v. *Rosin* (1994), 157 A.R. 184 (Alta. C.A.).

For cases in which the presumption was NOT rebutted see: *Bandurak* v. *Bandurak* , *supra* note 88; *Jackson* v. *Jackson*, *supra* note 114; *Bakken* v. *Bakken* (1992), 132 A.R. 356 (Q.B.); *Nicholson* v. *Nicholson* (1993), 142 A.R. 254, suppl. reasons at 4 R.F.L. (4th) 69 (Q.B.); *Hensch* v. *Werner* (1993), 50 R.F.L. (3d) 168 (Alta. C.A.); *Katay* v. *Katay* (1995), 168 A.R. 31 (Q.B.); *Melville* v. *Melville*

b. Distributable property

[90] Distributable property is the property listed in section 7(3), which is as follows:

> (a) the difference between the exempted value of the property described in subsection [7](2) (in this subsection referred to as the "original property") and the market value at the time of trial of the original property or property acquired
>
> (i) as a result of an exchange for the original property, or
>
> (ii) from the proceeds, whether direct or indirect, of a disposition of the original property
>
> (b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii).
>
> (c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses;
>
> (d) property acquired by a spouse by gift from the other spouse.

c. Divisible property

[91] Divisible property is all property owned by the spouses that is not exempt property or distributable property.

3. Debts

[92] Unlike some Canadian matrimonial property statutes, the MPA does not specify how debts and liabilities are to be dealt with. The Court is directed to divide non-exempt property having regard to the factors listed in section 8, and one such factor is the debts and liabilities of the parties at the time of trial and income tax that may be triggered upon sale or transfer of the property. Even though the MPA primarily focuses on division of property, Alberta courts have developed certain conventions to deal with debts and liabilities of both spouses.

[93] Generally speaking, the court takes into account all debts and liabilities incurred by each spouse or by both of them during the marriage.[124] The method of dealing with the debts in existence at the time of trial depends upon whether it is a

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(1995), 167 A.R. 372 (Q.B.); *Brokopp* v. *Brokopp*, *supra* note 115; *Johnston* v. *Mainwaring* (1997), 52 Alta. L.R. (3d) 223 (Q.B.); *Timms* v. *Timms*, [1997] 7 W.W.R. 392 (Alta. Q.B.); *Cox v. Cox* (1998), 233 A.R. 258 (Q.B.); *Wilde* v. *Wilde* (1998), 221 A.R. 140 (Q.B.).

[124] Although there is no case on point, debts that were incurred before the marriage should not be taken into account in the matrimonial property unless they are secured debts that reduce the value of an asset. Also, debts that are related to exempt assets will not be taken into account: *Nickerson* v. *Nickerson* (1990), 27 R.F.L. (3d) 321 (Q.B.).

secured debt, unsecured debt, tax liability or cost of disposing of the asset. Debts may affect the value of an asset or merely be offset against the total value of property available for distribution. The value of an asset is discounted to reflect a debt secured against the property, the cost of disposing of the property[125] or any tax liability triggered by disposal of the asset. The court will make a deduction for unsecured debts of either spouse incurred during the marriage that are in existence as of the date of trial. Usually no distinction is made between investment debts and debts related to the upkeep of the family, and both are deducted. There are, however, exceptions to the general approach to treatment of unsecured debts. In unusual situations, business or investment debts incurred by one spouse may not be deducted.[126] In addition, living expenses incurred after the separation of the couple are considered the personal responsibilities of the spouses. Debts incurred to pay such expenses are not deducted.[127] Similarly, no deduction is made for the legal fees incurred in the matrimonial property proceedings.[128]

[94] The treatment of debts and liabilities upon death is the same as the treatment upon marriage breakdown. However, the choice of valuation date will determine if debts that arise by reason of death are taken into account. We discuss this under the next heading.

4. Valuation date

[95] Although the MPA does not spell out when the court should identify and value the assets and liabilities of each spouse, jurisprudence has established that

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[125] The cost of disposing of the asset is not always taken into account. Much depends upon whether the asset will in fact be disposed of by one of the spouses and, if so, how soon this will happen.

[126] *Pila* v. *Pila* (1983), 36 R.F.L. (2d) 448 (Alta. Q.B.); *Portigal* v. *Portigal* (1986), 4 R.F.L. (3d) 328, varied by Alta. C.A. Dec. 11, 1987; *Raffa* v. *Raffa* (1986), 4 R.F.L. (3d) 108 (Alta. Q.B.); *LePage* v. *LePage* (1992), 42 R.F.L. (3d) 188 (Alta. Q.B.); *Brand* v. *Brand* (1996), 182 A.R. 205 (Q.B.); *Labron* v. *Labron* (1996), 183 A.R. 251 (Q.B.); *Werlin* v. *Werlin*, [1997] A.J. No. 1159 (Q.B.), online: QL (AJ); *Laboret* v. *Hennings* (1999), 240 A.R. 94 (Q.B.).

[127] Although section 8(d)(ii) refers to obligations and liabilities that exist as of the time of trial, the reported decisions often focus on unsecured debts and liabilities that exist as of the date of separation. This reflects the practice of treating living expenses incurred after separation as the personal responsibility of the spouses. For cases dealing with living expenses incurred after separation see: *Pila* v. *Pila*, *ibid.*; *Portigal* v. *Portigal*, *ibid.*; *Nawrot* v. *Nawrot* (1989), 19 R.F.L. (3d) 416 (Q.B.); *Cirone* v. *Cirone* (1991), 115 A.R. 136 (Q.B.); *Labron* v. *Labron*, *ibid.*

[128] *Nawrot* v. *Nawrot*, *ibid.* and *Labron* v. *Labron*, *ibid.*

the valuation date is the date of trial[129] and that this rule applies where one of the spouses dies.[130] The court does, however, have a limited discretion under section 8(f) to use the date of separation as the valuation date where it would not be just and equitable to divide property acquired after separation equally.[131] This really amounts to ordering unequal division under section 7(4) of the Act.

[96] The choice of valuation date will significantly affect the entitlement of the surviving spouse. If the valuation date is the date of trial, the court will identify all of the assets and debts of each spouse existing as of that date. Any assets that pass on the moment of death to a third party will not be owned by either spouse as of the valuation date and will not be available for distribution unless the property can be recaptured under section 10 of the MPA. Moreover, the debts of the estate of the deceased spouse will be increased by the debts that accrue as a result of the death. This will include income tax that is triggered on death, funeral expenses and the cost of administering the estate (i.e., executor fees, legal fees and accounting fees).[132]

[97] If the valuation date is the date of separation, only those assets and liabilities existing as of the date of separation will be considered. Where the deceased owned will substitutes, the assets of the deceased spouse would include assets that at the moment of death passed to a third party. Nevertheless these assets are not available for the satisfaction of any matrimonial property order granted in favour of the

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[129] *Mazurenko* v. *Mazurenko*, *supra* note 7; *Ahlgrim* v. *Ahlgrim* (1983), 45 A.R. 9 (Q.B.); *Herchuk* v. *Herchuk* (1984), 38 R.F.L. (2d) 240; *Burger* v. *Burger* (1985), 48 R.F.L. (2d) 158 (Q.B.); *Zubiss* v. *Moulson Estate*, *supra* note 71; *McWilliams* v. *McWilliams* (1989), 23 R.F.L. (3d) 265 (Alta. Q.B.); *Baker* v. *Baker Estate*, *supra* note 80; *Bracewell* v. *Bracewell*, *supra* note 87; *McAllister* v. *McAllister* (1997), 201 A.R. 287 (Q.B.); *Cox* v. *Cox*, *supra* note 123.

[130] *Zubiss* v. *Moulson Estate*, *ibid.* and *Baker* v. *Baker Estate*, *ibid.*

[131] For example, see *Baker* v. *Baker Estate*, ibid. and *Kary* v. *Kary* (1996), 194 A.R. 194 (Q.B.).

[132] *Zubiss* v. *Moulson Estate*, *supra* note 71, is a case where the valuation date was the date of trial. At page 182 of the judgment, the judge determined the increase in value of the husband's assets between date of marriage and date of trial. He subtracts the net value of the estate at trial from value of estate at marriage. The net value of the estate at trial was the value of the estate after payment of income tax of $224,472, being taxes owed by the deceased personally and by limited companies on the winding-up. The case does not indicate whether funeral expenses or cost of administering the estate were considered in determining the value of the estate at time of trial. Logically, this should have happened.

surviving spouse.[133] Valuing assets as of this date may also raise difficult valuation questions in situations where the imminence of death affects the value of an asset.[134] In addition, the debts of the deceased spouse will not include funeral expenses or costs of administering the estate.[135] Query whether income tax triggered by death would be deducted.[136]

[98] As noted earlier, the cost of bringing or defending the matrimonial property action is considered the personal responsibility of each spouse and is not taken into account in the matrimonial property division.[137] Therefore, no matter what the valuation date, the costs of defending the action should not influence the surviving spouse's entitlement under the MPA. Such costs are more appropriately dealt with by an award of costs.[138]

E. Exercise of judicial discretion

1. Upon marriage breakdown

[99] Section 7 empowers the Court to make a distribution of all the property owned by both spouses and by each of them in accordance with the section. Subsection 7(2) property is exempt as to the value of that property at the time of

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[133] This is a problem under the Ontario *Family Law Act* because in a division of matrimonial property upon the death of a spouse, the valuation date is the date before the death of the spouses. See OLRC, *Report on Family Property Law* (1993) at 105-107 ("Ontario Report").

[134] *Ibid.*

[135] *Baker* v. *Baker Estate, supra* note 80 is a case in which the couple separated three months before the husband died. The court chose the date of separation as the valuation date to ensure the estate did not benefit from the savings accumulated by the wife after separation by reason of her frugality and hard work at a time when she had no benefit of the assets acquired over the course of the marriage. In this case, no assets passed on death to a third party. When valuing the debts of the deceased spouse, the court included only those that were in existence at death. It excluded funeral debts and the costs of administering the estate. See (1992), 136 A.R. 94 at 110-111 and footnotes 5, 7 and 8 to the original decision.

[136] This issue was not addressed in *Baker* v. *Baker Estate, ibid.* Income tax payable by reason of RRSPs was taken into account in the valuation of the RRSPs. In Ontario, the valuation date is the day before death. In *Bobyk* v. *Bobyk Estate* (1993), 47 R.F.L. (3d) 310 (Ont. H.C.J., Gen. Div.), the court held that tax liability relating to RRSPs that was triggered by death should be treated as a debt in existence on the valuation date. It also treated as a debt the income tax that was payable by reason of recapture of depreciation on death.

[137] *Baker* v. *Baker Estate, supra* note 80 at 111.

[138] McLeod & Mamo, *supra* note 66 at A-29.

marriage or the date on which the property was acquired, whichever is later. Subsection 7(3) property is to be distributed in a manner that a court considers just and equitable after taking the factors listed in section 8 into consideration,[139] and the presumption of equal division does not apply. All other property is to be distributed equally unless it would not be just and equitable to do so having regard to the factors listed in section 8.[140]

[100] Section 8 reads as follows:

> 8. The matters to be taken into consideration in making a distribution under section 7 are the following:
>
> (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;
>
> (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;
>
> (d) the income, earning capacity, liabilities, obligations, property and other financial resources
>
> (i) that each spouse had at the time of marriage, and
>
> (ii) that each spouse has at the time of trial;
>
> (e) the duration of the marriage;
>
> (f) whether the property was acquired when the spouses were living separate and apart;
>
> (g) the terms of an oral or written agreement between the spouses;
>
> (h) that a spouse has made
>
> (i) a substantial gift of property to a third party, or
>
> (ii) a transfer of property to a third party other than a bona fide purchaser for value;
>
> (i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;
>
> (j) a prior order made by a court;
>
> (k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;
>
> (l) that a spouse has dissipated property to the detriment of the other spouse;
>
> (m) any fact or circumstance that is relevant.

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[139] MPA, R.S.A. 1980, c. M-9, s. 7(3).

[140] *Ibid.*, s. 7(4).

[101] In *Mazurenko* v. *Mazurenko*,[141] the Alberta Court of Appeal rejected the idea that it should create some formula for the application of factors listed in section 8.[142] When speaking of a court's discretion in respect of section 7(4) property, Justice Stevenson held:[143]

> The court must, in my view, look at the relevant facts under section 8 and then ask itself if it would be unjust or inequitable to divide the property equally. That conclusion should not lightly be reached. There must be some real imbalance in contribution having regard to what is expected of each or attributable to the other factors in section 8. In establishing the presumption, I take the legislature to have decided that in the ordinary case equality is the rule.

2. Upon death

[102] Section 11(3) provides that when a matrimonial order is made in favour of the surviving spouse, the court, in addition to the matters in section 8, shall take into consideration any benefit received by the surviving spouse as a result of the death of the deceased spouse.

[103] In *Donkin* v. *Bugoy*,[144] the Supreme Court of Canada considered whether the fact of death should affect division of matrimonial property under the Saskatchewan *Matrimonial Property Act*.[145] Since Alberta courts have applied the principles established in this case to the Alberta MPA,[146] examining this decision in detail is useful. The facts of this case are that after 28 years of marriage, the husband petitioned for divorce and the wife applied for a matrimonial property order. The wife also executed a new will that disinherited her husband and their only child. She died before the divorce petition and the matrimonial property action were heard, and her personal representative continued the matrimonial property action. Under the Saskatchewan Act, the issue was whether the death of the spouse or the provisions of the will is a "relevant fact or circumstance" within

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[141] *Supra* note 7.

[142] This flexible approach to the statute was reaffirmed by the Alta. C.A. in *Dwelle* v. *Dwelle* (1982), 31 R.F.L. (2d) 113.

[143] *Ibid.* at 120.

[144] *Supra* note 107.

[145] S.S. 1979, c. 6.1.

[146] *Baker* v. *Baker Estate*, *supra* note 80.

21(2)(q) or an "extraordinary circumstance" within section 22 that justified unequal division of property.

[104] The Court considered Part IV of the Saskatchewan Act and made the following findings:[147]

> The result of the interaction between ss. 36 and 30(1) is that while an estate may not commence an action under the MPA where none was brought by a deceased spouse, spousal rights under the MPA are preserved if the application was brought prior to death.
>
> It is clear . . . that this legislation contemplates the distribution of family property after the death of a spouse providing that spouse has made application for such a distribution in her lifetime. Subsection 30(1) reflects the Legislature's desire to respect the wishes of the deceased as expressed by his or her application to divide the assets of the marriage. To consider the death of the applicant or the provisions of a will which disinherits the other spouse would be to render virtually meaningless the power given to an estate to continue the MPA application already commenced. By the same token, the provision in subs. (1) of s. 30, allowing the surviving spouse to commence an application after the death of the other spouse, ensures that a spouse who remains in an unhappy marriage is not worse off than if separation had been sought while the other party was alive.

[105] Given the purpose of subsection 30(1) in allowing the personal representative to continue an action begun before death, the court held that the death of a spouse or content of a will are not a "relevant fact or circumstance" within 21(2)(q) or an "extraordinary circumstance" within section 22 which may be taken into account to justify unequal division. The Court concluded that the position of a personal representative in a matrimonial property action should be the same as if the spouse were alive.

[106] The court then reviewed the facts of this case and the factors listed in 21(2) and concluded that the property should be divided equally. Since the husband did not receive any benefits under the will, subsection 21(2)(l) played no role in this case. However, the court did offer these comments concerning this subsection:[148]

> Section 21(2)(l) entitles a court to have regard in disposing of an application under the MPA to "any benefit received or receivable by the surviving spouse as a result of the death of his spouse". By reason of s.30(3) this cannot include a benefit under *The Intestate Succession Act.* It would, of course,

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147 *Donkin* v. *Bugoy*, *supra* note 107 at 92.

148 *Ibid.* at 100.

> include a benefit received or receivable under a will. The express inclusion in the Saskatchewan Act of only **benefits** received or receivable upon death as an "equitable consideration" may very well have been intended to mesh with the right granted to a surviving spouse to bring an application for division of matrimonial property. As already discussed, while such a right ensures that a spouse who remains in an unhappy marriage is not worse off than if separation had been sought while the other party was alive, neither should the surviving spouse necessarily benefit twice by receiving property under both the will and the MPA if his or her application would have the effect of defeating testamentary intentions beyond that necessary to fulfil the policy of the Saskatchewan Act. The result may be different in those provinces which do not expressly allow for the consideration of such benefits. . . . (Parenthetically it may be added that s. 21(2)(l) may also contemplate consideration of other benefits received or receivable by a surviving spouse as a result of death in addition to those arising from a will. These include, and are certainly not limited to, joint tenancies, life insurance and pension rights. The issue need not be decided as none of these interest are present here.)

[107] In *Baker* v. *Baker Estate*,[149] the court held that under the Alberta MPA, the death of a spouse or content of a spouse's will are not factors that can set aside the presumption of equal sharing.

F. Inter vivos transfers, gifts, and dissipation

[108] Under the Act, spouses are separate as to title and, generally speaking, they may deal with their property as they see fit until an order is made under the Act.[150] The spouses will share whatever matrimonial property exists at the date of trial. This means that both spouses take the benefit or disadvantage of decisions made during the course of the marriage. This general rule is subject to three exceptions: (1) fraudulent transfers, (2) gifts and transfers to persons who are not bona fide purchasers for value, and (3) dissipation of assets. As used in this report, fraudulent transfers are those that fall within section 10 of the Act. Let us look at each exception in detail.

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[149] *Supra* note 80.

[150] This general statement is subject to certain restrictions once the action is commenced under the Act. Section 33 prohibits a spouse who knows the action has been commenced from disposing of household goods or, except in the case of an emergency, removing appliances, effects or furnishings from the matrimonial home. This prohibition does not apply where the other spouse consents to these activities or the Court authorizes such conduct.

1. Section 10: Fraudulent transfers

[109] Under section 10 the court has the power to set aside some, but not all, transactions that were entered into with the purpose of defeating a claim that the other spouse may have under the Act. This section strikes a balance between giving spouses freedom to deal with their property as they see fit and ensuring that the principle of equal sharing is not defeated.

[110] Before a court can give a remedy under section 10, it must be satisfied that the transaction in question meets each requirement that is prescribed by subsections 10(1)(a) to (d),[151] which read as follows:

> (a) a spouse has
>
> (i) transferred property to a person who is not a bona fide purchaser for value, or
>
> (ii) made a substantial gift of property,
>
> (b) the spouse making the transfer or gift did so with the intention of defeating a claim that the other spouse may have under this Part,
>
> (c) the transferee or donee accepted the transfer or gift when he knew or ought to have known that the transfer or gift was made with the intention of defeating a claim a spouse may have under this Part, and
>
> (d) the transfer or gift was made not more than one year before the date on which either spouse commenced the application for the matrimonial property order.

[111] If the transaction meets each of these requirements, then the court has the power to:[152]

> (e) order the transferee or donee to pay or transfer all or part of the property to a spouse;
>
> (f) give judgment in favour of a spouse against the transferee or donee for a sum not exceeding the amount by which the share of that spouse under the matrimonial property order is reduced as a result of the transfer or gift;
>
> (g) consider the property transferred or the gift made to be part of the share of the spouse who transferred the property or made the gift, when the Court makes a matrimonial property order.

[112] The stringent requirements of subsections 10(1)(a) to (d) restrict the operation of the section. For example, a disclaimer of a valuable interest in a parent's estate cannot be challenged under this section because such a disclaimer is not a transfer or a gift. Also a disclaimer of an inheritance cannot be made with the

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[151] *Pedersen* v. *Pedersen* (1987), 81 A.R. 345 (Q.B.).

[152] MPA, R.S.A. 1980, c. M-9, s. 10(1)(e) to (f).

intention of defeating the spouse's claim under the MPA because the spouse has no claim in respect of an inheritance.[153] Moreover, any gift or transfer that occurs earlier than one year before the action is commenced cannot be remedied under this section,[154] even if one spouse intended to defeat the claim of the other spouse under the Act.

2. Cases interpreting section 10

[113] Three reported Alberta decisions consider this section. In *Mulek* v. *Sembaliuk*,[155] the husband disclaimed an interest in his father's estate worth $450,000 to ensure that his wife did not get any of this money. The wife sought to set aside the disclaimer under section 10 of the Act. The court held that a disclaimer of an interest in an estate cannot be challenged under section 10 because it is not a transfer or gift. Moreover, the husband did not disclaim the interest in the estate with the intention of defeating the wife's claim under the MPA because an inheritance is exempt from distribution under the Act.

[114] *Pedersen* v. *Pedersen*[156] is a case involving a late-in-life second marriage. The defendant wanted to give farm land that he had acquired during his first marriage to his daughter of the first marriage and her children. To avoid a tax on gifts, he sold the land to the daughter and grandchildren in 1965 and 1966 by way of agreements for sale with the intention to forgive payments under the agreement. He executed the first agreement for sale before he had decided to marry again. He executed the second agreement in contemplation of his impending second marriage. Each year he would forgive the payment owing under the agreement, and in 1971 he forgave the entire balance of the debt then owing. It was agreed that the father would continue to farm the land for as long as he wanted to do so. He did not transfer title to his daughter until three weeks before the trial of the matrimonial property action.

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[153] *Mulek* v. *Sembaliuk* (1983), 35 R.F.L. (2d) 415 (Alta. Q.B.).

[154] *Pedersen* v. *Pedersen*, *supra* note 151.

[155] *Supra* note 153.

[156] *Supra* note 151.

[115] The court viewed the agreements as gifts that fell within section 10(1)(a) but held that the requirements of 10(1)(b) to (d) were not met. The father did not enter the agreements for sale with the intention of defeating his wife's claim because in 1965 and 1966 the MPA was not in existence. By asking for title to be transferred in 1985, the daughter was only enforcing the rights available to vendors who had paid for land under an agreement for sale. Furthermore, the gift was completed in 1971 when the debt was forgiven and the fact that title did not transfer until 1985 does not change this fact. From 1971 until 1985, the father was a bare trustee of the land.

[116] *Burger* v. *Burger*[157] is one case in which a spouse successfully brought a claim under section 10. During the marriage, the couple incorporated a company to buy a bakery business from the husband's parents. The husband owned 98 voting shares, the wife owned 98 non-voting shares and the parents owned two shares. After the separation of the couple, the company defaulted on the debenture given to the parents, and in due course, the parents reacquired the business and employed the son.

[117] The court concluded that the husband had dissipated the value of the company because:

- the company had sufficient money to meet the debenture obligations at the time of default,
- he made unrealistic efforts to meet the baking competition,
- he deliberately failed to maintain the business customers, and
- he made inappropriate decisions relating to employees.

The husband argued that depression had affected his judgment and, therefore, he should not be accountable for his actions. The court rejected these arguments on the basis that he had sufficient control of his faculties to run the business in the way he had done before the breakup of the marriage.

[118] The court could not make an order against the parents because the spouses had agreed to drop the proceedings brought against the parents in this action. Instead, the court concluded that the conduct of the husband amounted to a gift of the bakery business to his parents. At the time of the gift, the wife's interest in the

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[157] (1985), 48 R.F.L. (2d) 158 (Alta. Q.B.).

business was $18,000. Under section 10(g), the court held that the gift of the wife's interest in the bakery was to be treated as part of the husband's share of matrimonial property. To effect equal division of matrimonial property, the court ordered the husband to transfer his interest in the matrimonial home, worth $12,500, to the wife. The court acknowledged that it could not award an order of damages for the difference between $18,000 and $12,500. The Act only authorizes the court to dispose of existing property.

[119] The court also declared that:

- the wife had a half-interest in the shares of the husband and that the husband had a half-interest in the shares of the wife, and
- the wife has status, on behalf of the company, to launch an action relating to enforcement of the debenture.

3. Gifts and transfers that do not fall within section 10

[120] Section 8 allows the court to consider:

> (h) that a spouse has made
>
> (i) a substantial gift of property to a third party, or
>
> (ii) a transfer of property to a third party other than a bona fide purchaser for value.

[121] The fact of a gift is one factor a court must consider when exercising its discretion to divide the matrimonial property unequally under subsection 7(3) and 7(4). This does not, however, make property in the hand of a third party available for distribution under the MPA.[158] Recovery of a gift made with the intent to defeat a claim can only take place under section 10 of the MPA. For example, in *Mazurenko* v. *Mazurenko*,[159] the husband purchased a home after he separated from his wife. This home was registered in the name of the husband and the two daughters of the marriage, as joint tenants. There was no evidence that by making such a gift to the daughters the husband intended to defeat the claim of the wife under the MPA. The Alberta Court of Appeal held that only the husband's interest in the home should be included as matrimonial property, and valued this interest as one-third of the market value of the home. The gift made to the daughters was one of several factors considered by the Court when arriving at its decision to divide

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[158] *Mazurenko* v. *Mazurenko*, *supra* note 7.

[159] *Ibid.*

the matrimonial property equally between the spouses. In *Hopwood* v. *Hopwood*,[160] the husband bought his previous wife a condominium worth $140,000 and he held an unregistered transfer of title. It is not clear from the decision whether the husband was lending money to the wife or was making a gift to the wife. The judge, however, treated this as a gift made by the husband to the previous wife and did not include any loan or the condominium itself as an asset of the husband. When exercising its discretion under 7(3), the court considered the gift, among other factors, when deciding how to divide the increase in value of property owned at the time of marriage.

[122] Although under section 10 a court may not be able to set aside a transfer or gift or treat it as the matrimonial property of the spouse who made the gift, it still can consider gifts and transfers for less than adequate consideration as grounds for deviating from equal division of matrimonial property.[161] In *Pedersen* v. *Pedersen*,[162] the court gave more to the wife than it otherwise would have because of the husband's substantial gift of land to his daughter of an earlier marriage. This was the case even though no remedy was available under section 10 of the Act.

[123] Notwithstanding the decision of the Alberta Court of Appeal in *Mazurenko*, there are two cases involving gifts made by a spouse to a third party where the court did treat the gifted property as matrimonial property and made no mention of section 10. Both cases involved gifts made by a spouse to children of the marriage after the couple had separated. *Sparks* v. *Sparks*[163] is a case in which the husband went to extreme measures to defeat the claim of his wife under the MPA. Within 90 days of the couple separating, the husband had sold most of the matrimonial property and, with few exceptions, had spent the proceeds. He also transferred a quarter section of land he owned into the name of himself and his sons, as joint tenants. All of this was done without the knowledge or participation of the wife. The judge held:[164]

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[160] (1983), 37 R.F.L. (2d) 81 (Alta. Q.B.).

[161] *Pedersen* v. *Pedersen*, *supra* note 151.

[162] *Ibid*.

[163] (1994), 159 A.R. 187 (Q.B.).

[164] *Ibid*. at 198.

> Post-separation, the husband transferred title to one of these parcels into the names of his sons along with himself. At the time of the transfer this land was not his to gift in this way as it was subject to the wife's potential matrimonial property claim. I therefore do not exclude it from the division of matrimonial property.

After determining the wife's entitlement under the MPA, the court then ordered the land, including the quarter section held in joint tenancy, sold to provide funds to pay the wife's claim.

[124] In *Kamajian* v. *Kamajian*,[165] the husband alleged that the wife had made substantial gifts to her daughters after the couple had separated and was hiding money offshore. The wife had made the daughters shareholders in a company operating a hair salon and had transferred another salon to one of her daughters. This daughter sold the salon shortly thereafter for $20,000. The wife also transferred $94,000 to an account of one of her daughters. The court held that the wife had not made a gift to the daughters of an interest in the hair salons. When they became shareholders, the company was of little value and they were merely given the opportunity to earn income by working with their mother. The second salon was given to the one daughter at a time when the rental arrears were $5,000. The $20,000 sale price was the result of the efforts of the daughter, not the wife. The court did find that the wife transferred the $94,000 with the intention of hiding the money from her husband. Upon making this finding, the court treated this money and the interest thereon as matrimonial property in the possession of the wife.

[125] Both *Sparks* and *Kamajian* were cases in which the spouses were clearly trying to defeat the claim of the other spouse by transferring assets to third parties after the couple had separated. As such, the courts may have been exercising the powers given to them under section 10 of MPA, without mentioning the section themselves. If this is not the case, they conflict with the decision in *Mazurenko*.

[126] Another decision in which gifts made by a spouse to third parties were treated as the property of that spouse is *Sutton* v. *Sutton*.[166] A few days before trial, the wife collapsed an RRSP of $40,000. The financial institution withheld $11,000

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[165] (1995), 172 A.R. 321 (Q.B.).

[166] (1997), 207 A.R. 321 (Q.B.).

for income tax and paid the balance of $29,000 to the wife. She then transferred $14,000 to her mother and $15,000 to a male companion with whom the wife was living. The court treated the $40,000 as non-exempt property of the wife and divided the matrimonial property on that basis. Recognizing that the wife had collapsed the RRSP and transferred the net proceeds with the intention of defeating the claim of the husband, the court invited the husband to bring an application under section 10 of the MPA. The fact that the gifts were made a few days before trial may distinguish this case from *Mazurenko*.

4. Dissipation of assets

[127] Section 8 also allows a court to consider:

> (l) that a spouse has dissipated property to the detriment of the other spouse.

"If a spouse deals with property in a reckless, careless or spiteful manner, then this factor will be effective in achieving an uneven division of the remaining property."[167] However, merely selling an asset is not dissipation of an asset.[168] Dissipation of assets means the wasteful expenditure or squandering of assets. In one case, although the court did not view the wasteful spending as dissipation, it still considered the fact of wasteful spending as reason to award unequal division of assets.[169]

[128] The court has two methods of dealing with dissipation of assets. By the first method, the court adds the value of the dissipated assets into the matrimonial property pool and divides the assets as is appropriate in the circumstances. The value of the dissipated assets is listed as a part of the property that the spouse who dissipated the assets is supposed to receive.[170] By the second method, the court

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[167] McLeod & Mamo, *supra* note 66 at A-38.

[168] *Ibid.*

[169] *Aleksiuk* v. *Aleksiuk* (1991), 112 A.R. 298 (Q.B.).

[170] *McWilliam* v. *McWilliam* (1989), 23 R.F.L. (3d) 265 (Alta. Q.B.); *Bakken* v. *Bakken* (1992), 132 A.R. 356 (Q.B.); *Reid* v. *Reid* (1993), 99 D.L.R. (4th) 722 (Alta. Q.B.); *Sparks* v. *Sparks*, *supra* note 163; *Labron* v. *Labron*, *supra* note 126; *Timms* v. *Timms*, *supra* note 123; *Wilde* v. *Wilde*, *supra* note 123 but compare with *Laboret* v. *Hennings*, *supra* note 126.

awards an unequal division of existing assets to account for the dissipation of assets.[171]

[129] Many cases deal with dissipation of assets.[172] A discussion of five of these cases will illustrate how the factor of dissipation affects division of matrimonial property. In *Aleksiuk* v. *Aleksiuk*,[173] the husband earned $72,000 per year for several years after separation and received a severance pay of one year's salary upon termination of his employment. Within two years of loss of his job he was on welfare. At the time of trial he could not explain how the money was spent. The court did not view this as dissipation of assets because he suffered depression, loss of employment and financial difficulties resulting from bank loans. Nevertheless, the court ordered unequal division of matrimonial property in favour of the wife because of the husband's wasteful spending.

[130] In *Hauck* v. *Hauck*,[174] the husband suffered several bouts of manic depression in the two years after separation. During these bouts he made improvident bargains and disposed of assets worth $320,000. The Alberta Court of Appeal held that these circumstances warranted unequal division of matrimonial property in favour of the wife. Given the cyclical nature of the disease, the husband should have sought treatment during that period and failed to do so. Of the $644,000 of remaining property, the court awarded the wife two-thirds and the husband one-third.

[131] In *Bakken* v. *Bakken*,[175] the wife had cashed a registered retirement savings plan worth $43,455 after separation. She was a medical doctor with a healthy income. The court viewed this as dissipation of assets and brought the after tax value of this asset ($22,000) into the accounting.

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[171] *Hauck* v. *Hauck* (1991), 37 R.F.L. (3d) 397 (Alta. C.A.); *Webb* v. *Webb Estate*, *supra* note 30; *Cox* v. *Cox*, supra note 123. A good summary of principles is found in *Cox* v. *Cox*.

[172] See cases cited in the two preceding footnotes.

[173] *Supra* note 169.

[174] *Supra* note 171.

[175] *Supra* note 170.

[132] *Sparks* v. *Sparks*,[176] which has been referred to previously, is another case dealing with this issue. In that case, the husband sold most of the matrimonial property within 90 days of separation and spent the proceeds. The wife had no knowledge or participation in these transactions. In addition, the husband transferred one piece of land to himself and his sons. The court held that since the transfer took place after separation it was subject to the wife's matrimonial property claim and should be included in the division of matrimonial property. The consumption of the proceeds of sale of the other assets and the sale of one asset at less than fair market value was viewed as dissipation of assets. The court treated the value of the dissipated assets as an advance of matrimonial property to the husband.

[133] In *Webb* v. *Webb Estate*,[177] the couple was separated when the wife learned of her declining health. With this knowledge, she entered into a separation agreement with her husband whereby she agreed to leave him $25,000 by the terms of her will if he would release any rights he had under the MPA, the *Family Relief Act* or the *Dower Act*. Upon her death, he commenced an action seeking division of matrimonial property plus family relief. The estate was valued at $160,000 and of this $60,000 was the value of assets owned by the wife at the time of marriage. When dealing with the matrimonial property action, the court held that at best the husband was entitled to only 25% of the net matrimonial property. The unequal division was supported by the following factors: (1) the husband contributed little to the marriage, (2) he did nothing to acquire or preserve assets, and (3) he dissipated $100,000 of his wife's assets in bad land deals.

G. Interconnection between rights under *Matrimonial Property Act* and rights that flow by way of the *Family Relief Act*, the *Dower Act*, will or intestacy

[134] If the couple have separated but not divorced prior to death of one of the spouses, the surviving spouse may have a claim for division of matrimonial

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[176] *Supra* note 163.

[177] *Supra* note 30.

property[178] as well as rights that flow by way of intestacy, will or the *Family Relief Act*. In this part, the interconnection between these claims is examined.

1. Does the surviving spouse still have a claim under the *Family Relief Act*?

[135] By virtue of section 18 of the MPA, the surviving spouse may bring an action under the MPA as well as make an application under the *Family Relief Act.* The surviving spouse can seek family relief even if the spouses separated before death. Usually the two actions are joined and heard at the same time.[179] There are three reported decisions in which the surviving spouse made a claim under the MPA and the *Family Relief Act.* In two of the cases, the deceased had by will disinherited the surviving spouse.[180] In one case the deceased had left a small bequest to the surviving spouse. [181]

[136] When the surviving spouse brings a claim under the MPA and the *Family Relief Act*, the court must deal first with the claim under the MPA.[182] This result flows from the fact that section 15 provides that money paid to the surviving spouse under the MPA is not property which is part of the estate of the deceased spouse in respect of a claim against the estate by a dependant under the *Family Relief Act.* It also makes logistic sense because the court must know the size of the estate of the deceased spouse and the assets of the surviving spouse when addressing a claim for family relief.[183]

[137] The entitlement of the surviving spouse to a division of matrimonial property is not affected by the claim for family relief. The general principles that apply to the division of matrimonial property, as modified slightly by the fact of death, govern division in cases where the action is brought or continued under the MPA after death. See earlier discussion of valuation date and exercise of judicial discretion.

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[178] See earlier discussion at the beginning of this chapter.

[179] S. 18(2) of MPA, R.S.A. 1980, c. M-9 provides for this.

[180] *Zubiss* v. *Moulson Estate*, *supra* note 71; *Baker* v. *Baker Estate*, *supra* note 80.

[181] *Webb* v. *Webb Estate*, *supra* note 30.

[182] *Zubiss* v. *Moulson Estate*, *supra* note 71; *Baker* v. *Baker Estate*, *supra* note 80.

[183] *Ibid.*

[138] A matrimonial property order will affect the claim for family relief because it reduces the size of the estate and increases the assets of the surviving spouse. The claim for family relief by the surviving spouse relates to what is left in the estate after:[184]

- payment of allowed expenses relating to administration of the estate,
- distribution of the matrimonial property, and
- payment of allowed costs associated with the matrimonial property action.

The question of priority of payment is discussed in more detail later in this chapter.

2. May the surviving spouse seek division of matrimonial property in addition to the life estate in the homestead that arises under the *Dower Act*?

[139] Upon death of the deceased spouse, a life estate in the homestead vests in the surviving spouse by virtue of section 18 of the *Dower Act*.[185] What then is the interrelationship between this dower right and the right to seek division of the matrimonial property upon death of the deceased spouse? Is the surviving spouse entitled to both? There is no single answer to this question because it is a matter of court discretion. In the exercise of its discretion under Part 1 of the MPA, the court can require the surviving spouse to release his or her dower rights in the homestead as a condition of the matrimonial property order.[186] The court can also divide the matrimonial property so that the surviving spouse is entitled to one-half of the matrimonial property as well as the life estate in the homestead. To accomplish this, the court would simply divide the matrimonial property so that the homestead falls into the property that is distributed to the estate and not require the surviving spouse to release his or her dower rights in the homestead. The exercise of this discretion would depend upon the financial needs of the surviving spouse, the other factors listed in section 8, and "any benefit received by the surviving spouse as a result of the death of the deceased spouse."[187] Of course, the dower interest itself is such a benefit and must be taken into account.

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[184] *Baker* v. *Baker Estate*, *supra* note 80 at 116.

[185] R.S.A. 1980, c. D-38.

[186] MPA, R.S.A. 1980, c. M-9, s. 9(3)(f).

[187] *Ibid*., s. 11(3).

3. May the surviving spouse assert his or her claim to matrimonial property in addition to or in lieu of rights that flow by way of will or intestacy?

[140] In some provinces, the matrimonial property legislation provides that the surviving spouse is entitled to the benefit of a matrimonial property order as well as the benefits that flow by way of intestacy or will.[188] In one province, the marital property claim is reduced by the value of assets the surviving spouse is entitled to receive by way of intestacy or under the will, even if the surviving spouse renounces them.[189] In another province, the surviving spouse must make an election between rights under the will or upon intestacy and the right to seek a division of matrimonial property.[190]

[141] The Alberta MPA is silent on this point. The only reference to benefits that arise on death is found in section 11(3), which reads as follows:

> 11(3) When a matrimonial property order is made in favour of a surviving spouse, the Court, in addition to the matters in section 8, shall take into consideration any benefit received by the surviving spouse as a result of the death of the deceased spouse.

In *Donkin* v. *Bugoy*,[191] the Supreme Court of Canada considered a similar provision found in the Saskatchewan *Matrimonial Property Act*. As discussed earlier in this chapter,[192] the Court suggested, in obiter, that the purpose of such a section is to ensure that the surviving spouse does not necessarily benefit twice by receiving the property under the will as well as under the MPA.

[142] This approach was taken in *Webb* v. *Webb Estate*,[193] although the judge does not refer to *Donkin* v. *Bugoy*. This is the only reported Alberta case in which the

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[188] See *Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, s. 30(3); *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 12(4); *Family Law Act*, R.S.N. 1990, c. F-2, s. 21(2). For example, s. 21(2) of the Newfoundland Act provides:

> 21(2) Rights that a surviving spouse has to the ownership or division of property under this Act are in addition to rights that the surviving spouse has as a result of the death of his or her spouse, whether that right arises on intestacy or by will.

[189] See *Marital Property Act*, R.S.M. 1987, c. M45, sections 38 and 39.

[190] *Family Law Act*, R.S.O. 1990, c. F-3, ss 5 & 6 make the surviving spouse elect between the rights under the will or upon intestacy and the right to seek an equalization entitlement.

[191] *Supra* note 107.

[192] See discussion beginning at para. 103 of this chapter.

[193] *Supra* note 30.

surviving spouse asserted his claim under the MPA in the face of a will in which he received a bequest.[194] Before the wife died, the couple had entered into a separation agreement in which the husband waived his rights under the MPA in exchange for an immediate payment of $5,000 and a $20,000 bequest in his wife's will. Upon her death, he brought an action seeking division of matrimonial property plus family relief. Justice Hembroff held that the husband was not entitled to anything further under the MPA because $25,000 was a generous division of matrimonial property in the circumstances. He ordered the estate to pay the surviving spouse the $20,000 bequest under the will but nothing more in respect of the MPA. Reluctantly, he granted relief to the surviving spouse under the *Family Relief Act* because the husband was on social assistance. This case suggests that the court will view the gifts that pass to the surviving spouse as going towards satisfaction of the matrimonial property claim. The result is that the surviving spouse will receive the greater of the gifts under the will or his or her matrimonial property claim. The surviving spouse will not be able to seek a matrimonial property order in addition to the gifts under the will.

[143] Although there is no Alberta case law on point, it seems logical that a similar approach would be taken in respect of rights upon intestacy.[195] To avoid benefiting the surviving spouse twice, the court should determine what the claim of the surviving spouse is under the MPA and then contrast this with what the surviving spouse would receive if he or she made no claim under the MPA and the entire estate was distributed under the *Intestate Succession Act.* If the share upon intestacy exceeds that of entitlement under the MPA, then the matrimonial property action should be dismissed. If the share upon intestacy is less than the entitlement under the MPA, the court should treat the intestacy share as matrimonial property of the surviving spouse and direct payment of the difference.

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[194] The facts of the case were discussed earlier under the topic of dissipation of assets.

[195] On this point, *Donkin* v. *Bugoy*, *supra* note 107 will not be applicable because section 30(3) of the Saskatchewan *Matrimonial Property Act* allows the surviving spouse to have the benefit of both the *Matrimonial Property Act* and intestacy. Since the Alberta MPA does not have such a section, the interaction of rights under the MPA and under wills or upon intestacy should be the same in Alberta.

H. In the administration of the estate, what priority is given to payment of the matrimonial property order?

[144] Sections 14 and 15 of the MPA relate to priority of payment of the matrimonial property order. They read as follows:

> 14(1) If an application for a matrimonial property order is made or continued by a spouse, the executor, administrator or trustee of the deceased spouse shall hold the estate subject to any matrimonial property order that may be made, and the executor, administrator or trustee shall not proceed with the distribution of the estate other than in accordance with the matrimonial property order.
> (2) If an executor, administrator or trustee distributes a portion of the estate contrary to subsection (1), the executor, administrator or trustee is personally liable to the living spouse for any loss to that spouse as a result of the distribution.
>
> 15 Money paid to a living spouse or property transferred to a living spouse under a matrimonial property order shall be deemed never to have been part of the estate of the deceased person with respect to a claim against the estate:
> (a) by a beneficiary under a will,
> (b) by a beneficiary under the *Intestate Succession Act*, or
> (c) by a dependant under the *Family Relief Act*.

[145] These sections were considered in *Baker* v. *Baker Estate*.[196] This case involved an abusive marriage that lasted 37 years ending in the death of the husband. For the last 15 years of the marriage the husband did not work outside or inside the home. The couple separated two months before the husband died. By will the husband left all to his three daughters and nothing to his wife or son. At the time of separation, the husband had assets of $186,000 and debts of $12,000 and the wife had assets of $39,000. The total matrimonial property, after income tax and debts were taken into consideration, was $213,282. The wife brought an action under the MPA and joined it with an application for family relief. A daughter was the executrix of the estate. Shortly after the father's death, the executrix and one of her sisters assaulted the mother.

[146] The court held that in the circumstances of this case the valuation date should be the date of separation and not the date of trial. It would be inequitable for the estate to benefit from the efforts of the wife who acquired assets of $25,000 after separation because of her frugality at a time when she had no access to the sale of

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196 *Supra* note 80.

the principal asset of the marriage, the farm. Given this decision, the court then valued the assets and debts as of that date. Since the period between the date of separation and death was only two months, the court viewed the value of the assets to be unchanged during that period. In determining the net matrimonial property of the husband, the court valued the matrimonial property held by the husband as of death less debts owing at the time of death. The debts taken into account did **not** include debts that flowed from death such as funeral costs and legal fees and accounting fees incurred by the estate.

[147] In the circumstances of this case, the court held that it was just and equitable to deviate from equal sharing of the matrimonial property. It awarded the wife 75% of the matrimonial property as valued on the date of separation, interest on a portion of the judgment, and costs in the matrimonial property action.

[148] After determining the wife's entitlement under the MPA, the court then considered the wife's application for family relief. Upon considering the various factors, the court held that the wife had not received adequate maintenance and support and was in need of relief. It ordered that for the rest of her life she receive all the income from the balance of the estate, with a right to encroach upon capital upon court application. It also awarded her costs for the family relief application.

[149] The wife made a further application concerning costs and priority of payment. The executrix argued that she should be entitled to all of her expenses in opposing the matrimonial property action and the family relief application and that these should be paid before the claims of the wife. The wife made two arguments. First, in these circumstances, the wife's judgment and costs should have priority to the claim for costs of the executrix. Second, the court should not award the executrix costs of defending the matrimonial property action because defence of the action was unreasonable in the circumstances.

[150] The court judged the executrix's decision to defend the matrimonial property action as unreasonable in these circumstances. It then considered the order of priority in which the estate should pay the matrimonial property order, costs awarded to the wife in the matrimonial property action and the family relief

application, and costs of the executrix in defending these actions. The court held:[197]

> It is clear from ss 14 and 15 of the ***Matrimonial Property Act***, that the payment out of the judgment, including interest and costs, under the **MPA** is a first priority against the net estate (after debts due at death), prior to any claims of any beneficiary under a will, because it is "deemed never to have been part of the estate of the deceased spouse", and the executrix is to "hold the estate subject to any matrimonial property order", and shall distribute same "in accordance with the matrimonial property order". Accordingly, the expenses of the executrix (through expenses incurred on behalf of the estate in defending the **MPA** and **FRA** action) rank second in priority to the payment of Mrs. Baker's judgment, interest and costs under the MPA.

[151] The court directed the executrix to distribute the estate in the following order:[198]

> (1) payment of funeral and other third party debts and expenses deemed due on or at death (after which the net value of the Estate is calculated);
> (2) payment to Mrs. Baker of the judgment, interest and costs (as taxed or agreed) awarded under the **MPA** action;
> (3) payment of other legal and accounting disbursed expenses of the executrix (not executrix fees) unrelated to this litigation as taxed;
> (4) Mrs. Baker's costs, as taxed, under the **FRA** action;
> (5) one-half of the executrix's costs (fees and disbursements) to each of trial and at trial in respect of each of the **FRA** action . . . and the **MPA** action, being one full set total, as may be taxed, both on a party-party basis under Column 5 of the Alberta **Rules of Court**;
> (6) income from the Estate to Mrs. Baker until her death (with power to encroach with approval of the court) under the **FRA** action.

Upon the death of the wife, the estate is to pay any executrix fees and expenses not covered above and then distribute the estate in accordance with the will.

[152] Given the unique circumstances of this case, it is unclear whether it will serve as a precedent in other situations. Query whether the result would have been different if the conduct of the executrix had been more exemplary and if the court had not judged the executrix's decision to defend the matrimonial property action as unreasonable. Section 15 clearly gives the matrimonial property order priority over beneficiaries under a will or upon intestacy and dependants seeking family relief. But this list of interested parties always take what is left of the estate after payment of funeral and testamentary expenses and payment of debts and liabilities.

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197 *Ibid.*, suppl. reasons at 11-12.

198 *Ibid.*, suppl. reasons at 12.

It is not so clear that section 15 gives the matrimonial property order priority over testamentary expenses.[199] Although one may wish to treat the cost of defending the action differently from the general cost of administering the estate, it makes no sense to give debts priority over the remaining testamentary expenses.[200]

[153] The second problem is that in this case the court chose the date of separation as the valuation date. This allowed it to calculate the entitlement of the surviving spouse under the MPA by ignoring the funeral and testamentary expenses that arise as a result of death. If the valuation date was the date of trial, then the debts of the deceased spouse would include all funeral and testamentary expenses, except the costs of defending the action. This reduces the net value of matrimonial assets subject to equal sharing. It makes no sense to make a deduction for such expenses and then give priority of payment to debts that accrue before death but not expenses that arise as a result of death. Moreover, in this context, the cost of administration is a necessary cost of distributing the assets and should be treated similarly.

[154] The third problem with this case is that it ignores the body of case law governing administration of insolvent estates,[201] which gives priority to payment of funeral and testamentary expenses over creditors of the estate.[202] The result would have been different if the personal representative had assigned the estate into bankruptcy or if the court had recognized that it was dealing with an insolvent estate and administered it under provincial law.[203]

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[199] The normal rule is that the executor must pay funeral and testamentary expenses before the debts of the estate: *Widdifield on Executors' Accounts* 5th ed. (Toronto: Carswell, 1967) Chapter 4 generally and page 103 specifically. This is also the rule found in s. 136(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and renamed by S.C. 1992, c. 27 and the rule that operates when an estate is administered under s. 43 of the *Administration of Estates Act*, R.S.A. 1980, c. A-1. *Re Stewart Estate* (1997), 50 Alta. L.R. (3d) 170 (Q.B.) illustrates this point in the context of section 43 of the *Administration of Estates Act*.

[200] See the detailed discussion of priorities in Chapter 6.

[201] An insolvent estate exists whenever the assets of the estate are insufficient to meet the funeral and testamentary expenses and the debts of the deceased. A money judgment which forms part of a matrimonial property order is treated as an unsecured debt in the context of bankruptcy and in the administration of insolvent estates under provincial law.

[202] This law is discussed in more detail in Chapter 6.

[203] See authorities cited in footnote 199.

[155] Any proposals we make should be clear as to the priorities as between a matrimonial property claim of a surviving spouse and expenses that arise because of death, namely funeral expenses and general cost of administering the estate and the cost of defending the family relief application and the matrimonial property action.

I. How does satisfaction of the matrimonial property order affect beneficiaries of the estate?

1. In the case of a will

[156] In this part, we examine how satisfaction of the matrimonial property order will affect beneficiaries of the will. This issue will arise in two contexts. In the first context, the deceased spouse disinherits the surviving spouse and leaves his or her entire estate to others. How will satisfaction of the matrimonial property order affect the beneficiaries named in the will? In Alberta, there is no provision in the MPA or elsewhere that determines how satisfaction of matrimonial property order will affect beneficiaries of the deceased spouse. When a matrimonial property statute is silent on this issue, the effect on beneficiaries is determined by: (1) terms of the matrimonial property order, (2) the doctrine of ademption, and (3) the rules relating to the order in which the assets are ultimately applied in payment of debts.

[157] To the extent that the court divides an asset *in specie*, for example by dividing investments equally or vesting the home in the surviving spouse, the asset that vests in the surviving spouse under the order is no longer part of the estate.[204] This means that any specific bequest or devise of such an asset will fail by virtue of the doctrine of ademption, and the intended beneficiary will not receive that asset. To this extent, the exercise of court discretion in the division of matrimonial property will have a direct effect on certain beneficiaries.

[158] To the extent that the matrimonial property order is a money judgment, it is treated as an unsecured debt. It follows that the rules that determine the order in which assets are ultimately used to pay debts determine how satisfaction of the

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[204] This statement is true as against beneficiaries of the estate because of section 15 of the MPA but may not be true as against creditors. See *Deloitte, Haskins & Sells Ltd.* v. *Graham and Graham* (1983), 42 A.R. 76 and *Maroukis* v. *Maroukis*, [1984] 2 S.C.R. 137. But compare with *Burroughs* v. *Burroughs* (1988), 87 A.R. 310 (Q.B.); *Pegg* v. *Pegg* (1992), 128 A.R. 132 (Q.B.); *Markey* v. *M.N.R.* (1997), 197 A.R. 382 (Q.B.), aff'd (1997) 31 R.F.L. (4th) 32 (Alta. C.A.).

monetary judgment will affect the beneficiaries under the will.[205] In Alberta, unless the testator expresses a contrary intention, the order in which the assets of the estate can be resorted to for payment of debts is as follows:[206]

1. The general personal estate not bequeathed at all, or by way of residue only.
2. Real estate devised in trust to pay debts.
3. Real estate descended to the heir[207] and not charged with payment of debts.
4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by reason of lapsed devise, to descend; or (as to personalty) specifically bequeathed, subject to that charge.
5. General pecuniary legacies, including annuities and demonstrative legacies that have become general.
6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts, to contribute *pro rata*.
7. Real and personal estate over which the testator had a general power of appointment which has been expressly exercised by deed (in favour of volunteers) or by will.
8. Paraphernalia of the testator's widow.

Similar statements are found in other sources,[208] although class 8 is not usually included in the other sources. Class 1 is sometimes described as "the general personalty[209] less the retention thereout of a fund sufficient to meet any pecuniary

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[205] Ontario Report, *supra* note 133 at 128. Note that the Ontario rules governing the order in which assets are ultimately applied in the payment of debts differ from those of Alberta. See also *Re Kotowski Estate* (1987), 27 E.T.R. 183 (Man. C.A.).

[206] Widdifield, *supra* note 199 at 87-86.

[207] This class refers to land that passes by way of intestacy. The class is expressed in this fashion because the rules were developed during the time when land that did not pass by will descended to the heir by right of primogeniture and personal property that did not pass by will went to the next of kin.

[208] See : (1) Theobald, *A Concise Treatise on the Law of Wills*, 7th ed. (London: Stevens and Sons, 1907) at 828-32,
(2) 14 Halsbury's Laws of England (London: Butterworths, 1910) at 285-288, 291-293,
(3) *Snell's Principles of Equity*, 19th ed. (London: Sweet & Maxwell, 1925) at 249-53,
(4) Queensland Law Reform Commission, *A Report on the Law Relating to Succession* (Report No. 22, 1978) at 38-39.
(5) Woodman, *Administration of Assets*, 2d ed. (Sydney: Law Book Company, 1978) Chapter 2.
(6) Law Reform Commission of Western Australia, *Report on the Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies* (Project No. 34- Part VII, 1988) at 12-17,
(7) Ontario Law Reform Commission, *Report on the Administration of Estates of Deceased Persons*, 1991, at 184-85.

[209] Another term used to describe "general personalty" is "general personal estate".

legacies."[210] In this context, general personalty includes (1) personalty not bequeathed at all, and (2) personalty bequeathed by way of residue.[211] Another term used interchangeably with "general personalty" is "general personal estate".

[159] The result is that the satisfaction of the money judgment in the matrimonial property order will affect beneficiaries differently depending on the terms of the will and the nature of the assets that make up the estate. Contrast this result with how beneficiaries are affected by an order for family relief. The *Family Relief Act* provides that the order for maintenance and support under the Act falls ratably on the whole of the estate.[212]

[160] In the second context, the deceased leaves some gifts to the surviving spouse but the surviving spouse is entitled under the MPA to more than the value of these gifts. How will payment of the balance affect the other beneficiaries of the will? The gifts will be treated as part of the matrimonial property entitlement of the surviving spouse.[213] The only question is how payment of the balance will affect the other beneficiaries. The same rules as discussed above for disinherited spouses will apply but the operation of the rules will only affect beneficiaries other than the surviving spouse. As part of his or her matrimonial property entitlement, the surviving spouse will receive what he or she would have received under the will if there had been no matrimonial property claim. It is only a question of how the other beneficiaries are affected by satisfaction of the balance of the matrimonial property order. Again this will depend upon whether the matrimonial property order contains a money judgment or an *in specie* division of assets, the nature of the estate and the terms of the will.

2. In the case of intestacy

[161] Situations arise in which divorce precedes the death of the deceased spouse and the subsequent division of matrimonial property. In such situations, the ex-

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[210] Woodman, *supra* note 208 at 13.

[211] Woodman, *supra* note 208 at 17. This author also notes that it included personalty subject to a general power of appointment which passed under a residuary gift by virtue of s. 27 of the *Wills Act*, 1837 (U.K.).

[212] *Family Relief Act*, R.S.A. 1980, c. F-2, s. 9.

[213] See earlier discussion of *Webb* v. *Webb Estate*, *supra* note 30.

spouse is not the beneficiary of the deceased who dies without a will. Satisfaction of the matrimonial property order diminishes the size of the estate that is distributed according to the *Intestate Succession Act* and thereby decreases what the beneficiaries of the estate would otherwise have received.

[162] If the spouses are still married at the time of death, the surviving spouse will be a beneficiary under the *Intestate Succession Act.* It may be that what the surviving spouse is entitled to receive under the *Intestate Succession Act* exceeds what he or she would have been entitled to receive under the MPA.[214] As in the case of a will, the matrimonial property claim will be dismissed. Where, however, the surviving spouse is entitled under the MPA to more than his or her share under the *Intestate Succession Act,*[215] the balance will be paid from the portion of estate that would otherwise go to the children.

J. When can the personal representative distribute the estate?

[163] The personal representative cannot distribute any portion of the estate during the six months from the issue of the grant of probate or letters of administration without the consent of the living spouse or an order of the Court.[216] If an application for a matrimonial property order is made, the personal representative must hold the estate subject to any matrimonial property order that may be made. Moreover, the personal representative cannot distribute the estate other than in accordance with the matrimonial property order.[217] In addition, the surviving spouse may seek an order suspending in whole or in part the administration of the deceased spouse until an application for a matrimonial property order has been determined.[218]

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[214] This may happen where the deceased spouse had no surviving children, or where the estate is small and the deceased is survived by his or her spouse and children.

[215] This may happen when the estate is large and the deceased spouse is survived by his or her spouse and two or more children.

[216] MPA, R.S.A. 1980, c. M-9, s. 13(1).

[217] MPA, R.S.A. 1980, c. M-9, s. 14.

[218] MPA, R.S.A. 1980, c. M-9, s. 12.

K. Must a court approve of the settlement reached by the surviving spouse and the personal representative of the deceased spouse?

[164] As will be discussed in the next part, living spouses may enter into agreements regarding division of matrimonial property and, if the necessary safeguards are met, the court cannot vary such an agreement. We can find nothing in the MPA that would prevent a personal representative and the surviving spouse from entering into such an agreement.

L. Can spouses contract out of the regime upon death?

1. Contracting out of the *Matrimonial Property Act* — Sections 37 and 38

[165] Section 37 and 38 read as follows:

> 37(1) Part I does not apply to property that is owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.
> (2) An agreement under subsection (1) may be entered into by two persons in contemplation of their marriage to each other but is unenforceable until after the marriage.
> (3) An agreement under subsection (1)
> (a) may provide for the distribution of property between the spouses at any time, including, but not limited to, the time of separation of the spouses or the dissolution of marriage, and
> (b) may apply to property owned by both spouses and by each of them at or after the time the agreement is made.
> (4) An agreement under subsection (1) is unenforceable by a spouse if that spouse, at the time the agreement was made, knew or had reason to believe that the marriage was void.
>
> 38(1) An agreement referred to in section 37 is enforceable if
> (a) each spouse, or
> (b) each person, in the case of persons referred to in section 37(2), has acknowledged, in writing, apart from the other spouse or person,
> (c) that he is aware of the nature and effect of the agreement,
> (d) that he is aware of the possible future claims to property he may have under this Act and that he intends to give up these claims to the extent necessary to give effect to the agreement, and
> (e) that he is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.
> (2) The acknowledgment referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other spouse or before whom the acknowledgment is made by the other spouse.

2. Interpretation of sections 37 and 38

[166] Section 37 allows spouses to contract out of the operation of Part I of the MPA if the agreement complies with the formalities of execution provided in section 38 and is valid according to the law of contract and equity.[219] Spouses can enter into such a contract before marriage, during marriage or upon separation or dissolution.[220] The terms of such a contract cannot be varied by the court.[221] So where a separation agreement provides that land will be offered for sale at a certain price, the court cannot vary the contract by reducing the asking price.[222] Unlike other provinces, the Alberta legislation does not give the court the power to set aside unfair agreements.[223]

[167] Section 38 does not require a lawyer to give independent legal advice to the spouse. It only imposes the formalities of execution prescribed by the section.[224] Nevertheless, most lawyers have developed the practice of providing both a certificate of independent legal advice and a certificate that complies with section 38. Despite the existence of either certificate, the contract may be invalid or unenforceable for any reason sounding in contract law or equity, including unconscionability or misrepresentation.[225]

[168] When examining the practice of the certificate of legal advice, the Alberta Court of Appeal held:[226]

> The Act does not invalidate a contract for lack of independent legal advice. Moreover, no rule in equity or contract invalidates an agreement simply on account of a lack of independent legal advice. The function of advice, in that

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[219] *Corbeil* v. *Bebris* (1993), 49 R.F.L. (3d) 77 (Alta. C.A.).

[220] MPA, R.S.A. 1980, c. M-9, s. 37. See discussion in McLeod & Mamo, *supra* note 66 at A-51.

[221] *Soutzo* v. *Soutzo* (1991), 33 R.F.L. (3d) 180 (Alta. C.A.).

[222] *Ibid*. In this case, the settlement agreement provided that Part I of the MPA would not apply to the marriage and the agreement would be the sole determinant of the division of property.

[223] McLeod & Mamo, *supra* note 66 at A-52.

[224] *Corbeil* v. *Bebris*, *supra* note 219.

[225] *Ibid*.

[226] *Ibid*. at 81-82. *Murray* v. *Murray*, *supra* note 102 is an example of a case in which the wife unsuccessfully argued that a settlement agreement dealing with matrimonial property, spousal support and child support should be set aside as unconscionable.

> context, is to remove a taint that, left unremoved, might, according to contract or equity law, invalidate the contract.

[169] If the formalities of execution established in section 38 are not met, the court retains its power and discretion under Part I of the MPA to divide the matrimonial property. Nevertheless, when exercising its discretion under section 7, section 8(g) requires the court to consider "the terms of an oral or written agreement between the spouses," which includes agreements that do not comply with section 38.[227] This does not mean the court must give effect to the agreement; it merely means the court must consider the terms of the agreement and its impact on the parties in determining if equal division of property would be unjust or inequitable. Failure to consider this special circumstance is a reversible error.[228]

M. What procedure applies to division of property upon death?

[170] The general rules of procedure that apply to division of property upon marriage breakdown also apply to division of property upon death. Except for subsection 11(4), no specific rules of procedure relate only to division of property upon death. Subsection 11(4) provides that an application by the surviving spouse may not be commenced more than six months after the date of issue of a grant of probate or administration of the estate of the deceased spouse.

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[227] *Corbeil* v. *Bebris*, *supra* note 219 and *Morozuk* v. *Morozuk* (1989), 21 R.F.L. (3d) 85 (Alta. C.A.).

[228] *Corbeil* v. *Bebris*, *ibid.*

CHAPTER 4. DIVISION OF MATRIMONIAL PROPERTY FOLLOWING THE DEATH OF A SPOUSE

A. Introduction

[171] As a consequence of death, assets may cease to exist or come into existence or pass to another by right of survivorship or beneficiary designation, none of which would occur on marriage breakdown. In addition, debts may become payable or be incurred by reason of the death. The consequences of death dictate that division of matrimonial property upon death, while similar, is not identical to division of matrimonial property on marriage breakdown. Amendments to the MPA that give the surviving spouse a right to seek division of matrimonial property on the death of the deceased spouse must take into account this reality.

[172] In this chapter, we examine who may apply for the matrimonial property order, the applicable limitation period, the property that will be available for distribution, exemptions, treatment of debts and liabilities, valuation date, exercise of judicial discretion and the ability to contract out of the proposed regime. Our recommendations are tailored for a division of matrimonial property that takes place after the death of one of the spouses. As such they will apply to actions commenced by the surviving spouse upon death of the deceased spouse and to actions commenced before death of the deceased spouse and continued thereafter.

[173] We leave for later chapters the discussion of the interrelation between the proposed rights under the MPA and other areas of the law, how the satisfaction of the matrimonial property order will affect the administration of the estate, and will substitutes.[229]

B. Should there be exceptions to the general rule that a matrimonial property action does not survive for the benefit of the estate?

[174] In Chapter 2, we recommended that the surviving spouse be able to commence an action or continue an action upon the death of the deceased

[229] This term is defined in footnote 49.

spouse.[230] We did not recommend that an estate of a deceased spouse be allowed to commence an action upon death.[231] Where, however, the deceased spouse commenced the action during the joint lives of the spouses, the estate of the deceased spouse should be able to continue the action. Under this heading, we examine whether there should be any additional exceptions to the general rule that a matrimonial property action does not survive for the benefit of the estate.

1. Discontinuance of an action commenced before death

[175] Assume that the surviving spouse commences the action during the joint lives of the couple and his or her spouse dies before filing a statement of defence and counterclaim. In this situation, should the estate of the deceased spouse be able to file a statement of defence and counterclaim after death? Such a question arose in *Boychuk* v. *Boychuk Estate*.[232] The husband brought an action seeking equal division of the matrimonial property under the *Matrimonial Property Act* of Saskatchewan. Some negotiations took place but the wife's failing health delayed the matter, and she died before her counsel had filed an answer and counter-petition. By will she left all of her property to her only daughter of her first marriage. After her death, the husband applied for payment of the wife's superannuation benefits and had title to the home registered in his name as the surviving joint tenant. He then discontinued his matrimonial property action.

[176] When the wife's lawyers learned of the steps taken by the husband, they sought an order restraining payment of the pension benefits and any further dealings with the home. The personal representative of the estate then sought an order permitting the estate to continue the wife's claim to one-half of the matrimonial property. The husband argued that since the wife had not filed a statement of defence and counterclaim, the estate was precluded from continuing the action because the wife had not commenced an action under the Act before her death.

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[230] See Recommendation 2 and 3.

[231] See Recommendation 3.

[232] (1993), 1 R.F.L. (4th) 78 (Sask. C.A.).

[177] The court held that the petition seeking equal division of matrimonial property raises and includes the application by the wife for her share of the matrimonial property. Therefore, the wife's death and the husband's filing of a discontinuance did not extinguish the wife's claim to one-half of the matrimonial property. Furthermore, the court held that the filing of an answer and counter-petition was a mere formality where the husband concedes the wife's entitlement. In any event, the negotiations were the functional equivalent of an answer and counter-petition. The court set aside the discontinuance and gave the estate leave to file a formal answer and defence.

[178] It is likely that courts would apply this reasoning in the interpretation of the Alberta MPA, but it would be better if the statute answered this question. In our opinion, the MPA should be amended to make it clear that, after death, the estate of the deceased spouse can file a statement of defence and counterclaim in the action brought by the surviving spouse before death. Furthermore, the surviving spouse should not be able to discontinue the action without the consent of the estate of the deceased spouse or leave of the court. This recommendation, along with the recommendations made in Chapter 2, will ensure that where an action has been commenced during the joint lives of the spouses, the death of one of the parties does not create a windfall for either party. [233]

RECOMMENDATION No. 4

Where a matrimonial property action is commenced during the joint lives of the spouses and the defendant dies before filing a statement of defence and counterclaim,

(i) the personal representative of the deceased spouse should be able to file a statement of defence and counterclaim in the action and defend the action, and

(ii) the surviving spouse may not discontinue the action without the consent of the personal representative of the deceased spouse or leave of the court.

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[233] All of the commentators who commented on Recommendation 4 of RFD No. 17 voiced support for the recommendation. Given that the policy underlying Recommendation 4 in RFD No. 17 is the same policy that underlies our final recommendation on this point, we think there will be broad support for the revised recommendation.

2. Murder of deceased spouse by surviving spouse

[179] One commentator has suggested that an estate be allowed to commence an action after the death of the deceased spouse where the surviving spouse murders the deceased spouse. While recognizing that these situations do not arise with any frequency, the commentator thought that it would be very useful if an estate could commence a matrimonial property action in these circumstances.

[180] This very issue has been addressed in *McCarthy Estate* v. *McCarthy*,[234] which was an action commenced after the husband killed the wife. Insurance proceeds payable upon the death of the wife were used to pay the mortgage on the home, which by right of survivorship was then registered in the name of the husband. The home was the only matrimonial property of value and the equity in the property was the result of the payment of the insurance proceeds. The estate commenced an action under the Saskatchewan *Matrimonial Property Act*[235] seeking an order transferring the home in its entirety to the estate of the deceased wife on the basis that the husband should not profit from his wrongdoing.

[181] The court held that even though it is contrary to public policy for the husband to benefit from his wrongdoing, this principle does not give the court the right to create a statutory right that does not otherwise exist. Rights of a deceased spouse under the Act do not survive for the benefit of his or her estate unless an application has been brought before death. Given the design of the Act, the estate has no cause of action under the Act. The solution to the problem lies in the area of unjust enrichment and constructive trust, not matrimonial property.[236]

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[234] (1994), 4 R.F.L. (4th) 223 (Sask. Q.B.).

[235] S.S. 1979, c. M-6.1.

[236] In updating this decision via QuickLaw, we noted that an addendum to the judgment is shown at [1994] S.J. No. 189, online: QL (SJ). Read literally, the addendum seems to reverse what was earlier said in the decision. For the following reasons, we do not think that this addendum forms part of the judgment:

(1) The Saskatchewan Court of Queen's Bench has no record of the addendum.
(2) Neither the judge who wrote the decision nor the lawyer who argued the case has any memory of an addendum.
(3) The matter was resolved according to the suggestion in the original decision. The estate commenced a new action against the surviving spouse for constructive trust and thereby obtained an order transferring the house to the estate of the wife.
(4) Although the decision is reported by several other publishers, none of the other law report series includes the addendum as part of the decision.
(5) QuickLaw has a copy of the original judgment but has no copy of the addendum, although

[182] The Public Trustee deals with most of the situations in which a spouse murders his or her spouse. We are advised by that office that it rarely deals with a situation in which a spouse kills his or her spouse where divorce and matrimonial proceedings have not already been commenced. Sometimes it is the deceased spouse's success in these proceedings that triggers the murder. But in situations in which no proceedings have been commenced, the estate must commence an action for constructive trust.

[183] We do not recommend that an estate be allowed to commence a matrimonial property action in these circumstances. Domestic violence that leads to murder occurs infrequently, and matrimonial property proceedings have often been commenced before the murder takes place. The law of constructive trust and the law that a murderer cannot benefit from his wrongdoing will be sufficient to provide an appropriate remedy in these circumstances.

3. Death of both spouses in a common accident

[184] One commentator suggested that an estate be allowed to commence an action after death where the spouses die in a common accident. If a matrimonial property action is allowed in these situations, then it does not matter where the assets end up according to the law of survivorship. Each estate will receive the deceased's share of matrimonial property. Then assuming there is a will with a survivorship clause and a gift over, they would distribute each estate to beneficiaries chosen by the testator, and not beneficiaries chosen by the testator's spouse.

[185] We think that the better approach is to reform the law of survivorship as proposed in Report No. 47, *Survivorship*.[237] The proposals made in that report will ensure that each estate will be distributed to beneficiaries of the testator, and not to beneficiaries of the testator's spouse, and that each spouse is deemed to have an equal share in all property held in joint tenancy by the couple. This should ensure fair division of property in most situations involving the common death of spouses. It also solves the problem without deviating from the principle that the decision to

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they say that this is not startling given the reorganization that the corporation was undergoing at the time this judgment was entered into the database.

The source of the phantom addendum remains a mystery.

[237] Alberta Law Reform Institute, *Survivorship* (Final Report No. 47, 1986).

commence a matrimonial property action should be made by one of the spouses while alive.

C. Is there any conduct that would disqualify a surviving spouse from making a claim under the *Matrimonial Property Act*?

1. Immoral or improper conduct

[186] Immoral or improper conduct of a spouse is no bar to an action for matrimonial property division upon marriage breakdown. Moreover, such conduct is NOT something the court can consider when making a distribution of matrimonial property under the MPA.[238] Conduct of the spouses is only relevant in so far as it is a matter a court can consider under section 8 of the MPA when exercising its discretion to order unequal division of matrimonial property, such as dissipation or gifting of assets. This principle is firmly entrenched in most Canadian matrimonial property statutes.[239]

[187] These same principles should apply to a division of matrimonial property on death. Immoral or improper conduct should not be a bar to the commencement of the action, no matter how reprehensible the conduct. This will mean that the surviving spouse will be entitled to bring an action upon the death of the deceased spouse even though it was an abusive relationship or the surviving spouse committed adultery and so on.

[188] The only exception to these principles arises in the situation in which one spouse kills the other spouse. Can the surviving spouse seek division of matrimonial property after he or she has murdered the deceased spouse? Sadly, cases deal with this very point. In *Maljkovich* v. *Maljkovich*,[240] the couple separated and began settlement negotiations. Before these negotiations were concluded, the husband murdered his wife and his daughter. Neither spouse had

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[238] *T.R.F.* v. *P.K.S.* (1994), 150 A.R. 1 (Alta. Q.B.). In this case, the husband had been convicted of unlawfully having illicit sexual intercourse with one of his stepdaughters between March 1, 1981 and April 30, 1986. Justice Andrekson held that improper conduct, including that complained of in this case, was not a relevant fact or circumstance that could be considered under section 8(m). If the law were otherwise, the court would be "flooded with cases where conduct including adultery and assaults of varying degrees of seriousness would immeasurably lengthen court proceedings." (At 5).

[239] See for example, s. 25 of the *Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11.

[240] (1995), 20 R.F.L. (4th) 222 (Ont. Ct. Just., Gen. Div.).

commenced an action under the *Family Law Act* of Ontario. At the time of her death, the wife had a will leaving all of her property to her husband. The husband pleaded guilty to both charges of murder. Since the common law prevented him from receiving any benefit under the will, the husband filed an election under section 6 of the Act to receive an equalization of net family property.

[189] The court concluded that in these circumstances it is against public policy for the husband to profit from his wrongdoing, and, therefore, the husband cannot be permitted to make an election under section 6 of the Act. The court also expressed the opinion that the result would not be any different had the husband commenced an action before the death of the wife. Under the Act, the right to equalization that exists upon separation is extinguished upon death and new rights arise by reason of the death. The spouse would not be permitted to exercise those new rights where the spouse has murdered the deceased spouse.

[190] Although these situations are extreme, they do occur from time to time. Should the MPA deal with the murder of a spouse by the surviving spouse? The MPA could be silent on the point and leave it to the common law principle that a wrongdoer cannot benefit from his wrongdoing. This is what is presently done in Canadian matrimonial property statutes. Alternatively, the MPA could state that such conduct bars the murderer from commencing the action or continuing an action brought before death.

[191] Murder of a spouse by the other spouse will have ramifications in many areas, including payment of insurance policies, distribution of the estate and commencement of a matrimonial property action. Therefore, it is best to leave this issue to the common law principle that a wrongdoer cannot benefit from his wrongdoing.[241] This will prevent the action from being commenced after the murder, but may not prevent the surviving spouse from continuing an action commenced while the parties were alive. The public policy that a wrongdoer cannot benefit from his wrongdoing does not go so far as to require forfeiture of

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[241] *McKinnon* v. *Lundy*, (sub. nom. *Lundy* v. *Lundy*) (1895), 24 S.C.R. 650 and other cases cited in *Maljkovich* v. *Maljkovich, ibid*.

rights already enjoyed by the wrongdoer at the time of the crime.[242] It is possible that a court could construe the right to continue the action as a pre-existing right.

2. Separation before death

[192] Presently, once the spouses have lived separate and apart for one year, they are entitled to bring a matrimonial property action, and the action must be commenced within two years of separation. After this period, an action based on separation is barred. Notwithstanding this fact, the cause of action revives if one of the spouses files a divorce petition, and the spouse must bring the matrimonial property action within two years of the granting of the divorce judgment.[243] Consequently, the two-year limitation period that runs from the date of separation is of little effect during the joint lives of the spouses. Several cases involve a lengthy period of separation. In one case, the period of separation was 19 years.[244]

[193] Assume that the spouses were separated for more than two years before the death of one of the spouses and that neither spouse commenced a matrimonial property action nor divorce proceedings. In these circumstances, should death revive the cause of action under the MPA? Or should death create a cause of action only for the benefit of a surviving spouse who was living with the deceased at the time of death? The question is not easily answered. On the one hand, the purpose in imposing short limitation periods is to encourage spouses to finalize their affairs within a reasonable time after separation.[245] On the other hand, ensuring that the cause of action is revived upon death means that the contribution of the surviving spouse to the marriage will always be recognized.

[194] In our opinion, the best solution is to revive the cause of action upon the death of the deceased spouse. Such a solution will ensure that the law recognizes the contribution made by the surviving spouse, and still give the court the flexibility to consider how the property should be divided given the peculiar facts

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[242] *Re Gore*, [1972] 1 O.R. 550 (Ont. H.C.J.) at 552.

[243] Section 6(1)(a) and *Weicker* v. *Weicker*, *supra* note 75.

[244] *Weicker* v. *Weicker*, *supra* note 93.

[245] Four of the commentators argued that separation for more than two years should also be a bar to an action on death. In their opinion, a spouse should be required to bring an application within a reasonable time of separation or divorce.

of the case. Much will depend upon whether there was a relationship after separation, whether property was acquired after separation and how such property was acquired. This option will also protect the surviving spouse who, while separated from his or her spouse, has chosen not to commence a matrimonial property action or divorce proceedings because of the failing health of the other spouse.[246] The revival of the cause of action upon death will work much like the revival of the cause of action where divorce proceedings are commenced during the joint lives of the spouses. The existing law does not cause insurmountable problems and should not do so under this proposal.

3. Previous division of matrimonial property by court order

[195] In the past, the divorce petition and the matrimonial property action were commenced at the same time and consolidated so that both actions were heard together. Recent changes to the Rules of Court allow for both actions to be brought in a single proceeding commenced by filing a Statement of Claim for Divorce and Division of Matrimonial Property. At trial, the judge will grant a divorce and then provide for division of the matrimonial property. If several years later one of the spouses dies, the surviving spouse will have no rights upon the death of the other because at that point in time they are no longer spouses.

[196] Situations will arise, however, where the spouses seek a matrimonial property order but do not divorce. In this situation, should the previous matrimonial property order bar the surviving spouse from commencing an action upon death of the deceased spouse? This really raises a question as to the scope of the right being created upon death. If the purpose is to ensure that the contribution of a spouse to a marriage is always recognized, there is no need to trigger a further cause of action upon death when that contribution has previously been recognized. A previous matrimonial property order should be a bar to commencing an action upon death of one of the spouses.[247] Of course, in this context, matrimonial

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[246] Consider the case where the spouses separate and at a later time it is discovered that one of the spouses has a terminal illness. In this situation, the one spouse may chose not to commence an action under the MPA for fear that it would cause stress to the other spouse in a time of serious illness. That spouse would have no cause of action under the existing MPA upon the death of the spouse if the parties had been separated for more than two years and an action had not been commenced under the MPA or *Divorce Act* before death.

[247] All of the commentators who offered comments on Recommendation No.5 of RFD No. 17 supported the recommendation.

property order refers to an order that deals with division of all the matrimonial property of the spouses. It does not refer to an interlocutory order, such as an exclusive possession order or an order dealing with interim division of certain property.

[197] The only exception to this rule would be where the parties reconcile after the matrimonial property order. In such situations, death should again trigger a cause of action no matter whether the parties are living together or apart at the time of death. It should work something like the existing section 5(2).[248]

RECOMMENDATION No. 5
(a) This recommendation applies where the spouses have obtained a matrimonial property order dealing with the division of all of their matrimonial property but have not obtained a divorce.
(b) If the spouses live separate and apart after the granting of the matrimonial property order, the matrimonial property order should be a bar to any action under the *Matrimonial Property Act* upon the death of one of the spouses.
(c) If after the granting of the matrimonial property order the spouses resume cohabitation for a period of more than 90 days, with reconciliation as its primary purpose, the Court may make a further matrimonial property order upon the death of one of the spouses with respect to the property of the same spouses.

4. Previous division of matrimonial property by agreement

[198] The next question is whether a division of matrimonial property under a settlement agreement should be a bar to an action upon death of one of the spouses where the spouses have not divorced in their joint lifetimes. In Manitoba, such an agreement is a bar to an action on death unless the couple reconciles in the

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[248] Section 5(2) of the MPA, R.S.A. 1980, c. M-9 reads as follows:
(2) Notwithstanding that a matrimonial property order has been made under the circumstances to which subsection (1)(b), (c), (d) or (e) applies, the Court may make a further matrimonial property order under circumstances to which subsection (1)(a) applies with respect to property of the same spouses if there has been a subsequent resumption of cohabitation by the spouses during a period of more than 90 days with reconciliation as its primary purpose.

interim.[249] Does the proposed MPA have to go this far or should it be a matter left to the contract negotiated by the spouses? For the purposes of determining whether such an agreement is a bar to commencing an action upon death, we see no difference between division of matrimonial property by court order or by agreement under sections 37 and 38 of the MPA. Both recognize the contribution of the spouses to the marriage, and in the absence of reconciliation, should bar the surviving spouse from commencing another action upon the death of the deceased spouse. Reconciliation would give rise to rights under the MPA, unless the agreement specifically waived rights in the event of reconciliation.[250]

[199] All of the commentators agreed with this position, but one suggested that it be clear that an agreement would be a bar to an action on death only where the agreement was a comprehensive agreement. An agreement in respect of one piece of property should not bar a spouse from bringing an action at the time of death. Our original recommendation assumed that all agreements would be comprehensive agreements. While this is usually true, exceptions to the general practice will occur. To cover all possibilities, an agreement should bar a matrimonial property action on death in respect of the property dealt within the agreement. This will ensure that a comprehensive agreement will bar any future action, and an agreement only in respect of one piece of property will bar an action only in respect to a claim as to that property.

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[249] By virtue of section 27(1) of *The Marital Property Act*, C.C.S.M., c. M45 a previous order under the Act and division of assets under a spousal agreement is a bar to an action on death. The exception to this is reconciliation. If the parties resumed cohabitation after division of assets by way of order or agreement, the surviving spouse has a right to an accounting in respect of assets acquired by the spouses during the period of resumed cohabitation. This right exists even if the spouses are not cohabiting at the time the spouse dies.

[250] In *Hulleman* v. *Hulleman*, [1999] A.J. No. 1472, online: QL (AJ), the Alberta Court of Appeal dealt with a situation in which the parties entered into a separation agreement in 1987 and reconciled five months later. They lived together for many years and separated again in 1995. The separation agreement waived the provisions of the MPA as well as entitlement to spousal support. It provided that it was a full and final settlement agreement and could only be terminated or amended in writing. The separation agreement did not deal specifically with possibility of reconciliation. Under the terms of the separation agreement, the wife paid the husband $4,000, and after reconciliation, the husband - by written agreement- repaid the $4,000 to the wife. The husband argued that the separation agreement continued in effect for the period of reconciliation because the parties did not vary its terms in writing. The majority of the Court held that the separation agreement did NOT survive the resumption of cohabitation. Since the MPA is designed to protect against inequalities arising out of a marriage, any waiver of rights created by the statute must be clear and unequivocal. The MPA will apply in the event of reconciliation unless there are express provisions in the separation agreement waiving rights that arise upon resumption of cohabitation.

RECOMMENDATION No. 6

(a) This recommendation applies where the spouses have not divorced but have divided all of their matrimonial property according to the terms of an agreement that complies with sections 37 and 38 of the *Matrimonial Property Act*.

(b) If the spouses live separate and apart after the execution of the agreement, the agreement would be a bar to any action under the *Matrimonial Property Act* upon the death of one of the spouses in respect of any property governed by that agreement.

(c) If after the execution of the agreement the spouses resume cohabitation for a period of more than 90 days, with reconciliation as its primary purpose, the Court may – in the absence of an agreement to the contrary – make a further matrimonial property order upon the death of one of the spouses with respect to the property of the same spouses.

D. When must the action be commenced?

[200] Since death itself will trigger a cause of action for the surviving spouse under the proposed scheme, we must determine the limitation period that will apply to actions of this nature. To assist in this discussion, we will compare the limitation periods that exist in several other provinces for such causes of action. We will then ask whether the general rule established by the *Limitations Act*[251] should apply or whether a shorter period is desirable.

1. Review of limitation periods in various provinces

[201] In Manitoba,[252] Nova Scotia[253] and Saskatchewan,[254] the surviving spouse must commence the action within six months of the grant of letters probate or letters of administration. In Ontario, the surviving spouse must make an election with the Estate Registrar of Ontario within six months of the death of the deceased

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[251] S.A. 1996, c. L-15.1, as am. by S.A. 1997, c. 13 and S.A. 1998, c. 23.

[252] *The Marital Property Act*, C.C.S.M., c. M45, s. 29(1).

[253] *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 12(2).

[254] *Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, s. 30(2).

spouse.[255] If an election is not filed within that period, the surviving spouse is deemed to have elected to take under the will or upon intestacy.[256] The Ontario Law Reform Commission ("OLRC") views the existing period as too short and has recommended that the six-month period run from the grant of the letters probate or letters of administration. In New Brunswick,[257] the surviving spouse must commence the action within four months of the death of the deceased; in Newfoundland,[258] the spouse must commence the action within one year of the death of the deceased spouse.

[202] In Saskatchewan[259] and Newfoundland, the court does not have the power to extend the limitation periods. By contrast, the courts of Manitoba, New Brunswick, Nova Scotia and Ontario do have the power to extend the limitation period in restricted circumstances.[260] But even if a Manitoba or Ontario court extends the limitation period, any order will only bind the portion of the estate remaining undistributed.[261] Nova Scotia does not have a similar provision. New Brunswick empowers the court to order beneficiaries of the estate to reconvey the property to

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[255] *Family Law Act*, R.S.O. 1990, c. F-3, s. 6(10).

[256] *Ibid.* at s. 6(11).

[257] *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 4(2).

[258] *Family Law Act*, R.S.N. 1990, c. F-2, s. 21(3).

[259] *Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, s. 30(2).

[260] For example, in Manitoba, the court will extend the limitation period only if it is satisfied the surviving spouse failed to make a timely application for any of the reasons specified in section 29(2). These are listed as follows:

> (a) the surviving spouse did not know of the death of the other spouse until after the limitation period expires;
> (b) the personal representative of the estate of the deceased spouse did not serve notice on the surviving spouse in accordance with section 3;
> (c) circumstances occur that are beyond the control of the surviving spouse;
> (d) after the limitation period expired, assets are discovered that are or might be subject to equalization under this Act.

[261] *The Martial Property Act*, C.C.S.M. c. M45, s. 29(2); *Family Law Act*, R.S.O. 1990, c. F-3, s. 6(16).

the spouse where it would be just and equitable to do so.[262] It is not clear how the court will exercise this discretion.[263]

2. What should the limitation period be when the cause of action is triggered by death of one of the spouses?

[203] Under the *Limitations Act*, the general limitation period for actions is two years after discovery of a claim, or ten years after a claim arose, whichever comes first.[264] This period will apply unless another statute prescribes a specific limitation period.[265] If the general limitation period were to apply, the limitation period for the spouse's claim for division of matrimonial property would commence upon discovery of the fact of death of the deceased spouse. The question is whether the MPA should be silent as to the limitation period and thereby bring the general rule into play, or whether it should provide a shorter period. Two conflicting principles affect this issue. On the one hand, it is desirable that the general limitation period prescribed by the *Limitations Act* have wide application. On the other hand, it is desirable that claims against the estate be brought quickly to ensure timely administration of the estate. The short limitation periods chosen in other provinces promote timely administration of the estate. The need for application of the general limitation period to as many areas of the law as possible must be balanced against the possibility that the general limitation period would in some situations delay the administration of estates unnecessarily.

[204] In Recommendation 7 of RFD No. 17, we tentatively recommended that the general limitation period in the *Limitations Act* apply. The personal representative should, however, have the ability to force the surviving spouse to bring the action sooner than two years from discovery of death. To exercise this power, the personal representative would have to give two notices to the surviving spouse. First, the personal representative would have to serve a notice under section 7 of the *Administration of Estates Act* that informs the surviving spouse of his or her

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[262] *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 4(3.1).

[263] See *Palmer* v. *Palmer Estate* (1986), 4 R.F.L. (3d) 436 (N.B.Q.B.), which was decided before the introduction of section 4(3.1) and *Payne* v. *Payne Estate*, [1997] N.B.J. No. 66 (Q.B.), online: QL (NBJ), which was decided after the introduction of the section.

[264] *Limitations Act*, S.A. 1996, c. L-15.1 as am., s. 3(1).

[265] *Ibid.*, s. 2(2)(b).

rights under the MPA. Then the personal representative would have to serve a notice of contestation under section 42 of the *Administration of Estates Act*[266] requiring the spouse to commence the action under the MPA. The notice of contestation could NOT be served until six months after service of the notice under section 7 of the *Administration of Estates Act*. Failure to commence the action under the MPA within 60 days of service of the notice of contestation would forever bar the surviving spouse from commencing an action under the MPA. These changes could be brought about by amendments to section 42 of the *Administration of Estates Act*. In result, the limitation period could be as short as six months plus 60 days from the death of the deceased spouse and as long as two years from when the surviving spouse learned of the death of the deceased spouse.

[205] This tentative recommendation met with mixed reviews. Six commentators supported the recommendation and five commentators preferred the existing law. Certain commentators who supported the recommendation suggested that the period between the notice under section 7 of the *Administration of Estates Act* and the notice under section 42 of that Act be reduced. Those who opposed the recommendation emphasized the need for certainty and simplicity in the administration of estates. In the opinion of one commentator, the notice of contestation will not provide sufficient certainty and would be an invitation to litigate. Furthermore, it was argued that running the limitation period from the date of probate is reasonable because any estate that is faced with a matrimonial

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[266] Section 42 of the *Administration of Estates Act*, R.S.A. 1980, c. A-1 reads as follows:

> 42(1) When a claim is made against the estate of a deceased person or if the legal representative of an estate has notice of a claim, he may serve the claimant with notice in writing referring to this section and stating that he contests the claim in whole or in part and, if in part, stating what part.
>
> (2) Within 60 days after the receipt of a notice of contestation under subsection (1) or within 3 months thereafter if the judge on application on motion so allows, the claimant, may, on filing with the clerk a statement of his claim verified by affidavit and a copy of the notice of contestation, apply to a judge on motion for an order allowing his claim and determining the amount of it and the judge, after hearing the parties and their witnesses, shall make whatever order on the application that he considers just.
>
> (3) Not less than 10 days' notice of the application shall be given to the legal representative.
>
> (4) If the claimant does not make an application under subsection (2) within the time limited by that subsection, his claim is forever barred.
>
> (5) Instead of proceeding as provided by this section, the judge may on the application of the legal representative or the claimant direct an issue to be tried on any terms and conditions the judge considers just.
>
> (6) This section applies to a claim not presently payable and for which, for that reason, an action for the recovery of it could not be brought, but if such a claim is established under this section, no proceedings shall be taken to enforce payment of it without permission of a judge.

property claim should be probated.[267] Another commentator noted that problems could arise if the personal representative could distribute the estate before expiry of the limitation period. Even if the surviving spouse could look to the beneficiaries to pursue the matrimonial property claim, this is a more difficult situation than pursuing an estate that has not been distributed.

[206] These comments have caused us to reconsider our tentative recommendation. Our concern is that tentative Recommendations No. 7 and 22 create unnecessary complexity in the administration of estates for the sole purpose of having wide application of the general limitation period established in the *Limitations Act*. We are now of the view that priority should be given to the need for certainty and speed in the administration of estates. A shorter limitation period created by the MPA would be preferable. We recommend retention of the existing limitation period. A surviving spouse may not commence a matrimonial property action later than six months after the date of issue of a grant of probate or administration of the estate of the deceased spouse.

[207] The effect of such a limitation period is that the personal representative must quickly take steps to obtain a grant of probate or administration. We do not think that this is unreasonable given a potential matrimonial property claim, nor that it will be costly given the recent changes in probate fees.[268] While we recognize that it is increasingly common for estates to be administered without the need of probate, we are also told that this practice is most common in situations in which the surviving spouse is the sole beneficiary and executor of the estate and the recipient of any assets that pass outside the estate. These situations will not involve matrimonial property claims and, therefore, will be unaffected by this limitation period. We also see benefit in having similar limitation periods under the MPA and the *Family Relief Act*.

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[267] In the experience of this commentator, probate is omitted only when the assets are all owned jointly with the deceased and his or her spouse, or all third parties provide releases.

[268] See *Government Fees and Charges Review Act*, S.A. 1999, c. G-6.5, as amended by A.R. 43/2000. As of February 25, 2000, the court fees that are charged for grants of probate or letters of administration range from a low of $25 to a high of $400. No matter what the size of the estate, the fee cannot exceed $400.

RECOMMENDATION No. 7
A matrimonial property action may not be commenced more than six months after the date of issue of a grant of probate or administration of the estate of the deceased spouse.

E. What property will be brought into account?

1. Introduction

[208] On marriage breakdown, "all the property owned by both spouses and by each of them"[269] as of the valuation date is available for distribution, subject of course to any claim for exemptions. On division upon death, judicial interpretation has restricted this general rule by excluding from distribution property that passes to the surviving spouse by right of survivorship.[270] In this part, we examine whether property that passes to the surviving spouse on death by right of survivorship or beneficiary designation should be taken into account in determining the matrimonial property entitlement of the surviving spouse. Such property includes assets held in joint tenancy by the spouses, insurance on the life of the deceased spouse that is payable to the surviving spouse, and registered retirement savings plans, registered retirement income funds, annuities, and pensions that are payable to the surviving spouse on the death of the other spouse. We also examine whether assets that accrue to the estate of the deceased spouse by reason of the death should be available for distribution.

[209] We leave for later the discussion of treatment of debts that arise by reason of death and the discussion of assets that pass to a third party outside the estate.

2. Law in other provinces

[210] The various provinces approach these issues differently. In Manitoba, assets that pass to the surviving spouse outside the estate are excluded for the purpose of an equalization of assets[271] in an effort to maximize the share of the surviving spouse in an after-death marital property accounting situation. This position reflects the province's concern that "elderly women, who already form a

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[269] MPA, R.S.A. 1980, c. M-9, s. 7(1).

[270] *Dunn Estate* v. *Dunn*, *supra* note 105. See earlier discussion of this case in Chapter 3 beginning at para. 78.

[271] *The Marital Property Act*, C.C.S.M., c. M45, s. 37.

disproportionate portion of Canada's poor, would be further harmed by the proposed after-death marital property equalization regime."[272] However, the proceeds of a life insurance policy payable to the estate and any other payment to the estate by reason of the death of the deceased spouse are treated as an asset of the deceased spouse for the purpose of the accounting if the spouses were cohabiting with each other on the date of death.[273]

[211] In contrast, matrimonial property is defined in Saskatchewan as all property owned by one or both of the spouses at the time the application is made pursuant to the Act. Where the action is commenced after the death of the deceased spouse, all property owned at that time by the surviving spouse[274] or the estate is taken into account. This means that the matrimonial property of the surviving spouse will include survivor benefits under a pension,[275] assets that pass by right of survivorship,[276] and registered retirement savings plans[277] that are paid by reason of the death of the deceased spouse. The one exception is life insurance proceeds, which are exempt from sharing under the Saskatchewan legislation.[278]

[212] Ontario finds itself somewhere between these two positions because of the valuation date used in that province. If death is the event that triggers division of assets, the valuation date in Ontario is the "date before the date on which one of

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[272] Letter of March 29, 1996 from Joan MacPhail, Q.C., Director of the Family Law Branch, Manitoba Justice.

[273] *The Marital Property Act*, C.C.S.M. c, M45, ss. 35(1)(e) and (f).

[274] *Edward* v. *Edward Estate and Skolrood*, *supra* note 63*; Olesko* v. *Olesko Estate and Public Trustee for Saskatchewan* (1990), 28 R.F.L. (3d) 459 (Sask. Q.B.).

[275] See for example *Edwards* v. *Edwards Estate and Skolrood*, *ibid*., where the capitalized value of the veteran's pension payable to his wife as survivor was considered matrimonial property of the wife.

[276] *Olesko* v. *Olesko Estate and Public Trustee for Saskatchewan*, *supra* note 274 where jointly held bank accounts and RRSPs that passed to the surviving spouse were treated as the property of the surviving spouse for the purpose of the MPA. See also *Edward* v. *Edward Estate and Skolrood, ibid*.

[277] *Olesko* v. *Olesko Estate and Public Trustee for Saskatchewan*, *ibid*.

[278] *Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, s. 23(3)(b) as interpreted in *Ferguson* v. *Ferguson Estate* (1984), 42 R.F.L. (2d) 305 (Sask. Unif. Fam. Ct.) and *Harry* v. *Harry Estate*, [1988] 4 W.W.R. 46 (Sask. Surr. Ct.).

the spouses dies leaving the other spouse surviving."[279] The result is that each spouse must claim the net family property that they owned on this date. This is so even if the property will pass by way of survivorship to another on death. For example, joint property owned by the spouses would still pass by right of survivorship to the surviving spouse. Nevertheless, one-half of the value of such property is included in the net family property of each spouse and the surviving spouse does not have to account for the property that passes to him or her by right of survivorship.[280] Moreover, any assets or liabilities that come into existence after the valuation date are not taken into account when determining the net family property.[281] In result, net family property does NOT include the following:

- the value of a death benefit payable under a pension plan,
- the value of survivor's benefits payable under a pension plan,
- a deduction for funeral expenses and the cost of administering the estate (Income tax liabilities are taken into account because they were in existence on the valuation date),[282] and
- life insurance proceeds payable to the surviving spouse or to the estate of the deceased spouse upon the death of the deceased spouse.

[213] Although insurance proceeds and death benefits paid under pension plans do not constitute net family property, these moneys are, in certain situations, credited against the equalization entitlement of the surviving spouse. Subsection 6(6) of the *Family Law Act*[283] provides that if a surviving spouse is a beneficiary of insurance on the life of the deceased spouse, payment under the policy must be credited against the equalization entitlement of the surviving spouse. Both an individual

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[279] *Family Law Act*, R.S.O. 1990, c. F-3, s. 4(1).

[280] Ontario Report, *supra* note 133 at 106.

[281] *Ibid*.

[282] All of the cases, except one, do not deduct funeral expenses. As to the majority position see *Bobyk* v. *Bobyk Estate*, *supra* note 136 and *Patton* v. *Roach Estate (Litigation Administrator of)*, [1997] O.J. No. 4382, online: QL (OJ). The one exception is *Stone* v. *Stone*, [1999] O.J. No. 3502, online: QL (OJ) in which at para. 72 the court held as follows: "Although this account was not, strictly speaking, a liability on the valuation date . . . it is in the truest sense the 'ultimate liability' of the estate and so attaches to the estate for the purposes of arriving at its net value... It seems to me that fairness requires that this certain expense should be included; It [sic] is the incidental expense of the triggering event itself and I would not have thought that any spouse would expect the value of the net family property of a deceased spouse not to be net of the cost of the funeral."

[283] R.S.O. 1990, c. F-3.

policy owned by the deceased spouse and a group policy covering the deceased spouse fall within this rule. The subsection demands a similar credit for a lump sum benefit paid under a pension or similar plan on the death of the deceased spouse. This rule does not apply where the deceased spouse has, in writing, declared that the surviving spouse shall be entitled to receive both the equalization entitlement under the Act and the life insurance benefits or lump sum payment under the pension plan.

[214] If the surviving spouse elects to take the equalization entitlement, and the insurance proceeds or the lump sum payment exceeds the equalization entitlement, subsection 6(7) empowers the personal representative to recover the excess amount in the absence of any declaration stating otherwise.[284]

[215] Subsections 6(6) and (7) apply to all actions commenced by the surviving spouse after the death of the deceased spouse. This is so even if the couple separated before the death. The only consequence of separation before death is that the valuation date is the date of separation. Section 6 still applies to the division of net family property even though the valuation date is the date of separation.[285]

3. Analysis

[216] Given this diverse treatment of assets that pass to the surviving spouse or the estate on death, we approach these two issues from first principles.

[217] Before starting this analysis we make one observation about registered retirement savings plans, registered retirement income plans and annuities. Section 47 of the *Trustee Act*[286] allows an individual to designate a person to receive the benefit under such plans by way of beneficiary designation or by will. It is unclear

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[284] *Family Law Act*, R.S.O. 1990, c. F-3, s. 6(7). Subsection 6(8)(b) of the *Family Law Act*, 1986, S.O. 1986, c. 4 provided that the spouse was deemed to disclaim the right to receive life insurance proceeds or death benefits under a pension plan payable upon the death of the deceased spouse. On July 10, 1986, this section was repealed by S.O. 1986, c. 35, s. 2(2) because it caused delay in the payment of insurance proceeds: LSUC, Death of a Spouse, 1987, Glen Stephens, Tax Topics at D-15. The amending Act directed that the insurance proceeds or death benefit under the insurance plan be credited against the equalization entitlement and allowed the personal representative to recover any excess.

[285] *Panangaden* v. *Panangaden Estate* (1991), 42 E.T.R. 87 (Ont. Gen. Div.).

[286] R.S.A. 1980, c. T-10.

in Alberta whether the existence of a beneficiary designation means that immediately upon death of the deceased, the beneficiary becomes the owner of the plan or whether it remains part of the estate.[287] Given the broader policy implications of this issue, we will not resolve it in this project. For now, it is sufficient to say that for the purposes of matrimonial property division, a surviving spouse must treat such property as his or her property where the benefit of the plan passed to the surviving spouse by reason of a beneficiary designation made in an instrument other than a will.[288]

a. Assets that pass to the surviving spouse on death

i. Property held in joint tenancy, pensions, annuities, RRSPs, RRIFs

[218] Let us first look at joint property and pensions, annuities and similar plans and then look at life insurance.[289] Joint property, pensions, annuities, registered retirement savings plans, and registered retirement income funds usually represent assets of significant value and, therefore, must be included in the accounting if the principle of equal sharing of property acquired during marriage is to be served. That principle is defeated if the surviving spouse receives all the property that passes by to the surviving spouse outside of the estate plus one-half of the remaining assets of the spouses that are not exempt from sharing. This amounts to an unprincipled infringement of testamentary capacity because it effectively deprives the surviving spouse of bequeathing his or her share of that matrimonial property.[290] The fact of death should not be an invitation to exclude what would

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[287] For a detailed discussion of this issue, see Chapter 7 at para. 390.

[288] If the benefit of the plan becomes property of the designated beneficiary immediately upon death, then this is property of the surviving spouse as of the valuation date and will be treated accordingly. If the benefit of the plan remains property of the estate, the surviving spouse must still treat the benefit as his or her property for the purposes of the MPA. This effectively creates an exception to the principle discussed in Chapter 5 that the surviving spouse is entitled to his or her matrimonial property entitlement plus any gift that would pass under the will after satisfaction of the matrimonial property order.

[289] This discussion distinguishes between life insurance proceeds and annuities even though s. 240.1 of the *Insurance Act*, R.S.A. 1980, c. I-5 defines life insurance to include annuities.

[290] *Dunn Estate* v. *Dunn*, *supra* note 105 illustrates the unfairness that arises when property that passes to the surviving spouse outside the estate is excluded from the matrimonial property pool. That case involved a second marriage for both parties. The husband commenced the action but died before the matter came to trial, and his estate opted to continue the action. The only significant asset was a jointly owned home which had a life insurance policy on the lives of both spouses to cover the mortgage. At the time of the death, the home was worth about $108,000 and the balance on the mortgage was about $70,000. The court held that the life insurance proceeds were exempt property

otherwise have been property available for distribution. It also confuses the principles that are reflected in the MPA and the *Family Relief Act*. Since both will be available to the surviving spouse there is no need to design the MPA to serve the purposes of the *Family Relief Act*.

[219] Let us examine the consequence of this position in two different situations. Assume the couple is living together at the time of death and all assets owned by either spouse were acquired over the course of the marriage. The home and bank account were owned in joint tenancy and the surviving spouse was named as the beneficiary of a registered retirement savings plan and now receives a survivor's pension benefit. The estate consists of an apartment building. The surviving spouse has no other assets. After death of the spouse, the surviving spouse brings an action under the MPA. The purpose in bringing the home, bank account, registered retirement savings plan and survivor's benefit into the matrimonial property accounting is to serve the principle of equal sharing of property acquired over the course of the marriage. If the value of these assets is equal to that of the apartment building, the surviving spouse should be entitled to nothing further under the MPA. If the value of these assets is less than that of the apartment building, the surviving spouse is entitled to money sufficient to bring his or her share to one-half of the value of all the assets. If the value of these assets is greater than the value of the apartment building, the surviving spouse is entitled to retain those assets but will not receive anything further. Of course, in any of these situations, the surviving spouse can then seek family relief if the assets owned by the surviving spouse or received under the MPA or both are insufficient to meet his or her needs.

[220] Now assume that the deceased spouse commenced the action but died before the matter came to trial. By oversight, the deceased spouse failed to sever the joint tenancies or change the beneficiary designation under the registered retirement

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under the Act and property that passed by way of survivorship on the death of the spouse was no longer matrimonial property. As a result of this decision, the surviving spouse received the home, which was the only asset of value, and this effectively made the estate's right to continue the action worthless. Ignoring for the moment the issue of insurance, the husband was prevented from giving his half of the equity in the matrimonial property (i.e one-half of $38,000) to whoever he may have wanted to benefit. The ordinary rules of matrimonial property division should have applied and any further need of the surviving spouse should have been dealt with under family relief.

savings plan and the pension.[291] In this case, the surviving spouse should have to list as his or her assets all property that passes by right of survivorship or beneficiary designation. This will mean the estate can share in the value of the home, bank account, registered retirement savings plan, and the survivor's pension benefit. Since the pension is divisible if the matter came to trial before the death, it should be divisible where the matter comes to trial after death. If this does not happen, the surviving spouse obtains a windfall only because of the untimely death of the deceased spouse. Family relief is still available to a surviving spouse who can show that they have insufficient assets for their maintenance and support.

ii. Life insurance

[221] Many matrimonial property statutes, including that of Alberta, exempt life insurance proceeds from division.[292] In the event of marriage breakdown, the insurance proceeds will have been paid upon the death of a third party. This is seen as a gift from that person and, therefore, is treated as an exempt asset. In the event of division after death, the insurance proceeds will have been paid to the surviving spouse under a policy insuring the life of the deceased spouse. In this part, we examine whether life insurance proceeds payable to the surviving spouse upon the death of the deceased spouse should or should not be exempt property. We assume that the premiums for the policy were paid by the spouses themselves or by an employer of the spouse as part of a benefit package.[293]

[222] Before proceeding with the analysis, it should be emphasized that any recommendations made in respect of reform of the MPA will not affect distribution of life insurance proceeds under the *Insurance Act*. The insurer will still pay the proceeds to the designated beneficiary. This project is only concerned with how such proceeds should be dealt within a matrimonial property action.

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[291] For some pensions, legislation dictates that the survivor's benefit will go to the surviving spouse and it will not be possible to change the beneficiary designation. For other pensions, a change of the designated beneficiary is possible.

[292] Section 7(2)(e) exempts for distribution the value of "the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses." This does not however exempt from distribution upon marriage breakdown the cash surrender value of a life insurance policy.

[293] In situations in which a third party has gratuitously paid the insurance premiums, the payment of the insurance proceeds becomes a gift to the surviving spouse and would be exempt from distribution.

[223] The question is whether the proceeds payable to the surviving spouse under a policy that insures the life of the deceased spouse should be an exempt asset or not. The exemption for insurance proceeds is unique given that all of the other exemptions created by section 7(2) relate to property that was not acquired by the efforts of both spouses.[294] Proceeds of an insurance policy is the only exempt asset that is acquired over the course of the marriage by the efforts of the spouses. Nothing we have read explains the justification for this deviation from the general principle of equal sharing in the context of death. We can only speculate. Perhaps the exemption reflects the view that life insurance proceeds must be exempt because if they are brought into the accounting the estate may share in these proceeds. Such a result would conflict with the concept that life insurance proceeds payable to the surviving spouse do not form part of the estate of the insured and are not subject to the claims of the creditors of the insured.[295] Perhaps the exemption reflects the view that life insurance provides for the support of the surviving spouse and on death this is of more importance than serving the principle of equal sharing. Perhaps the exemption reflects the view that life insurance proceeds, more than any other asset, contain an element of windfall that cannot be attributed to the efforts of the spouses.

[224] In our view, a life insurance policy is property acquired over the course of the marriage. Therefore, life insurance proceeds paid to the surviving spouse pursuant of a policy owned by either spouse should be treated as non-exempt property of the surviving spouse.[296] Insurance principles designed to protect the surviving spouse from creditors of the deceased spouse are inapplicable when it comes to determining the matrimonial property rights as between the spouses. If the surviving spouse wishes to seek division of matrimonial property upon the death of the spouse, he or she should have to give credit for these proceeds. To do otherwise is to severely distort the principle of equal division of matrimonial property in favour of the surviving spouse.

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[294] This includes assets owned before the marriage, inheritances, gifts, and tort damages.

[295] *Insurance Act*, R.S.A. 1980, c. I-5. s. 265.

[296] The OLRC takes the same position in the Ontario Report, *supra* note 133 at 110-11.

[225] Nor do we think that including the life insurance proceeds in the matrimonial property accounting will mean that the needs of the surviving spouse for adequate support will be unmet. Including life insurance proceeds in the accounting will not deprive the surviving spouse of the benefit of the insurance policy where the action is commenced after death. Where the surviving spouse has more than one-half of the non-exempt property after insurance proceeds and other property of the surviving spouse is accounted for, then an application for a matrimonial property order commenced after death should be dismissed.[297] The estate will not benefit from an action brought after death of the deceased spouse.

[226] But what should be the result where the deceased spouse brings an action and dies before the matter comes to trial?[298] Should the life insurance proceeds be exempt from distribution in this situation? By treating the proceeds as non-exempt matrimonial property, all of the property acquired over the course of the marriage will be divisible. This gives the fullest effect to the principle of equal sharing. At the same time, it creates the potential for the estate to share in these insurance moneys, and this conflicts with the general notion that life insurance proceeds should be available for the support of the surviving spouse and should not be available to creditors of the deceased spouse.[299]

[227] We find this acceptable because the result is a logical consequence of the decision to commence the action upon marriage breakdown and the classification of life insurance proceeds as an asset acquired over the course of the marriage. Moreover, the assumptions that apply when a marriage ends in death or marriage breakdown are different. In a marriage that ends upon death, and not marriage breakdown, one can assume the deceased spouse wants the surviving spouse to have the benefit of the life insurance. One cannot make the same assumption in the case of marriage breakdown. Any agreement reached by the spouses after marriage

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[297] See earlier discussion in Chapter 2 at paras. 58-62.

[298] This is the fact situation that arose in *Dunn Estate* v. *Dunn*, *supra* note 105. This situation should not arise that often because spouses who have separated and commenced an action under the Act will usually change the designated beneficiary of the insurance policy. Failure to change the beneficiary designation is more often an oversight than a conscious decision to benefit the surviving spouse.

[299] Section 265 of the *Insurance Act*, R.S.A. 1980, c. I-5 provides that when a beneficiary is designated, the insurance money is not part of the estate of the insured and is not subject to claims of creditors of the insured.

breakdown as to the treatment of life insurance proceeds can be considered by the court under section 8, but life insurance proceeds should not be exempt just to ensure that in this situation the estate cannot share in the life insurance proceeds. Furthermore, the *Family Relief Act* will still be available in those situations where the surviving spouse is in need of support after division of the matrimonial property.

[228] Recommendation 8 of the RFD No. 17 received broad support among the commentators and, therefore, we affirm it as our final recommendation.

RECOMMENDATION No. 8

For the purposes of an accounting on death, the full value of property acquired by the surviving spouse on the death of the predeceasing spouse by virtue of:

(i) a right of survivorship;

(ii) 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;

(iii) a retirement savings plan, retirement income fund or annuity payable to the surviving spouse on the death of the other spouse;

(iv) proceeds that are payable to the surviving spouse under a policy of life insurance on the life of the deceased spouse that is owned by either spouse; and

(v) proceeds that are payable to the surviving spouse under a policy of life insurance that was taken out on the lives of a group of which the deceased spouse was a member;

should be included as property of the surviving spouse.

b. Assets that increase the value of the estate

[229] There will also be assets that are paid to the estate by reason of death. These should also be taken into account in a division of matrimonial property on death. The most common example will be proceeds of a life insurance policy that is payable to the estate upon the death of the deceased spouse. However, any other asset that increases the value of the estate should also be taken into account, such as payments under pension plans or annuities. This will serve the principle of equal

division of matrimonial property and prevent easy circumvention of the claim of the surviving spouse by use of life insurance polices payable to the estate.[300] This position also received strong support among the commentators.

RECOMMENDATION No. 9
For the purposes of an accounting on death, the following property should be included as property of the deceased spouse:

(i) proceeds of a policy of life insurance on the life of the deceased spouse and owned by either spouse which proceeds are payable to the estate;
(ii) proceeds that are payable to the estate under a policy of life insurance that was taken out on the lives of a group of which the deceased spouse was a member; and
(iii) any other sum of money payable to the estate by reason of the death of the deceased spouse.

F. What property should be exempt from distribution?

[230] In order to bring about equal sharing of property acquired over the course of marriage by the effort of both spouses, the exemptions that apply on marriage breakdown must apply on death. Of course, this general rule will be modified as suggested above in respect of life insurance proceeds and assets that pass to the surviving spouse on death of the deceased spouse. Both the surviving spouse and the estate would be entitled to any exemption that the respective spouse is entitled to receive. Furthermore, any life insurance proceeds paid to either spouse upon the death of a third party would be exempt from distribution.

[231] Section 7(2) of the MPA requires two modifications to ensure that the property listed in Recommendation 8 is not exempt from distribution under the MPA. First, section 7(2)(e) must be reworded to ensure that life insurance proceeds that are paid to the surviving spouse or the estate upon the death of the deceased spouse are not exempt from distribution. The exemption should be for "proceeds of insurance **paid during the joint lives of the spouses** where the policy is not insurance in respect of property". Second, it must be clear that the

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[300] OLRC, *Report on Family Law*, Part IV, 1974 at 95-6.

other property listed in Recommendation 8 that passes to the surviving spouse on death of the deceased spouse is not exempt from distribution. The easiest way to do this is to limit section 7(2)(b) to "property acquired by a spouse by inheritance **from a third party**". This would preclude any argument that assets listed in Recommendation 8 are property of the surviving spouse acquired by inheritance, and therefore exempt from distribution under the existing section 7(2)(b).[301]

[232] The proposed amendment to section 7(2)(b) would not, however, make assets that pass to the surviving spouse under the will of the deceased spouse or upon intestacy of the deceased spouse available for distribution. Other recommendations made in Chapter 6 will make it clear that the court must not consider what the surviving spouse might receive under the will or upon intestacy of the deceased spouse when dividing the matrimonial property. Indeed, it is impossible to know what the surviving spouse will receive under the will or upon intestacy until the matrimonial property entitlement is determined.[302]

RECOMMENDATION No. 10

(a) For the purposes of an accounting on death, the following property will be exempt from distribution:

(i) property acquired by a spouse by gift from a third party,

(ii) property acquired by a spouse by inheritance from a third party,

(iii) property acquired by a spouse before marriage,

(iv) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or

(v) the proceeds of an insurance policy paid during the joint lives of the spouses where the policy is not

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[301] In our opinion, inheritance would include only those assets that pass to beneficiaries by virtue of will or upon intestacy. Yet, a broader, less legalistic interpretation, might define inheritance as including anything that passes to another on the death of a deceased spouse.

[302] One commentator asked us whether property acquired by inheritance as between the spouses would be exempt under our proposed scheme. Our response was this issue should not arise. At the stage when the matrimonial property entitlement, if any, is being quantified, there will have been no distribution of the estate. The main reason for this is that what the spouse actually inherits depends upon the nature of the assets and debts, the terms of the matrimonial property order, and the terms of the will. Therefore, the matrimonial property order must be quantified first, without consideration of what the surviving spouse will inherit under the terms of the will or upon intestacy.

insurance in respect of property, unless the proceeds are compensation for a loss to both spouses.

(b) The exemption will be for the market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later.

G. How should debts and liabilities be dealt with?

[233] In the division of matrimonial property, Alberta courts have developed certain conventions with respect to the treatment of debts and liabilities incurred by the spouses.[303] These conventions bring about a fair division of matrimonial property upon marriage breakdown and upon death and should continue. The only question that arises in the context of division of matrimonial property upon death is the treatment of funeral and testamentary expenses. In this part, we analyse how funeral and testamentary expenses[304] should be treated in a division of matrimonial property upon death.

[234] In most provinces, the choice of valuation date determines whether funeral costs, testamentary expenses, and income tax triggered by death will be treated as debts of the deceased spouse. In Saskatchewan, the funeral and testamentary expenses are treated like any other debt in existence on the valuation date and are deducted from the matrimonial property pool.[305] In Ontario, the valuation date is the day before death and therefore funeral and testamentary expenses are not taken into account when determining the net family property of the deceased spouse. Income tax triggered by death is treated, however, as a debt in existence as of the valuation date.[306] In Alberta, the funeral costs, testamentary expenses, and income tax triggered by death are taken into account if the valuation date is the date of trial, but not if the valuation date is the date of separation, although the value of certain assets may be reduced by reason of a tax liability.[307] The court will usually use the date of trial as the valuation date. In Manitoba, funeral and testamentary

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[303] See Chapter 3 at para. 92.

[304] See definition of this term in footnote 49.

[305] See *Edward* v. *Edward Estate, supra* note 63.

[306] See *Bobyk* v. *Bobyk Estate*, *supra* note 136.

[307] *Zubiss* v. Moulson, *supra* note 71 and *Baker* v. *Baker Estate*, *supra* note 80.

expenses are not included in the calculation of an equalization payment even though such debts are in existence as of the valuation date.[308]

[235] The object of a deferred sharing regime is to give the surviving spouse his or her fair share of the property acquired over the course of the marriage. To accomplish this, taxes must be considered as well as the cost of disposing of any assets that becomes necessary to pay the claim of the surviving spouse. Administration of an estate is necessary to facilitate disposal of the assets and, therefore, in the absence of extreme circumstances,[309] should be taken into account in determining the net value of matrimonial property that is available for sharing. The funeral expenses are just like any other debt incurred by the deceased spouse during his or her lifetime and should also be taken into account.

[236] In our opinion, the existing treatment of debts and liabilities under the MPA is adequate. It should be clear, however, that the courts must treat funeral and testamentary expenses as debts of the deceased spouse that come into existence after the death of the spouse. This recommendation received strong support from the commentators.

RECOMMENDATION No. 11
The existing treatment of debts and liabilities in the context of division of matrimonial property on death is satisfactory. Where the valuation date is the date of trial, the debts and liabilities of the deceased spouse will include funeral and testamentary expenses.

H. What will be the valuation date?

[237] Choice of valuation date is extremely important in bringing about a fair result in division of matrimonial property upon death. Four possible choices exist: (1) day before the date of death, (2) date of death, (3) day afer date of death, and (4) date of trial, with discretion to vary valuation date when it is appropriate to do

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[308] *The Marital Property Act*, C.C.S.M., M45, s. 36.

[309] *Baker* v. *Baker Estate*, *supra* note 80 is an example of extreme circumstances. In that case the executor and her sister assaulted their mother, the surviving spouse, shortly after the death of the father, the deceased spouse.

so. Among the commentators, the majority preferred the fourth choice, which is the existing law, while a small minority preferred the date of death.

[238] The Ontario experience shows that making the valuation date the day before the date of death creates serious problems that should be avoided.[310] The date of death is also unworkable as a valuation date. If the spouse dies at noon on a given date, does the court value the property owned in the morning, including the spouse's interest in assets held in joint tenancy, or does it value only the property owned in the afternoon, which would not include property that passed by right of survivorship. To avoid such legal niceties, the day after the date of death could be chosen as the valuation date. But this then gives rise to problems when the value of assets increases or decreases between that date and the date of trial. It also fails to recognize that the financial arrangements of a couple will be interdependent until the point of matrimonial property division. The existing Alberta law is preferable; as a general rule, the valuation date should be the date of trial. The court should continue to have a limited discretion to use the date of separation as the valuation date where it would not be just and equitable to divide property acquired after separation equally.

RECOMMENDATION No. 12
The jurisprudence governing choice of valuation date is adequate.

I. Should the exercise of judicial discretion be limited?

[239] Except for Manitoba, all of the provinces that have a deferred sharing regime that operates upon death give the court the discretion to vary from the norm of equal sharing in division of matrimonial property upon death. Manitoba has removed this discretion in the case of division upon death and the court must divide all divisible property equally.[311]

[240] The Manitoba position reflects the recommendation of the MLRC made in 1984. At that time, the MLRC considered whether the court should also have the

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[310] Ontario Report, *supra* note 133 at 106-7.

[311] *The Marital Property Act*, C.C.S.M., c. M45, s. 40.

discretion to vary from the norm of equal sharing of marital property on death. It noted that Saskatchewan, New Brunswick, Newfoundland and Nova Scotia all retained this discretion in the context of division of property on death.[312] For the following reasons, the MLRC recommended removal of this discretion.[313] First, since courts are reluctant to deviate from equal sharing, it would not lead to a radical departure from the current case law. Second, the MLRC disliked how courts in the four provinces cited above were exercising their discretion. In some provinces, the courts used their discretion to restrict the surviving spouse to the assets left by will to the surviving spouse. In other cases, the courts used their discretion to give the surviving spouse more than he or she would be entitled to receive on marriage breakdown. The latter result is an unwarranted encroachment of the deceased's power of testamentary freedom. Third, in division of property on death, difficult evidentiary problems arise in proving facts that give rise to unequal division of property. Fourth, if the court had a discretion to order unequal division of marital property, the personal representative of the estate may be unwilling to settle a marital property claim without court approval. Fifth, the rule of equal division will create certainty similar to that provided by the *Dower Act*.

[241] One year after the MLRC made this recommendation, the Supreme Court of Canada gave its decision in *Donkin* v. *Bugoy*.[314] The Court held that under the Saskatchewan *Matrimonial Property Act*, the death of a spouse or content of a will is not a "relevant fact or circumstance" within 21(2)(q) or an "extraordinary circumstance" within section 22 which may be taken into account to justify unequal division. The Court concluded that the position of a personal representative in a matrimonial property action should be the same as if the spouse were alive. This case has been followed in Alberta.[315]

[242] This decision establishes the proper parameters for exercise of judicial discretion in the division of matrimonial property upon death.[316] It remedies the

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[312] Ontario did not have a deferred sharing regime that operated upon death until 1986.

[313] Manitoba Report, *supra* note 6 at 63-70.

[314] See earlier discussion of this case in Chapter 3 beginning at para. 103.

[315] *Baker* v. *Baker Estate*, *supra* note 80.

[316] See the discussion in our Report No. 57, *Section 16 of The Matrimonial Property Act* at 28-30.

diverse approach to exercise of this discretion observed by the MLRC. The other concerns of the MLRC have not materialized under the other provincial matrimonial property statutes. Therefore, we recommend that the Alberta court retain its discretion to award unequal division of matrimonial property upon death if such an award would be made during the joint lives of the parties. This recommendation received broad support among the commentators.

[243] Subject to some revision of the factors listed in section 11(3) of the MPA that is necessitated by certain Recommendations made in Chapter 6, we make the following recommendation. Discussion of the factors to be listed in section 11(3) will be postponed until Chapter 6.

RECOMMENDATION No. 13
In a division of property upon death, the court should retain its discretion to deviate from equal division where this is justified upon consideration of the factors listed in section 8 of the *Matrimonial Property Act*.

[244] As discussed in Chapter 3,[317] the presumption of equal sharing does not apply to all types of property. Section 7(3) property, which includes property acquired by a spouse by gift from another spouse, is to be distributed in a manner that a court considers just and equitable after taking the factors listed in section 8 and 11(3) into consideration. All other non-exempt property is to be distributed equally unless it would not be just and equitable to do so having regard to the same factors.

[245] In a division of matrimonial property upon death, should assets that pass to the surviving spouse by reason of right of survivorship or beneficiary designation be subject to a presumption of equal division? Or should they be seen as gifts made by one spouse to another and within the scope of section 7(3)? In our opinion, the presumption of equal division would apply under the existing law because section 7(3)(d) is designed to deal with *inter vivos* gifts given by one spouse to another and not to assets that pass by reason of death. If this is not the case, the section should be amended to reflect this position. The principle of equal division of matrimonial property is not well served if the home and bank account

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[317] Chapter 3 at para. 99.

that was held in joint tenancy is not subject to the presumption of equal sharing because on death it passed to the surviving joint tenant.

RECOMMENDATION No. 14
Property of the type listed in Recommendation 8 should be governed by section 7(4) of the *Matrimonial Property Act*.

J. Can spouses agree that the *Matrimonial Property Act* will not apply to their property on death?

[246] Most provinces,[318] including Alberta,[319] allow a couple to agree that the matrimonial property legislation will not govern some or all of their assets. Saskatchewan goes one step farther by providing that such a contract will not be binding upon the parties if it was, at the time the agreement was entered into, unconscionable or grossly unfair.[320] If the agreement is unconscionable or grossly unfair, the court distributes the property as if the agreement does not exist, but the court may take the interspousal contract into consideration and give it whatever weight it considers reasonable.[321]

[247] Sections 37 and 38 of the MPA should continue to apply to division of property upon death because it is important that spouses be at liberty to come to their own agreement in respect of their matrimonial property.[322] The only question is whether the legislation should protect those who enter into unconscionable or grossly unfair agreements. Given that each spouse must attend before a lawyer and discuss the proposed agreement, further protection against unconscionable or grossly unfair agreements is unnecessary. People who would sign such an agreement would be doing so against the advice of their lawyer. This is sufficient protection.

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[318] See *The Marital Property Act*, C.C.S.M., c. M45, s. 5 and 27(3); *Family Law Act*, R.S.O. 1990, c. F-3, ss 52 and 4(2)6; *Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, ss. 24 and 38 - 42.

[319] See discussion of ss. 37 and 38 of the MPA, R.S.A. 1980, c. M-9, which is found in Chapter 3 beginning at para. 165.

[320] *Matrimonial Property Act*, 1997, S.S. 1997, c. M-6.11, s. 24.

[321] *Ibid.*

[322] This position received strong approval from the commentators.

[248] In Chapter 7, we will examine how the proposed changes to the MPA would affect spousal agreements entered into before the changes come into force.

RECOMMENDATION No. 15
Sections 37 and 38 of the *Matrimonial Property Act* should continue to apply to the division of matrimonial property on death.

CHAPTER 5. INTERRELATION BETWEEN RIGHT TO SEEK DIVISION OF MATRIMONIAL PROPERTY AND RIGHTS THAT MAY EXIST IN OTHER AREAS OF THE LAW

A. Introduction

[249] The twentieth century has seen many innovations designed to assist the surviving spouse. These innovations include American-style dower rights, family relief, a preferred share upon intestacy, and the increasing tendency for the deceased spouse to leave by will all or most of the estate to the surviving spouse as opposed to the children of the marriage. Some of these innovations are rooted in the concept that a deceased spouse should provide for the support of the surviving spouse. Some are acknowledgments of the contribution of the surviving spouse to the marriage and accumulation of assets. Perhaps some are influenced by both notions. All of these innovations were developed during a period in which the surviving spouse was not entitled to an equal share of matrimonial property, and therefore, we must examine whether the earlier legislative innovations are still needed if our proposals are implemented. In this chapter, we examine the interaction between the right to seek division of matrimonial property on death and the rights presently available to the surviving spouse on the death of the deceased spouse.

B. Should the surviving spouse have a claim for matrimonial property division as well as a claim for family relief?

[250] A claim for matrimonial property division is different in nature from a claim for family relief. The right to share matrimonial property derives from the partnership theory of marriage. It is presumed that each spouse contributed equally and independently to the marriage and the acquisition of matrimonial property, and is, therefore, entitled to an equal share of the assets acquired during the course of marriage. In contrast, family relief reflects the view that individuals have an obligation to support their spouse and minor children even after death. Matrimonial property division may reduce the need of a surviving spouse to seek family relief, but situations will exist in which the surviving spouse is in need of maintenance and support even after receiving his or her share of matrimonial

property. Family relief should be a supplement to, but not a substitute for, division of matrimonial property upon death.

[251] Section 18 of the MPA provides that "nothing in the Act affects the right of a surviving spouse to make an application under the *Family Relief Act*."[323] All commentators who spoke to this issue approved of the policy reflected in this section. This should continue to be the law under the new proposals for division of matrimonial property upon death.

[252] Having made this recommendation, we must acknowledge that the nature of an award under the *Family Relief Act* will possibly change over time. That is inevitable as circumstances and views change. We do not wish to preclude the developing jurisprudence under that legislation. We do, however, wish to be sure that the *Family Relief Act* is not called upon to perform the function that an amended *Matrimonial Property Act* can more appropriately perform.

RECOMMENDATION No. 16
The right of the surviving spouse to seek division of matrimonial property upon the death of the deceased spouse would not affect the right to make application under the *Family Relief Act*. An application under the *Family Relief Act* may be joined with an application under the *Matrimonial Property Act*.

C. Should dower rights be in addition to a claim for matrimonial property division?

1. The existing dower rights

[253] The *Dower Act*[324] creates five main dower rights, which have been summarized as follows:[325]

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[323] Similar provisions are found in Manitoba and Saskatchewan. See *Dependants Relief Act*, C.C.S.M. c. D-37, s. 18(2) and *The Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, s. 37. While Ontario does not have a section stating that these two actions can be brought, there is nothing preventing the two actions from being brought by the surviving spouse.

[324] R.S.A. 1980, c. D-38.

[325] ALRI, *The Matrimonial Home* (Report for Discussion No. 14, 1995) at 17-18 ("Report for Discussion No. 14").

> (i) a right to prevent the disposition of the homestead by withholding consent;
> (ii) the right to damages for a wrongful disposition of the homestead;
> (iii) the right to make a claim from the assurance fund under the *Land Titles Act* when a judgment for damages is unpaid;
> (iv) the right to a life estate in the homestead on the death of the owning spouse;
> (v) the right to a life estate in [certain] personal property of the deceased.

For a detailed examination of the development and operation of the existing dower rights see Report for Discussion No. 14, *The Matrimonial Home*.

2. Proposed reform of dower rights

[254] In 1995, the Alberta Law Reform Institute issued Report for Discussion No. 14 entitled *The Matrimonial Home*. In that report, the Institute made recommendations for reform of Part 2 of the MPA and the existing law relating to dower. The key recommendations made in that report are outlined in the executive summary as follows:[326]

> In Chapter 2, we propose that both spouses be accorded an equal right of possession in the home, even without the need for a court order. We also suggest ways in which the law can be rendered more certain. At present, if one spouse seeks an order for exclusive possession, there is very little guidance in the law as to what a court should consider in granting an order. Similarly, the ancillary orders that can be made when exclusive possession is granted (regarding such matters as responsibility for the payment of current expenses, or obligations of repair) are not set out in the Act. We propose that Part 2 of the MPA be amended to provide better direction for the spouses, their counsel, and the courts as to factors to be considered in making such orders.
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> In Chapter 3, we recommend that the dower life estate should be transformed into a right of occupation governed by Part 2 of the MPA. This would mean that the home would remain available for a widowed spouse. However, unlike the current dower life estate, the right of occupancy would be (i) variable as circumstances change; and (ii) subject to orders concerning payments and repairs (as in the case of other orders granted under Part 2 of the MPA). We also propose that the current "life estate in personal property", which is intended to give a widowed spouse rights over specified household goods, be transformed into a right of exclusive possession of household goods under Part 2 of the MPA. We also recommend that matrimonial fault should not be a bar to the enjoyment of occupancy rights.
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> In Chapter 4, the rules governing the requirements for spousal consent to transfers of the home are considered. In our view, these rules provide important protections against dealings that might deprive a spouse of the occupancy rights which we propose in Chapters 2 and 3. Although the rules

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[326] *Ibid.* at 1-3.

> governing consent were originally enacted to preserve the home for the enjoyment of the dower life estate, they now also prevent the loss of occupancy rights under Part 2 of the MPA. This Report recommends that the law continue to require that dispositions of the home be accompanied by a consent signed by a non-owning spouse. We propose that a lawyer or a notary public must acknowledge that the consenting spouse has signed the consent voluntarily, with knowledge that occupancy rights in the home are being waived. The law will clearly state that a disposition of the home will be invalid if undertaken without compliance with the consent and acknowledgment formalities. If, however, the home is transferred into the hands of a good faith purchaser for value who is entitled to take the home free from all unregistered interests, the non-consenting spouse will then no longer be able to invalidate the transaction, but will be able to seek compensations against the other spouse. Unlike the current law, even the improper granting of a short-term lease may give rise to compensation.
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> In Chapter 5, we examine the rules governing contracts made between the spouses concerning these rights of occupancy. In doing so, we attempt to balance the freedom of contract accorded to married couples, as against other policy concerns, especially the importance of the provision of support for family members. This balance is struck by allowing the spouses to contract out of the rights conferred under these reforms, subject to several qualifications. First, these contracts can be varied by court order where a radical change of circumstances arises that undermines the basis of the original agreement, or where the terms of the contract are not in the best interests of dependent children of the marriage. Second, even where a contract waives the rights of a spouse to occupancy of the home on the death of the owning spouse, the surviving spouse will be entitled to remain in the home for a 90-day period. Third, we propose that the right of occupation cannot be surrendered until the spouses have separated. A contract made earlier would be unenforceable.

The other recommendations made in that report deal with the definition of matrimonial home and exemption from seizure by creditors.

3. Does entitlement to matrimonial property division on death eliminate the need for the dower life estate or similar interest?

[255] The existing dower rights are "premised on a support obligation owed by spouses to each other on the termination of a marriage by death."[327] In Report for Discussion No. 14, the Institute recommended that this obligation continue in some form. Besides a life estate in the homestead, the Institute examined six other options that would serve that policy. One of those options was to abolish dower and amend the MPA so as to provide for the division of matrimonial property upon death. This option was not chosen as it would have a greater impact than was

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[327] *Ibid.* at 46.

necessary to preserve the support obligation. In this project, we must examine whether the existing dower life estate or the proposed right of occupancy under Part 2 of the MPA should coexist with matrimonial property rights upon death or be subsumed by such rights. Report for Discussion No. 14 does not preclude such a detailed examination because we made no decision on this particular issue in that report.

[256] There are two conflicting points of view on this issue. According to the first view,[328] retention of a dower life estate or similar interest is unnecessary because the matrimonial property that would be allocated to the surviving spouse would usually provide the main basis for support. Where this property proves insufficient for adequate support of the surviving spouse, applications under the *Family Relief Act* would remain available. According to the second view,[329] division of matrimonial property would not replace a dower life estate or similar interest because it would not ordinarily preserve the family home. Admittedly, where the couple has acquired substantial assets over the course of the marriage, the transfer of the house to the surviving spouse might form part of his or her share of matrimonial property. Yet this will not always be the case, and many situations will arise in which matrimonial property division will not preserve the survivor's right to remain in possession of the home. These situations are described as follows:[330]

> Where, however, there is no balancing claim in favour of the surviving spouse or where it is not of a sufficient amount to permit the transfer of the home, the fundamental aim of the homestead laws would be thwarted. This is particularly so in the case of estates where the home is the only substantial asset and where it is registered in the name of the predeceasing spouse. Similarly, the entitlement to the life estate in the homestead may play a key role where the home is pre-acquired property or an inheritance such that its value would not be shareable in an allocation of property on death.

[257] The stumbling block is the fact that in some situations the surviving spouse will require both a dower life estate (or similar interest) and a claim under the MPA, while in other situations the surviving spouse will require only the latter.

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[328] *Ibid.* at 57.

[329] Manitoba Report, *supra* note 6 at 166-67.

[330] *Ibid.* at 166.

This is not, in our opinion, an insurmountable problem. Matrimonial property division upon death should be in addition to the reformed dower rights as proposed in Report for Discussion No. 14. The dower life estate should be replaced with a right to occupation under Part 2 of the MPA. The right to occupation would exist until varied by court order, and a court would grant such an order only when it "is convinced that the benefits of the home to the widowed spouse are substantially outweighed by the benefits that would accrue to those making a claim."[331] In determining this issue, the court can take into account other assets available for the support of the surviving spouse, including the matrimonial property entitlement of the surviving spouse. It is the flexibility created by the proposals in Report for Discussion No. 14 that would ensure that right to occupation of the matrimonial home would remain with the surviving spouse unless he or she did not need it.

[258] This, of course, assumes that the recommendations in Report for Discussion No. 14 will be implemented. What happens if the law remains as it is? Should the dower life estate be in addition to the right to seek division of matrimonial property upon death? Or should the dower life estate be eliminated because the surviving spouse will be entitled to seek matrimonial property division and family relief? We recognize that family relief and dower rights serve the same policy, namely, that the deceased spouse is obliged to support the surviving spouse upon the termination of the marriage by death. Nevertheless, we are reluctant to replace the absolute entitlement of the dower life estate, which is certain and automatic, with the right to seek family relief, which is uncertain and costly. In our opinion, the dower life estate should coexist with the right to seek division of matrimonial property, but the dower life estate should be treated as property of the surviving spouse for the purposes of the matrimonial property action.

[259] Initially, we had thought that a court should consider the fact that the dower life estate was property of the surviving spouse when exercising its discretion under subsections 7(3) and 7(4) of the MPA. Including such a factor would give the court the ability to consider the needs of the surviving spouse. If those needs were large, the court could award the surviving spouse more than half of the matrimonial property. If those needs were small, the court would have no reason to deviate from equal sharing. However, we have decided against this position

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[331] Report for Discussion No. 14, *supra* note 325, Recommendation 7 at 60.

because it confuses the principles of matrimonial property with the principles that underlie the *Family Relief Act*. The fact that the surviving spouse receives the dower life estate should be no reason to deviate from equal division of matrimonial property. The question of need of the surviving spouse should be addressed under the *Family Relief Act*.

[260] Given the strong support received from commentators that the dower life estate be replaced with a right of possession under Part 2 of the MPA, we adopt this as our final recommendation.

RECOMMENDATION No. 17
As recommended in Report for Discussion No. 14, the dower life estate should be replaced with a right to occupation under Part 2 of the *Matrimonial Property Act*. The right to occupation would exist until varied by court order. In the event of such an application, the court should consider the assets available for the support of the surviving spouse, including the matrimonial property entitlement of the surviving spouse.

D. Should the right to division of matrimonial property upon death be in addition to or in lieu of rights that would flow by way of intestate succession?

[261] Whenever a province has deferred sharing of matrimonial property on death, it must consider how such a regime will interface with intestate succession. There are two possible interfaces to consider. By the first method, one would first divide the matrimonial property between the surviving spouse and the estate of the deceased spouse, and then distribute what is left in the estate of the deceased spouse according to the intestacy rules. Since the surviving spouse would be the primary beneficiary under the intestacy rules, this method would give the bulk of the estate to the surviving spouse. By the second method, one first calculates the claim of the surviving spouse under the MPA and then calculates the share the spouse would receive if no matrimonial property claim was brought and the entire estate was distributed according to the intestacy rules. The claim for matrimonial property is then reduced by the value of the benefits received under the *Intestate*

Succession Act. The result is that the surviving spouse will receive the greater of the claim under the MPA or the *Intestate Succession Act,* but not both.

[262] An example will illustrate how each method works. Assume the following facts:

- A husband dies intestate with an estate of $180,000, all of which is non-exempt property under the MPA.
- He leaves surviving his second wife and a daughter from his first marriage. The wife has no assets of her own. In this situation, the surviving spouse's share under the *Intestate Succession Act* is $40,000 plus one-half of the residue. The child of the intestate receives the other half of the residue.

By the first method, the wife would receive $90,000 as her half of the matrimonial property. The remaining $90,000, being the husband's share of the matrimonial property, would be distributed according to the *Intestate Succession Act,* with $65,000[332] going to the surviving spouse and $25,000 to the daughter. Applying this method, the wife would receive a total of $155,000[333] and the daughter would receive $25,000. By the second method, one calculates the wife's claim under the MPA, which in this example is $90,000. One then calculates the wife's share of the estate as if the entire estate was to be distributed under the *Intestate Succession Act.* In this example, the wife's claim under the *Intestate Succession Act* is $110,000.[334] One then reduces the matrimonial property claim by the value of the benefits received under the *Intestate Succession Act.* In this example, the set-off exceeds the claim under the proposed MPA, and therefore, the wife would receive $110,000 under the *Intestate Succession Act,* but would receive nothing under the proposed MPA. The daughter would receive $70,000 from the estate.

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[332] $40,000 + ½ [$50,000] = $65,000.

[333] $90,000 + $65,000 = $155,000.

[334] $40,000 + ½ [$140,000] = $110,000.

[263] Saskatchewan,[335] Nova Scotia,[336] and Newfoundland[337] have taken the first approach. Manitoba has taken the second approach.[338] Ontario puts the spouse to an election between: (1) the right to take under the will or intestacy, or (2) right to receive the equalization entitlement under the *Family Law Act*.[339] This is akin to the second method referred to above.

[264] Several law reform agencies have rejected the first approach. The Manitoba Law Reform Commission ("MLRC") rejected this approach because in its opinion the first approach ignores the purpose served by intestacy legislation and may result in overcompensation of the surviving spouse.[340] The *Intestate Succession Act* attempts to create a distribution scheme that a deceased spouse would most often provide for in the will. Intestacy rules operate as a primitive means of allocating marital property because the preferential share given to the surviving spouse reflects the surviving spouse's contribution to the family and to the acquisition of assets.[341] To adopt the first approach discussed above would in some cases result in overcompensation for the surviving spouse. For these reasons, the MLRC recommended "that where the surviving spouse seeks an allocation of property on death, any balancing claim in favour of the surviving spouse should be reduced by the entitlement of the surviving spouse under the [*Intestate Succession Act*]."[342]

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[335] *The Matrimonial Property Act*, S.S. 1997, C. M-6.11, s. 30(3) as interpreted in *Edward* v. *Edward Estate and Skolrood*, *supra* note 63, at 386.

[336] *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 12(4) as interpreted in *Fraser* v. *Vincent* (1981), 25 R.F.L. (2d) 171 (N.S. S.C.T.D.). But compare with *Re Levy* (1981), 25 R.F.L. (2d) 149 (N.S. S.C.T.D.).

[337] *Family Law Act*, R.S.N. 1990, c. F-2, s. 21(2). This is similar to Nova Scotia section discussed above.

[338] *The Marital Property Act*, R.S.M. 1987, c. M-45, s. 38.

[339] *Family Law Act*, R.S.O. 1990, c. F-3, s. 6(1)-(3).

[340] Manitoba Report, *supra* note 6 at 73-79.

[341] *Ibid.* at 76.

[342] *Ibid.* at 79.

The Law Reform Commission of Saskatchewan[343] and the Law Reform Commission of Nova Scotia[344] have made the same recommendation.

[265] The majority of commentators (eight of eleven) also reject the first approach. One commentator was of the opinion that the generous treatment of a spouse under the *Intestate Succession Act* is premised in part on the recognition of matrimonial property entitlement of the surviving spouse. It was also her view that the *Intestate Succession Act* is premised on a property system that does not allow a surviving spouse to bring an action for matrimonial property distribution. Another commentator is concerned that the recommendation would give undesirable results in second marriage situations. Two other commentators view the first approach as allowing for "double dipping".

[266] A small minority of the commentators (three of eleven) support the first approach. One such commentator sees the *Matrimonial Property Act* as creating capital for the surviving spouse and elevating him or her to the position of creditor. Since creditors should be paid before an estate is distributed under the *Intestate Succession Act*, he has no problem with the first approach.

[267] On this point, we find ourselves in disagreement with the law reform agencies that have considered this issue most recently and the majority of commentators. We prefer the first method because, in our opinion, the second method fails to recognize the matrimonial property entitlement of the surviving spouse and misconstrues the purpose that intestate succession legislation should serve.

[268] The principle of the MPA is that each spouse is entitled to a share in the property acquired by the efforts of both of them during the marriage. The entitlement is inchoate until a triggering event occurs, and it is not fully crystallized until the respective shares are definitively determined and the financial or property implications decided either by agreement or court order. But it is a true

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[343] LRCS, Proposals Relating to Matrimonial Property Legislation, (1985), Recommendation 12 at 18-19. ("Saskatchewan Report").

[344] LRCNS, Matrimonial Property in Nova Scotia, Suggestions for a New Family Law Act (Discussion Paper, 1996) at 51-52. ("Nova Scotia Report").

entitlement. If the deceased spouse has legal title to more than his or her share of the matrimonial property, the substance of the matter is that the surviving spouse has an immediate entitlement, and once quantified, its substance is beyond the reach of the deceased spouse's will and the *Intestate Succession Act*. The first option recognizes this fact, whereas the second option fails to recognize this fact.

[269] We do not believe that the first option ignores the purpose of intestacy legislation or overcompensates the surviving spouse. While we agree that intestate succession legislation should reflect the intention of the majority of Albertans, we do not think that this intention is shaped by the desire to recognize the contributions of the spouse to the acquisition of assets over the course of the marriage and nothing more. This intention is affected by the emotional attachment of the parties, the needs of the surviving spouse, the contribution of the surviving spouse to the accumulation of assets and the status of marriage.[345]

[270] The final question is whether the surviving spouse will be overcompensated by receiving his or her share of the matrimonial property plus the preferential share of the estate given to the surviving spouse under the *Intestate Succession Act*. It is hard to make that case in the situation where the deceased spouse is survived by the spouse and children of that marriage because studies show that the majority of people would give everything to the surviving spouse in this situation.[346] But what about the situation in which the deceased spouse is survived by the spouse and children, some of whom are of a previous relationship? Those same studies show that while most people are less likely to give the entire estate to the surviving spouse in this situation, they still treat the surviving spouse generously and give more than what can be explained on the basis of need of the surviving spouse.[347] In this situation, should we assume that once people are told that their spouse has a claim to matrimonial property on death that this intention will change and that they will give to the surviving spouse only what that spouse is entitled to receive under the MPA? We do not think that this will happen because in this situation the surviving spouse usually receives more than what that spouse would receive on the

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[345] For a full discussion of this point, see Intestate Succession Report, *supra* note 9 at 47-72.

[346] *Ibid.* at 38-41.

[347] *Ibid.* at 41-2.

basis of matrimonial principles alone. Furthermore, the treatment of the surviving spouse under the existing *Intestate Succession Act* is so inadequate[348] that the danger of overcompensation is minimal.

[271] But perhaps a danger of overcompensation exists in the case of our proposals for reform of the *Intestate Succession Act* where the deceased spouse is survived by the spouse and children, some or all of whom are of another relationship. We doubt if this will be the case,[349] but even if it is, that is an argument to consider when one considers the quantum of the spousal share under the *Intestate Succession Act*. It is insufficient reason to ignore the fact that upon death the surviving spouse is entitled to seek his or her share of the matrimonial property, and that property is beyond the reach of the estate of the deceased spouse and the *Intestate Succession Act* that will govern distribution of that estate.

RECOMMENDATION No. 18
The rights of the surviving spouse under the *Matrimonial Property Act* should be in addition to the rights of the surviving spouse upon the intestacy of the deceased spouse. This means:

(i) The granting of a matrimonial property order should not affect the rights of the surviving spouse on intestacy.
(ii) The court should not consider the amount payable to a spouse under *The Intestate Succession Act* in making a distribution of matrimonial property pursuant to an application made or continued by a surviving spouse or continued by the personal representative of a deceased spouse where the deceased spouse died intestate.

E. Should the right to division of matrimonial property upon death be in addition to or in lieu of rights that flow by way of will?

1. Introduction

[272] In many wills, the deceased spouse will leave the entire estate to the surviving spouse. In a small number of situations, the deceased spouse will

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[348] *Ibid.* at 50-55.

[349] See discussion of this point in ALRI, *Reform of the Intestate Succession Act* (Final Report No. 78, 1999) at page 87.

disinherit the surviving spouse and distribute the estate to others. And then there will be those estates in which the deceased, by reason of second marriage, considerable wealth, or some other special circumstance, "leave what they consider to be adequate provision for the other spouse without leaving all or the bulk of their estate to that surviving spouse."[350] It is only in those estates in which the spouse receives some, but not all, of the estate that one has to address the interface between rights of the surviving spouse under the MPA and under the will. Should the surviving spouse be entitled to seek a matrimonial order and also receive any benefits that would result when the remaining assets are distributed according to the will, or should the surviving spouse receive the greater of the claim under the MPA or will, but not both?

2. The law in other provinces

[273] The various provinces have answered this question in one of three ways. In Manitoba, Ontario, Saskatchewan and Alberta, the answer is that the spouse can have the greater of the claim under the MPA or the will. The means used to achieve this result differs, however, among these four provinces. In Nova Scotia, the answer is that the surviving spouse can have both the rights under the matrimonial property legislation and any benefits that would flow under the will. In New Brunswick, the answer depends upon the exercise of court discretion.

a. Manitoba, Ontario, Saskatchewan, Alberta: one or the other, but not both

[274] In Manitoba, the value of a bequest, gift or devise to which the surviving spouse is entitled under the will must be deducted from what the surviving spouse would otherwise be entitled to receive as an equalization claim.[351] This is the case even if the surviving spouse renounces such a bequest, gift or devise.[352] A deduction is also made for any gift mortis causa made to the surviving spouse by the deceased spouse.[353] (Of course, nothing affects the right of a surviving spouse

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[350] S. Jane Evans, The Law Society of Manitoba, 1993, Publication #W5-03, at IV-1.

[351] *The Marital Property Act*, C.C.S.M., c. M45, s. 39.

[352] *Ibid.*

[353] *Ibid.* One commentator suggests that section 39 includes renounced gifts to facilitate estate planning. Assume the following facts. The deceased spouse owns a home worth $200,000 and other assets worth $200,000. The entire estate consists of shareable marital property and the surviving spouse owns no assets. By will, the deceased spouse gives the home to the surviving spouse and the remaining assets to other beneficiaries. In this situation, the spouse will have no marital property claim

to take under the will and not under the *Marital Property Act.*[354]) The right to seek a share of matrimonial property is in addition to and not in substitution for or in derogation of the life estate in the homestead given under the *Homesteads Act*.[355]

[275] In Ontario, the spouse must elect between the right to: (1) take under the will, or (2) to receive the equalization entitlement under the *Family Law Act*. These are alternative rights, not cumulative rights. If the spouse elects to take under the will, the spouse is also entitled to any other assets that pass to the surviving spouse by reason of death of the deceased spouse.[356] If the surviving spouse elects to receive the equalization entitlement, the gifts made to the surviving spouse in the will are revoked (unless the will says otherwise) and the will is interpreted as if the surviving spouse died before the deceased spouse.[357]

[276] In Saskatchewan the law is unclear. In the case of intestacy benefits, section 30(3) of the *Matrimonial Property Act, 1997* states that the surviving spouse is entitled to a matrimonial property order as well as any benefits that flow upon intestacy. The section does not address benefits that flow under the will. Instead, section 21(3)(l) enables the court to consider any benefits that the surviving spouse is to receive under the will in determining whether it would be unfair and inequitable to divide the matrimonial property equally. The obiter comments of the Supreme Court of Canada in *Donkin* v. *Bugoy* suggest that the purpose of section 21(3)(l) is to ensure that the surviving spouse does not benefit twice by receiving benefits under the will and the Act.[358] This suggests that the surviving spouse should get the greater of the benefits under the will or the Act.

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because she has received one-half of the marital property. She will not have the ability to renounce the gift, seek her share of the marital property (i.e., $200,000) and still seek a life estate in the home under *The Homesteads Act*, C.C.S.M. c. H80. See John Deacon, "Use of Wills, Insurance and Spousal Agreements", The Law Society of Manitoba, 1993, Wills and Administration of Estates Series, Publication #W5-07 at 37.

354 *Ibid.*, s. 43.

355 *Ibid*., s. 44.

356 *Family Law Act*, R.S.O. 1990, c. F-3, s. 6(4).

357 *Ibid.*, s. 6(8).

358 See discussion in Chapter 3 at paras. 103-6.

[277] In Alberta, the MPA is silent as to whether the surviving spouse is entitled to the matrimonial property order as well as any benefits that might result upon intestacy or by will. Instead, the court must consider "any benefit received by the surviving spouse as a result of the death of the deceased spouse"[359] when distributing the matrimonial property. *Webb* v. *Webb Estate*[360] applied the approach suggested in *Donkin* v. *Bugoy*, although no mention is made of the Supreme Court of Canada decision. *Webb* is the only Alberta case in which the surviving spouse pursued division of matrimonial property and also received a gift under the terms of the will. In that case, the wife left a bequest of $20,000 to the surviving spouse as part of a separation agreement. The court held that the husband was not entitled to anything further under the MPA because the bequest plus the $5,000 received just before death was a generous division of matrimonial property in the circumstances.[361]

b. Nova Scotia: surviving spouse entitled to both

[278] In Nova Scotia, Section 12(4) of the *Matrimonial Property Act*[362] provides that:

> 12(4) Any right that the surviving spouse has to ownership or division of property under this Act is in addition to the rights that the surviving spouse has as a result of the death of the other spouse, whether these rights arise on intestacy or will.

[279] Two reported decisions give conflicting interpretations of this section. In *Fraser* v. *Vincent*,[363] the court held that it must first divide the matrimonial property and then distribute the remaining assets in the estate according to the terms of the will. The will gave the testator's wife a life estate in the home with a gift over to the daughter from the first marriage. The home was sold and the wife sought one-half of the proceeds under the *Matrimonial Property Act*. The court divided the matrimonial property (i.e., the home) equally and then distributed the balance of the estate according to the terms of the will. The wife received one-half

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[359] MPA, R.S.A. 1980, c. M-9, s. 11(3).

[360] *Supra* note 30.

[361] See earlier discussion of *Webb* in Chapter 3.

[362] R.S.N.S. 1989, c. 275.

[363] *Supra* note 336.

of the proceeds and interest on the balance during her lifetime. In *Re Levy*[364], the judge considered what the surviving spouse received by way of *inter vivos* gifts and right of survivorship and determined that what the surviving wife had received already constituted a fair division of matrimonial property. He exercised his discretion not to divide the matrimonial property equally because the marriage was short term and all of the assets now owned by the surviving spouse and the estate were acquired by the husband before the marriage. Although the court dismissed the claim for matrimonial property division, the wife was still entitled to the life estate in the home and cottage provided to her by will. In obiter, the judge said that a court would be reluctant to order equal division of matrimonial assets if a testator has made adequate provision in his will for his surviving spouse **even though** the Act made it clear that in determining the wife's entitlement to matrimonial property the court was not allowed to consider any benefits she was to receive under the will.[365]

c. New Brunswick: depends upon court discretion

[280] New Brunswick has crafted an approach that is somewhere in the middle of the other two. The *Marital Property Act* of that province provides as follows:

> 4(4) Any bequest or devise contained in the last will and testament of a deceased spouse, including a specific bequest or devise, and any vesting of property provided by law upon an intestacy, is superseded by the rights prescribed in subsection (1).
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> 4(5) Subject to subsection (4), in determining any matter respecting the division of marital property under subsection (1) the Court shall, as far as is practicable, divide the property so that the express wishes of the testator may be honoured in respect of specific devises and bequests and the administration of property on behalf of the beneficiaries.
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> 4(5.1) Where, on a division of marital property under subsection (1),
> (a) the Court has made an order that does not honour the express wishes of a testator, and
> (b) the Court is satisfied that the effect of its order is such that it would not be the wish of the testator that what is left in the testator's estate be distributed according to the will,
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> the court may make such further orders as to the distribution of the testator's estate as will, in the Court's opinion, best represent the distribution that the testator would have made if, in the will, the testator had left to the surviving

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[364] *Supra* note 336.

[365] *Ibid.* at 170.

> spouse the property that the surviving spouse will receive under the order of the Court.
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> 4(5.2) In the implementation of subsection (5.1) the Court may presume, in the absence of evidence to the contrary, that any wishes of a testator expressed in a will were intended to be carried out in relation to the property in the testator's estate at the time of death and not to the property remaining in the testator's estate after division of marital property under this section.

[281] Subsection 4(5.1) and 4(5.2) were added in 1993[366] to end uncertainty that existed under the original section as to treatment of property that remains in the testator's estate after the spouse's claim for marital property had been satisfied. Should the will be applied mechanically to what is left in the estate or, in interpreting and applying the will, should regard be had to the fact that the surviving spouse had already received property from the estate under the *Marital Property Act*?[367] Since it was not clear which approach should be used, concern arose that by operation of the court order and the terms of the will, the surviving spouse would receive the entire estate when this was clearly not the intention of the deceased.

[282] The following examples illustrate the problem.[368] Assume that all of the family assets of the couple are registered in the name of the husband who dies leaving a will in which he gives one-half of his property to his wife and one-half to his daughter. If the wife applies for division of marital property, can she receive one-half of the assets under the *Marital Property Act* and one-half of the assets remaining in the estate for a total of three-quarters of the property? Now assume that the wife is the registered owner of the home and a business and dies leaving a will in which she gives the home to the son and the business to her husband. Can the husband claim the marital home under section 4(1) of the *Marital Property Act* and then receive the business under the terms of the will?

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366 *Succession Law Amendment Act*, S.N.B. 1991, c. 62 which came into force in 1993.

367 Law Reform Branch, Office of the Attorney General, Province of New Brunswick, *Commentary on the Succession Law Amendment Act and the Survivorship Act* (June 1990) at p. 13. ("Commentary").

368 These examples are taken from the Commentary, *ibid.* at page 13.

[283] The Law Reform Branch in the office of the Attorney General did not think that an absolute rule could deal with all the cases in which this problem would arise. It did, however, view it as wrong to always apply literally the terms of the will to the estate left after division of marital property because the testator would never know what would make up the "post-division" estate. To overcome this problem, subsections 4(5.1) and (5.2) were introduced and are designed to work as follows:[369]

> The starting point of the amendment . . . is that there must be some way of ensuring that the testator's will is not **automatically** applied to the "post-division" estate without consideration of whether this was the property it was intended to apply to. If the will should, on the facts of the case, be so applied, so be it, but the Act should also allow for other possibilities. What the amendment does, therefore, is create a judicial discretion to make orders as to the distribution of the "post-division" estate. The key to the use of this discretion are the "express wishes" of the testator. The task of the court is to see what the "express wishes" of the testator were, to examine the effect of its division of marital property, and then to ask itself how the testator would have distributed the "post-division" estate if he or she had known what the surviving spouse was going to be awarded on the *Marital Property Act* application. If the court finds that the literal application of the will would produce, in the circumstances created by the application, distortion of the intent of the will, it may intervene to restore the intention of the testator as best it can, given that it now only has the "post-division" estate to work with.

[284] It remains unclear how a marital property claim will affect a gift, devise or bequest made to the surviving spouse in a will. The issue does not arise very frequently and when it has arisen, the testator gave the surviving spouse a life interest in the marital home and its contents. Such a gift is defeated if the surviving spouse receives the home as part of his or her marital property.[370] The cases decided before the introduction of subsections 4(5.1) and 4(5.2) differ as to whether the surviving spouse would be entitled to his or her share of the marital property as well as gifts under the will.[371] The cases decided since the amendments

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[369] *Ibid*. at p. 14.

[370] See for example: *Krumenacker* v. *Krumenacker Estate* (1987), 70 N.B.R. (2d) and 201 A.P.R. 53 (N.B.Q.B.) and *Watt* v. *Watt Estate*, [1996] N.B.J. No. 283 (Q.B.), online: QL (NBJ).

[371] In *O'Brien* v. *O'Brien Estate* (1990), 39 E.T.R. 129 (N.B.C.A.), the wife by her will gave her husband a life estate in the home and all her personal assets with a gift over to her daughter and the residue to her daughter. Given that the wife had owned the home before the couple married, the court held that the husband was entitled to one-half of the sale proceeds of the home under the *Marital Property Act* as well as a life interest in income from other half of the sale proceeds, which remain in the estate. The result was that the husband received his marital property as well as the gift under the

have not dealt with this issue in detail and, therefore, it is too soon to know how the court will exercise its discretion under subsections 4(5.1) and 4(5.2).

3. Recommendations of law reform agencies

[285] In determining which approach to adopt, the MLRC considered the intention of the deceased spouse. Would the deceased spouse who had prepared a will want the surviving spouse to receive one-half of the marital property as well as the benefits bequeathed under the will? Many spouses leave their entire estate to the surviving spouse and this intention should be respected. Yet what about those who leave the surviving spouse a smaller portion of the estate? The MLRC doubted that the deceased spouse intended to give the surviving spouse further benefits that those conferred by will and, therefore, concluded that benefits under a will and entitlement to share in marital property should not be cumulative.[372] It made the following recommendation:

> Recommendation 16
> That, except for a life estate in the homestead, every bequest, gift or devise contained in the deceased spouse's will which passes or has passed to the surviving spouse or which would have passed to the surviving spouse but was renounced should be charged against the balancing claim.

As noted above, *The Marital Property Act* reflects this recommendation.

[286] The Law Reform Commission of Saskatchewan thinks it unlikely the deceased spouse would want the surviving spouse to take the whole of the estate by the combined operation of the will or intestacy rules and the *Matrimonial Property Act*. Therefore, it made the following recommendation:[373]

> Recommendation 12
> When an application is made for distribution of matrimonial property after the death of a spouse, unless a contrary intention appears from the will of the deceased spouse, the entitlement of the surviving spouse to matrimonial property owned by the deceased spouse should be reduced by the entitlement of the surviving spouse under the will or under *the Intestate Succession Act.*

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will. In *Carson* v. *Carson Estate* (1990), 267 A.P.R. 204 (Q.B.), the wife received the marital home under the *Marital Property Act* and did not receive the $1000 gift she was to receive under the will.

[372] Manitoba Report, *supra* note 6 at 82.

[373] Saskatchewan Report, *supra* note 343 at 19.

[287] The Law Reform Commission of Nova Scotia views the failure to address the interaction of matrimonial property rights and inheritance rights as the biggest drafting failure of the *Matrimonial Property Act*. It prefers the Manitoba approach. Its recommendation was as follows:[374]

> 1. The new *Family Law Act* should specify that when a spouse applies for a division of family property on the death of the other spouse, the applicant spouse must deduct any benefits received under the will or intestacy of the deceased.

4. Comments received

[288] Of those who commented, three commentators were of the view that the matrimonial property entitlement should be in addition to any benefits that would flow to the surviving spouse under the will after satisfaction of the matrimonial property order. In the opinion of one of these commentators, it would be simple for a testator to indicate whether the gift in the will was or was not in addition to the matrimonial property entitlement, and it was important that a testator give such direction.

[289] Seven commentators thought that the surviving spouse should be entitled to the greater of the matrimonial property entitlement or the benefits, if any, that would flow under the will, but not both. In the opinion of one such commentator, if a testator makes a gift to a surviving spouse, the testator intends to meet any obligations he or she has under the *Matrimonial Property Act* and the *Family Relief Act* and to top up that amount if the testator so wishes. Most testators making a gift in a will would not want the surviving spouse to obtain a matrimonial property order plus the gifts, if any, that were made to the surviving spouse in the will. Therefore, a spouse should have to elect to take the matrimonial property entitlement or the gifts under the will, but should not be entitled to receive both.

5. Analysis

[290] In our opinion, the best approach to this issue is to provide that the rights of the surviving spouse under the MPA are in addition to any rights that flow under the will. If the will is silent on this point, what remains in the estate after satisfaction of the matrimonial property order will be distributed according to the

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[374] Nova Scotia Report, *supra* note 344 at 52.

terms of the will. If a spouse does not intend that the gifts in the will be in addition to the matrimonial property entitlement, the terms of the will must make this clear. The testator can choose one of several methods to achieve this result. The will can make the gift conditional upon the surviving spouse foregoing a claim under the MPA.[375] Alternatively, the testator can provide that the value of any gift made to the surviving spouse under the will is to be reduced by the value of any property that vests in the surviving spouse or is paid to the surviving spouse under a matrimonial property order. Another method that can be employed where the matrimonial property division is effected by a balancing payment is to direct that any matrimonial property claim be paid out of the assets that are to pass to the surviving spouse under the will.

[291] We prefer this approach to that of the Manitoba approach for two reasons. First, it recognizes the fact that the matrimonial property claim is the realization of an entitlement and is not merely a benefit being received from the estate. Second, it does not impute an intention to the deceased spouse that may or may not be true. We are not prepared to assume that the testator did not wish the surviving spouse to have his or her fair share of the matrimonial property plus the devise or bequest made in the will by the testator. It must be left to the testator to express his or her intention on this point. Although the New Brunswick approach is innovative, we prefer to leave the matter to the intention of the testator as expressed in the will.

RECOMMENDATION No. 19

The rights of the surviving spouse under the *Matrimonial Property Act* should be in addition to the rights that the surviving spouse has by reason of the will of the deceased spouse. This means:

(i) the court should distribute the matrimonial property in the same manner as if the parties were alive,

(ii) the personal representative should distribute what is left in the estate after satisfaction of the matrimonial property order and other debts and liabilities according to the terms of the will, and

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[375] See R.J. Downie, "Wills and *The Matrimonial Property Act*" (1981) 7 N.S.L.N. 61 and *Driscoll* v. *Driscoll Estate* (1988), N.S.R. (2d) 1 (N.S. S.C.T.D.).

(iii) quantification of the matrimonial property entitlement should not be influenced by the terms of the will.

F. Should benefits received by the surviving spouse by reason of death of the deceased spouse be considered by a court in the exercise of its discretion under the *Matrimonial Property Act*?

[292] In Chapter 4, we recommended that, in a division of property upon death, the court should retain its discretion to deviate from equal division where this is justified upon consideration of the factors listed in section 8. The recommendations in this chapter, however, necessitate a review of the factors listed in section 11(3).

[293] Section 11(3) provides that: "When a matrimonial property order is made in favour of a surviving spouse, the Court, in addition to the matters in section 8, shall take into consideration any benefit received by the surviving spouse as a result of the death of the deceased spouse." Under the existing MPA, the reason for considering benefits received on death is not immediately clear. In *Dunn Estate* v. *Dunn*,[376] Justice Trussler concluded that as a result of this section, property that passes by right of survivorship to the surviving spouse on death of the deceased spouse is no longer matrimonial property available for distribution. In *Donkin* v. *Bugoy*,[377] the Supreme Court of Canada interpreted a similar section in the Saskatchewan *Matrimonial Property Act* and, in obiter, suggested that the purpose in including such a factor was to ensure that the surviving spouse did not benefit twice by receiving property under both the will and the *Matrimonial Property Act*.

[294] Given Recommendation 8 and the recommendations made in this chapter, neither of these rationales have any meaning in the proposed regime. According to Recommendation 8, the assets that pass outside the estate to the surviving spouse are to be brought into the calculation. The fact the surviving spouse has received them by reason of the death of the deceased spouse is no reason to treat them differently from other property acquired over the course of the marriage or to

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[376] *Supra* note 105.

[377] *Supra* note 107. See discussion of this case in Chapter 3.

deviate from the principle of equal division.[378] According to Recommendation 19, the surviving spouse will be entitled to receive his or her matrimonial property entitlement plus any benefits under the will after satisfaction of the matrimonial property order. Therefore, receiving a benefit under a will is no reason to deviate from the presumption of equal sharing. As already discussed in this chapter, the existence of a dower life estate would also not influence the division of matrimonial property, although such an interest would be valued as property of the surviving spouse. Given these changes of policy, a court should not consider "any benefit received by the surviving spouse as a result of the death of the deceased spouse" as a factor when exercising its discretion under subsection 7(3) and 7(4).

RECOMMENDATION No. 20
When a matrimonial property order is made after the death of one of the spouses, the Court shall NOT take into consideration "any benefit received by the surviving spouse as a result of the death of the deceased spouse" as a factor when exercising its discretion under subsections 7(3) and 7(4).

[378] But remember that if the surviving spouse has more than his or her share of the matrimonial property, the action will be dismissed. The action does not survive for the benefit of the estate.

CHAPTER 6. ADMINISTRATION OF THE ESTATE

A. Introduction

[295] Making succession law fit with matrimonial law involves reform to both areas of the law. One must first define the right of the surviving spouse to seek division of matrimonial property on death and then deal with the issues that will arise in the administration of the estate by reason of the matrimonial property claim. In this chapter, we examine how satisfaction of the matrimonial property order will affect other beneficiaries of the estate, priority rules, timing of distribution of the estate, whether the surviving spouse can act as the personal representative, and other miscellaneous administration issues.

B. How will satisfaction of the matrimonial property order affect other beneficiaries of the estate?

[296] In order to facilitate estate planning and ease of administration, it must be clear how satisfaction of the matrimonial property order will affect the beneficiaries of the will. Three methods are available to determine which of the beneficiaries will bear the burden of satisfaction of the matrimonial property order. Each method derives from existing legislation. We have, however, modified these methods to apply to a regime in which the surviving spouse is entitled to receive his or her fair share of the matrimonial property as well as any benefits that would arise under the will.

1. Three models: Alberta, Manitoba and New Brunswick

a. Alberta: unsecured debt and ademption

[297] In Alberta, the MPA is silent on this issue with the result that the effect of the matrimonial property order upon beneficiaries of the estate is determined by: (1) the terms of the matrimonial property order, (2) the doctrine of ademption, and (3) the rules relating to the order in which assets are ultimately applied in the payment of debts.[379] The first model is based on the Alberta approach but will operate differently where the surviving spouse is a beneficiary of the estate. Under our proposals, the surviving spouse is entitled to seek his or her matrimonial property

[379] See more detailed discussion in Chapter 3 beginning at para. 158. For an example of how this model works see *Re Kotowksi Estate* (1987), 27 E.T.R. 183 (Man. C.A.).

claim as well as any benefits that may flow from the will. The extent of those benefits would be determined by the three factors listed above. This means that under this model the matrimonial property order will affect the surviving spouse and other beneficiaries in the same fashion, which is a change from the existing law.

[298] Under the first model, the nature of the matrimonial property is very important. To the extent that the court divides an asset *in specie*, for example, by dividing investments equally or vesting the home in one spouse, the asset that vests in the surviving spouse under the order is no longer part of the estate.[380] This means that any specific bequest or devise of such an asset will fail by virtue of the doctrine of ademption, and the intended beneficiaries will not receive that asset. To this extent, the exercise of court discretion in the division of matrimonial property will directly affect certain beneficiaries.

[299] In Alberta, neither the MPA nor any other act determines how payment of a money judgment found in a matrimonial property order will affect beneficiaries of the estate. When legislation is silent on this point, the portion of the matrimonial property order that is a monetary judgment is treated as an unsecured debt. It follows that the rules that govern the order in which assets are ultimately used to pay debts determine how satisfaction of the monetary judgment will affect the beneficiaries under the will. In Alberta, the order in which the assets of the estate can be resorted to for payment of debts is as follows:[381]

1. The general personal estate not bequeathed at all, or by way of residue only.
2. Real estate devised in trust to pay debts.
3. Real estate descended to the heir[382] and not charged with payment of debts.
4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by

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[380] This statement is true as against beneficiaries of the estate because of section 15 of the MPA but may not be true as against creditors. See *Deloitte, Haskins & Sells Ltd.* v. *Graham and Graham*, *supra* note 204 and *Maroukis* v. *Maroukis*, *supra* note 204. But compare with *Burroughs* v. *Burroughs*, *supra* note 204, *Pegg* v. *Pegg*, *supra* note 204 and *Markey* v. *M.N.R.*, *supra* note 204.

[381] Widdifield, *supra* note 199 at 86.

[382] This class refers to land that passes by way of intestacy. The class is expressed in this fashion because the rules were developed during the time when land that did not pass by will descended to the heir by right of primogeniture and personal property that did not pass by will went to the next of kin.

reason of lapsed devise, to descend; or (as to personalty) specifically bequeathed, subject to that charge.

5. General pecuniary legacies, including annuities and demonstrative legacies that have become general.
6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts, to contribute *pro rata*.
7. Real and personal estate over which the testator had a general power of appointment which has been expressly exercised by deed (in favour of volunteers) or by will.
8. Paraphernalia of the testator's widow.

This order applies unless the testator expresses a contrary intention.

[300] Since the historical reasons for the development of the rules are no longer relevant, the distinctions made are no longer justifiable. This along with the uncertainty resulting from a large body of case law developed over hundreds of years is cause for reform. In an upcoming report, we will tentatively recommend that a statutory order replace the existing rules. The proposed statutory order is as follows:

> (a) property specifically charged with the payment of debts or left on trust for the payment of debts;
>
> (b) property passing by way of intestacy
>
> (c) residuary property
>
> (d) general legacies
>
> (e) specific legacies and specific devises
>
> (f) property over which the deceased had a general power of appointment that he or she might have exercised for his or her own benefit without the assent of any other person, where the property is appointed by will.

Of course, the testator can always override this order by expressing a contrary intention in the will.

[301] Several basic concepts are reflected in the proposed statutory order. First, each class of assets would include realty and personalty that fall within that class because no distinction is made between personalty and realty. Second, assets within each class would contribute ratably to payment of debts. Third, it is assumed that by virtue of making a gift of a specific asset, the reasonable testator intends to benefit specific beneficiaries over general legatees. Fourth, property charged with payment of debts and property given in trust for payment of debts

form one class because there is no reason to make a distinction between these types of property. Both methods are an expression of the testator's intention as to which assets should be used to pay debts. Finally, a general direction to pay debts will not in itself create a charge on property for payment of debts. To bring assets within the first class, the will must contain an express charging of property or the creation of a trust.

[302] The following discussion applies to those situations in which the testator has not expressed an intention as to the order in which assets are to be applied in the payment of debts. If the monetary judgment created by the matrimonial property order is treated like an unsecured debt, it will be paid like other unsecured debts according to the existing rules or proposed statutory order. The assets in the first class are depleted before assets in the next class are resorted to for payment of unsecured debts. This means that recipients of the assets in the earlier classes will bear the burden of the payment of the matrimonial property monetary judgment. It also means that the effect of the matrimonial property claim on any gift given to the surviving spouse by the will depends on the nature of the gift made to the spouse. Of course, a testator can always choose to specify the assets that will be used to pay the matrimonial property claim, and in such a case neither the existing rules nor the proposed statutory rules would apply.

[303] An example will illustrate how this model will affect any gift given to the surviving spouse by the terms of the will. Assume that the existing rules apply and that the matrimonial order directs the estate to pay a certain sum to the surviving spouse. If the surviving spouse is the beneficiary of the residue of the estate, the personal property passing by way of residue will be used first to satisfy the matrimonial property order, thereby reducing the size of the gift that the surviving spouse will receive under the will. If the deceased spouse made a specific bequest or devise to the surviving spouse, other assets will be resorted to first in payment of the matrimonial property monetary judgment. The result would be similar under the proposed statutory order except that all property passing by way of residue would be used first to satisfy the matrimonial property claim.

b. Manitoba: Proportional burden

[304] Under the proportional burden model, one calculates what the beneficiaries would have received after payment of funeral and testamentary expenses and

debts, but before satisfaction of any matrimonial property order. Each beneficiary must then contribute pro rata to the payment of the matrimonial property claim. If the surviving spouse was a beneficiary of the estate, he or she would also share the burden of the matrimonial property. Although a court may direct *in specie* division of matrimonial property, the principles of ademption do not apply under the proportional burden model. Other beneficiaries would have to contribute a part of their share in order to create funds to be paid to the beneficiaries whose gift would otherwise have failed by reason of ademption.

[305] Manitoba uses this model but in the context of legislation in which the surviving spouse receives an equalization payment and in which gifts received by the spouse under the will are set-off against the marital property claim. Section 41(2) of *The Marital Property Act* of Manitoba reads as follows:

> **41(2)** An equalization payment under this Part shall be paid from the interest of the persons, other than the surviving spouse, who are beneficiaries of the estate, in proportion to the value of their respective interests in the estate, unless the will of the deceased spouse specifically provides for the manner in which the interests of the beneficiaries are to be used to satisfy an equalization payment, in which case the provisions of the will apply.

[306] The family relief legislation of Alberta and Ontario also use the proportional burden approach.[383] The one difference is that under family relief legislation the court usually has a limited discretion to relieve part of the estate from bearing its fair share of the incidence of the order. For example, section 9 of the *Family Relief Act* (Alberta) provides as follows:

> **9** Unless the judge otherwise determines, the incidence of any provision for maintenance and support that is ordered pursuant to this Act falls ratably
>
> (a) on the whole estate of the deceased, or
>
> (b) if the jurisdiction of the judge does not extend to the whole estate, on that part of the estate to which the jurisdiction of the judge extends,
>
> and the judge may relieve any part of the deceased's estate from the incidence of the order for maintenance and support.

When determining whether a part of the estate should be relieved from bearing its fair share of the burden of the family relief order, the court uses the test of the

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[383] For example, see *Family Relief Act*, R.S.A. 1980, c. F-2, s. 9 and *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 68. Cases that interpret similar sections include *Re Randle* (1976), 1 D.L.R. (3d) 208 (Alta. C.A.) and *Re Nalywayko* (1984), 17 E.T.R. 151 (Ont. Surr. Ct.).

reasonable testator. Would a reasonable testator have provided for that relief in the circumstances? This is an objective test.[384]

c. New Brunswick: court discretion

[307] The third model is that found in New Brunswick. It is different from the other two models in that it does not operate on the basis that the rights of the surviving spouse to division of matrimonial property are in addition to rights that the surviving spouse has by virtue of the will or intestacy. For this reason, it will not fit with our earlier recommendation. It is included, however, for the sake of completeness.

[308] The New Brunswick *Marital Property Act*[385] provides as follows:

> 4(4) Any bequest or devise contained in the last will and testament of a deceased spouse, including a specific bequest or devise, and any vesting of property provided by law upon an intestacy, is superseded by the rights prescribed in subsection (1).
>
> 4(5) Subject to subsection (4), in determining any matter respecting the division of marital property under subsection (1) the Court shall, as far as is practicable, divide the property so that the express wishes of the testator may be honoured in respect of specific devises and bequests and the administration of property on behalf of the beneficiaries.
>
> 4(5.1) Where, on a division of marital property under subsection (1),
>
> (a) the Court has made an order that does not honour the express wishes of a testator, and
>
> (b) the Court is satisfied that the effect of its order is such that it would not be the wish of the testator that what is left in the testator's estate be distributed according to the will,
>
> the court may make such further orders as to the distribution of the testator's estate as will, in the Court's opinion, best represent the distribution that the testator would have made if, in the will, the testator had left to the surviving spouse the property that the surviving spouse will receive under the order of the Court.
>
> 4(5.2) In the implementation of subsection (5.1) the Court may presume, in the absence of evidence to the contrary, that any wishes of a testator expressed in a will were intended to be carried out in relation to the property in the testator's estate at the time of death and not to the property remaining in the testator's estate after division of marital property under this section.

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384 *Ibid*, *Re Randle*.

385 S.N.B. 1980, c. M-1.1.

[309] Several New Brunswick decisions deal with a surviving spouse who received nothing under the terms of the will. In these cases, the effect of the marital property claim on the beneficiaries depended, of course, upon the resolution of the marital property claims. If the court directed that the marital home vest in the surviving spouse, this defeated any specific devise of the home to others under the terms of the will.[386] The same would be true for an *in specie* division of an asset that by the terms of the will is a specific devise or bequest. Where, however, the matrimonial property order takes the form of a money judgment, it will be paid from the residue and general bequests because, as far as possible, the court honours specific devises and bequests.[387] It is unclear whether the court will distribute the burden of the monetary judgment among the residue and general bequests.

[310] It remains unclear how a marital property claim will affect a gift, devise or bequest made to the surviving spouse in the will. This situation is uncommon, and in the cases where it has arisen, the testator had given the surviving spouse a life interest in the marital home and its contents. Such gifts were defeated where the surviving spouse received the home as part of his or her marital property.[388] The cases which were decided before the introduction of subsections 4(5.1) and 4(5.2) differ as to whether the surviving spouse should be entitled to his or her share of the marital property as well as gifts under the will.[389] The cases decided since the amendments have not dealt with this issue in detail and, therefore, it is too soon to know how the New Brunswick courts will exercise their discretion under subsections 4(5.1) and 4(5.2).

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[386] *Carson* v. *Carson Estate* (1990), 107 N.B.R. (2d) and 267 A.P.R. 204 (N.B.Q.B.), *Chiasson* v. *Succession Chiasson* (1993), 358 A.P.R. 259 (N.B.Q.B.), *Watt* v. *Watt Estate*, [1996] N.B.J. No. 283 (Q.B.), online: QL (NBJ), *Payne* v. *Payne Estate*, [1997] N.B.J. No. 66 (Q.B.), online: QL (NBJ).

[387] *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 4(5), which is quoted in the text.

[388] See for example: *Krumenacker* v. *Krumenacker Estate* (1987), 70 N.B.R. (2d) and 201 A.P.R. 53 (N.B.Q.B.) and *Watt* v. *Watt Estate*, *supra* note 386.

[389] In *O'Brien* v. *O'Brien Estate* (1990), 39 E.T.R. 129 (N.B.C.A.), the wife by her will gave her husband a life estate in the home and all her personal assets with a gift over to her daughter and the residue to her daughter. Given that the wife had owned the home before the couple married, the court held that the husband was entitled to one-half of the sale proceeds of the home under the *Marital Property Act* as well as a life interest in income from other half of the sale proceeds, which remain in the estate. The result was that the husband received his marital property as well as the gift under the will. In *Carson* v. *Carson Estate* (1990), 267 A.P.R. 204 (Q.B.), the wife received the marital home under the *Marital Property Act* and did not receive the $1000 gift she was to receive under the will.

2. Analysis

[311] For our purposes, the choice is between the Alberta model and the Manitoba model.[390] In RFD No. 17, we tentatively favoured the Alberta model because the assumption underlying the existing marshalling rules offered a reasonable basis upon which to operate. The existing marshalling rules (and the proposed rules) assume that by virtue of making a gift of a specific asset, the testator intends to benefit specific beneficiaries over general legatees or residual legatees. Therefore, the Alberta model would ensure that the burden of a money judgment granted in a matrimonial property order would fall on residual legatees and general legatees before beneficiaries of specific bequests or devises.

[312] After further thought, we are of the opinion that while the Alberta model works well for a money judgment granted in a matrimonial property order, it will not work well in respect of *in specie* division of matrimonial property. It is possible that the *in specie* division of matrimonial property could result in the ademption of specific bequests or devises. This runs counter to the assumption that the testator wishes to benefit specific beneficiaries over general legatees or residual legatees. We are now of the opinion that if would be fairer to adopt the Manitoba model and have the burden of the matrimonial property order, be it a money judgment or an *in specie* division or some combination, fall ratably on all the beneficiaries of the estate. This would be a default rule that would be displaced if the will of the deceased spouse specifically provided for the manner in which the interests of the beneficiaries are to be used to satisfy the matrimonial property order.

[313] Three points should be emphasized. First, the burden of satisfying the matrimonial property order would fall on all beneficiaries, including the surviving spouse. Second, a matrimonial property order vesting in the surviving spouse property that was the subject of a specific bequest or devise would not defeat the gift entirely. Although the beneficiary of the specific bequest or devise would not receive the asset itself, the other beneficiaries would have to contribute funds that would be paid to any beneficiary who would, if it were not for the matrimonial property order, have received the specific bequest or devise. Third, the pro rata

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[390] Among the commentators there was support for each of the three models, with the Alberta model receiving the most support by a significant margin.

calculation would be based on the share of each beneficiary after payment of funeral expenses, testamentary expenses and debts but before satisfaction of the matrimonial property order.

RECOMMENDATION No. 21

(a) If the will of the deceased spouse specifically provides for the manner in which the interests of the beneficiaries are to be used to satisfy a matrimonial property order, the provisions of the will shall apply.

(b) In the absence of a direction in the will, the burden of a matrimonial property order will fall ratably on beneficiaries of the estate in proportion to the value of their respective interests after payment of all funeral expenses, testamentary expenses, debts and liabilities.

(c) The fact that the matrimonial property order directs transfer of a specific asset to the surviving spouse does not prevent the beneficiary who would otherwise have received that asset from receiving the value of the asset less the proportionate burden of the matrimonial property order.

C. What priority should be given to satisfaction of the matrimonial property order?

[314] In determining priority of payment, we must consider priority as against five types of claims, namely:

- funeral expenses and testamentary expenses[391]
- debts and liabilities of a deceased spouse in existence at death
- beneficiaries under a will or in the event of intestacy
- contracts to leave property by will
- claims of dependants.

We begin by examining the law in other provinces and then examine the matter of priorities.

1. Existing law under matrimonial property legislation

[315] In this part, we will examine how other provinces deal with the issue of priority of payment in the context of a matrimonial property action brought as a

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[391] See definition of this tem in footnote 49.

result of the death of one of the spouses. Sections 14 and 15 of the MPA, which govern the matter of priorities in Alberta, have already been discussed in Chapter 3.

a. Manitoba

[316] Section 41(1) of *The Marital Property Act*[392] deals with the matter of priority of payment. It reads as follows:

> **41(1)** Where a surviving spouse is entitled under this Act to an equalization payment from the estate of a deceased spouse, the equalization payment is deemed to be a debt of the deceased spouse, is payable after the other liabilities of the estate, and has priority over
>
> (a) a bequest, gift or devise contained in a will of the deceased spouse;
>
> (b) an obligation to pay maintenance under a maintenance agreement or an order of a court binding the estate of the deceased spouse; and
>
> (c) an order of a court under *The Dependants Relief Act*.

Manitoba goes further than other provinces by including subsection 41(1) (b). This subsection results in the different treatment of maintenance obligations that bind the estate and other debts. Subsections 41(1)(b) and (c) ensure equal treatment of orders granted under *The Dependants Relief Act* and any support obligations of the deceased spouse, present or future, which are binding on the deceased's estate.

[317] The payment of funeral and testamentary expenses[393] raises an interesting question. Section 36 of the Act states that funeral and testamentary expenses must NOT be included in the calculation of an equalization payment under Part IV. The result is that the surviving spouse's share is calculated on the basis that funeral and testamentary expenses do not exist. This ensures that the surviving spouse's share is not reduced by one-half of these expenses. Yet, section 41 does not specifically deal with priority of payment as against funeral and testamentary expenses. The usual rule for administration of estates is that funeral and testamentary expenses are paid **before** debts.[394] If the equalization payment is to be treated as a debt, it

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[392] C.C.S.M. c. M-45.

[393] In *Re Bertram Estate* (1972), 30 D.L.R. (3d) 46 (Ont. S.C. in Bankruptcy) the court held that "testamentary expenses" includes compensation payable to the administrator of the estate prior to bankruptcy, as well as compensation for legal services provided by their solicitors.

[394] See OLRC, *Report on Administration of Estates of Deceased Persons*, *supra* note 208 at 161-171.

should, by implication, be paid after these expenses. It would be better if this point were made clear.

[318] The result is a scheme that gives priority of payment to the following: (1) funeral and testamentary expenses, (2) claims of third party creditors, (3) the equalization claim[395], (4) claims of dependants under family relief orders or maintenance orders that bind the estate, and (5) bequests, gifts and devises under the will.

b. Ontario

i. Priority as against creditors of the deceased spouse

[319] Although the *Family Law Act* does not specifically state this, the rights of creditors have priority over an equalization entitlement. Section 4(1) makes it clear that liabilities are deducted from the spouse's property to determine the net family property as of the valuation date. "This approach reflects the statutory rationale that spouses should share the value of wealth that they have created during the relationship."[396] *Gaudet (Litigation Guardian of)* v. *Young Estate*[397] affirms this principle.

[320] The OLRC recommended that the existing law be codified and that "Part I of the *Family Law Act* should be amended to provide that the equalization obligation is a debt of the deceased spouse's estate ranking subsequently to the claims of secured, preferred and ordinary creditors."[398]

ii. Priority as against beneficiaries and dependants

[321] Priorities only become important when the estate is not large enough to satisfy competing claims. Subsection 6(12) of the *Family Law Act*[399] provides that the spouse's entitlement under section 5 has priority over:

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[395] Note that in calculating the balancing claim, the funeral and testamentary expenses are ignored: s. 36, *The Marital Property Act*, C.C.S.M., c. M45.

[396] Ontario Report, *supra* note 133 at 128.

[397] (1995), 11 R.F.L. (4th) 284 (Ont. Gen. Div.).

[398] Ontario Report, *supra* note 133.

[399] R.S.O. 1990, c. F-3.

> (a) the gifts made in the deceased spouse's will, if any, subject to subsection (13)
> (b) a person's right to a share of the estate under Part II (Intestate Succession) of the *Succession Law Reform Act*
> (c) an order made against the estate under Part V (Support of Dependants) of the *Succession Law Reform Act*, except an order in favour of a child of the deceased spouse.

[322] Subsection 13 makes an exception for contracts to leave property by will that are made in good faith and for valuable consideration. The spouse's entitlement "does not have priority over a gift by will made in accordance with a contract that the deceased entered into in good faith and for valuable consideration, except to the extent that the value of the gift, in the court's opinion, exceeds the consideration."[400]

c. Saskatchewan

[323] Section 35 of the Saskatchewan *Matrimonial Property Act, 1997*[401] determines the priority of payment of the matrimonial property order. It reads as follows:

> 35. Money paid or property transferred to a surviving spouse pursuant to a matrimonial property order is deemed never to have been part of the estate of the deceased spouse where a claim is made against the estate:
> (a) by a beneficiary under a will;
> (b) by a beneficiary pursuant to *The Intestate Succession Act, 1996*;
> (c) by a dependant pursuant to *The Dependants' Relief Act, 1996*;
> (d) by a claimant in an action pursuant to *The Fatal Accidents Act*;
> (e) by any creditor of the deceased spouse or of the estate, except where the court directs otherwise in the matrimonial property order.

[324] Subsection 35(e) is somewhat puzzling in that debts are usually taken into consideration in the matrimonial property division. As in Alberta, the Saskatchewan *Matrimonial Property Act, 1997*, does not require the court to make a deduction for debts. Debts are simply one factor the court considers when deciding whether to exercise its discretion to vary from equal division.[402] As in Alberta, however, the Saskatchewan courts have developed a practice of deducting

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[400] *Family Law Act*, R.S.O. 1990, c. F-3, s. 6(13).

[401] S.S. 1997, c. M-6.11, s. 35.

[402] One of the factors listed in s. 21(3) of *The Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11 is: (o) any debts or liabilities of a spouse, including debts paid during the course of the marriage.

debts from the assets when determining what is available for distribution.[403] Personal debts of the spouses are routinely deducted for the purposes of the matrimonial property division. Moreover, the cost of funeral and testamentary expenses are also deducted for the purposes of determining the matrimonial property entitlement of the surviving spouse.[404] Nonetheless, debts are still a matter subject to the discretion of the court.

[325] Given that sufficient assets are usually available for payment of debts, few situations arise in which section 35(e) operates to the detriment of creditors of the deceased spouse. Perhaps it is there to protect the surviving spouse against huge liabilities of the deceased spouse. In such a situation, however, the creditors could place the estate into bankruptcy and then all creditors, including the claim of the surviving spouse, would share equally.

[326] *Simpson* v. *Simpson*[405] is one case in which a matrimonial property order adversely affected a creditor of the deceased spouse. In that case, the deceased spouse died with substantial assets and substantial debts. After enforcement of the secured debts, the deceased had assets of $138,312 and debts of $136,882, which amounted to $1430 in equity. The assets of the deceased included the matrimonial home, which was valued at $55,000. The court gave two reasons in support of its order that the home vest entirely in the wife. First, the husband had dissipated matrimonial assets in the last year of his life. Second, the mortgage charging the home was paid by way of life insurance proceeds payable on the death of the husband. At the time the mortgage was placed, the wife had assigned her interest as a beneficiary in the policy to the mortgagee as security for the loan used to build the home.

[327] The effect of the order was to reduce the size of the assets available for payment of creditors of the deceased spouse. Now the fact that most of the equity in the home could be traced to life insurance proceeds, an exempt asset, may account for this decision. The case law of Saskatchewan suggests that it is only in

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[403] For example, see *Mitchell* v. *Mitchell* (1988), 72 Sask. R. 255 (Q.B.).

[404] *Edwards* v. *Edwards Estate and Skolrood, supra* note 63.

[405] (1981), 13 Sask. R. 323 (Sask. Dist. Ct.).

exceptional situations that the payment of the matrimonial property order will take precedence over the payment of creditors of the deceased spouse.

2. *Bankruptcy and Insolvency Act* and section 43 of the *Administration of Estates Act*

[328] Since priority disputes arise in the context of insolvent estates, a brief overview of the administration of insolvent estates is useful. In Alberta, an insolvent estate can be administered according to the *Bankruptcy and Insolvency Act*[406] ("BIA") or according to section 43 of the *Administration of Estates Act.*[407] The BIA will apply if a creditor petitions the estate into bankruptcy[408] or if the executor, on behalf of the estate, makes a voluntary assignment into bankruptcy.[409] The effect of bankruptcy on a matrimonial property order that was granted **before** the bankruptcy will depend upon the nature of the order. If the matrimonial property order was a money judgment, the surviving spouse is treated as an unsecured creditor in the bankruptcy and the order will not survive the discharge of the bankrupt.[410] Unlike maintenance orders and the other types of unsecured creditors listed in section 136(1) of the BIA, the matrimonial property order is not given a preference and ranks equally with unsecured creditors generally. If the matrimonial property order divides property *in specie*, by virtue of a vesting order or judicial declarations of ownership, the subsequent bankruptcy of the debtor who previously held title to the assets will not disturb the matrimonial property order.[411] Where, however, the bankruptcy **precedes** the claim of the spouse, the trustee in bankruptcy will have priority over the matrimonial property claim. In such a situation, the matrimonial property claim will be treated as an unsecured debt for the purposes of bankruptcy.[412] "The spouse has no priority or property right against

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[406] R.S.C. 1985, c. B-3 as amended and renamed by S.C. 1992, c. 27.

[407] R.S.A. 1980, c. A-1.

[408] *Ibid*., ss 43(17), 44.

[409] *Ibid*., s. 49(1).

[410] *Miller* v. *Miller* (1981), U.A.D. 1293 (Alta. C.A.) and *Peterson* v. *Peterson* (1995), 178 A.R. 70 (C.A.).

[411] Robert A. Klotz, *Bankruptcy and Family Law* (Toronto: Carswell, 1994) Chapter 11. This text contains a detailed discussion of the effect of bankruptcy on previously granted matrimonial property orders. Much depends upon the terms of the matrimonial property order.

[412] For a discussion of how a spouse goes about proving their matrimonial property claim in a bankruptcy, see Klotz, Chapter 4, *ibid*.

a trustee under the applicable matrimonial property legislation where bankruptcy occurs before a court ordered division or consensual property transfer."[413] An order granting *in specie* division of matrimonial property cannot be made after bankruptcy except over property that is exempt from the bankruptcy process, such as pensions.[414]

[329] Of course, not all insolvent estates are administered under the BIA.[415] Many are administered according to section 43 of the *Administration of Estates Act*,[416] which reads as follows:

> 43(1) If on the administration of the estate of a deceased person there is a deficiency of assets,
>
> (a) debts due to the Crown and to the legal representative of the deceased person, and
>
> (b) debts to others, including respectively debts by judgment or order, and other debts of record, debts by specialty, simple contract debts and any claims for damages that by statute are payable in like order of administration as simple contract debts,
>
> shall be paid pari passu and without any preference or priority of debts of one rank or nature over those of another.
>
> (2) Nothing in this section prejudices a lien existing during the lifetime of the debtor on any of his real or personal estate.
>
> (3) If the legal representative pays more to a creditor or claimant than the amount to which he is entitled under this section, the overpayment does not entitle any other creditor or claimant to recover more than the amount to which he would be entitled if the overpayment had not been made.

[330] Section 43 does not bind the federal Crown and does not affect the rights of secured creditors to the extent of their ability to enforce their security. Nor does the section interfere with any contractual rights of set-off a creditor may have against

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[413] Klotz, *ibid*. at 84 when speaking about division statutes such as the MPA of Alberta.

[414] Klotz, *ibid*. at 235 and Chapter 4.

[415] The choice is governed by considerations of cost and the complexity of the issues. Proceedings under the BIA are more costly, but may be needed where there are certain transactions that must be challenged.

[416] R.S.A. 1989, c. A-1.

the deceased.[417] The section governs the priority position of unsecured creditors[418] but does not alter the fact that funeral and testamentary expenses are paid in priority to claims of unsecured creditors.[419] The only deviation from equal treatment of unsecured creditors arises in the case of maintenance orders,[420] which have priority by virtue of section 15 of the *Maintenance Enforcement Act*.[421] Query whether this should be the case.[422]

3. Analysis

[331] Before proceeding with the analysis, certain observations should be made. First, insolvent estates will often face priority disputes.[423] While provincial legislation, such as section 43 of the *Administration of Estates Act*, is competent to govern insolvent estates, this legislation will have no application if a creditor petitions the estate into bankruptcy[424] or if the executor, on behalf of the estate,

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[417] *Re Stewart Estate, supra* note 199.

[418] For example, see *Re Taylor Estate* (1994), 4 E.T.R. (2d) 44 (Ont. Gen. Div.) and *Western Security Co.* v. *Nordin*, [1997] 8 W.W.R. 500 (Sask. Q.B.).

[419] The recent decision in *Re Stewart Estate, supra* note 199 illustrates this point. See also OLRC, *Report on Administration of Estates of Deceased Persons*, *supra* note 208 at 168-70.

[420] Whether the estate is obliged to continue paying spousal or child support is a question of intention. If the court order or settlement agreement is silent as to whether the payee is entitled to receive support after the death of the payor, the right to receive support dies with the payor. However, if the court order or settlement agreement reveals an intention that the support be paid after the death of the payee, this obligation will bind the estate. Such an intention will be found where the order or agreement states that the payee shall pay support for the lifetime of the payee and states that this obligation shall bind the estate. The case law is divided as to whether such an intention exists if the order or agreement provides for payment of support during the life of the payee but does not also include a clause binding the estate.

[421] S.A. 1985, C. M-05, s. 15 and *Wisener v. Wisener Estate* [2000] A.J. No. 236, online: QL (AJ).

[422] The interplay between section 15 of the *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5 and section 43 of the *Administration of Estates Act*, R.S.A. 1980, c. A-1 raises an interesting issue. Section 15 starts with "Notwithstanding any other Act." Section 43, however, says all debts listed in the section "shall be paid in pari passu and without any preference or priority of debts of one rank or nature over those of another." One could argue that this leads to a competition between two sections that are in fact both "notwithstanding" clauses. If this is the case, section 43 should be given effect in situations involving death because it is designed for just those situations.

[423] The rules relating to priorities as among the surviving spouse, creditors and funeral and testamentary expenses will govern insolvent estates. Issues of priority also arise in solvent estates, but those relate to the claims of the surviving spouse versus the dependants under the *Family Relief Act* and the beneficiaries of the estate.

[424] BIA, R.S.C. 1985, c. B-3 as amended and renamed by S.C. 1992, c. 27, ss 43(17) and 44.

makes a voluntary assignment[425] into bankruptcy.[426] The following proposals will govern only those insolvent estates that are administered under provincial law. The proposals will not affect proceedings under the *Bankruptcy and Insolvency Act*. These proposals would create a special set of rules for the administration of estates that are faced with a matrimonial property claim by the surviving spouse.

[332] A second observation is that the treatment of debts and liabilities within a matrimonial property action will influence, but not determine, the priority of payment of debts owing as of the date of death. If funeral costs and testamentary expenses are treated as a matrimonial debt and if all the remaining debts and liabilities are matrimonial debts, then assets will be available to pay these claims. In this situation, the remaining assets will always equal or exceed the claim of the surviving spouse assuming the value of the estate does not fluctuate. Priority disputes will arise only in situations where certain debts are ignored for the purposes of the matrimonial property action or where the value of the estate decreases between the date of the matrimonial property order and the date of distribution of the estate. It is then possible that the estate could be insufficient to pay both the matrimonial property claim and debts and liabilities, including funeral and testamentary expenses. *Howard* v. *Howard*[427] is a case in which debts were ignored. The husband had contingent liabilities in the millions of dollars and assets worth only $94,000. The court ignored these contingent liabilities for the purpose of calculating the matrimonial property claim of the wife. How should the estate have been distributed if the husband had died?

[333] The final observation is that the nature of the matrimonial property order itself can affect priorities. In situations involving marriage breakdown, a spouse can gain priority over unsecured creditors of the other spouse who do not have judgments by obtaining a matrimonial property order that divides the assets of the debtor spouse *in specie*[428] or creates a security interest in favour of the other

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[425] *Ibid*., s. 49(1).

[426] See *Robinson* v. *Countrywide Factors Ltd*., [1978] 1 S.C.R. 751.

[427] (1983), 37 R.F.L. (2d) 33 (Alta. Q.B.).

[428] To accomplish this, the court can grant a vesting order or order one spouse to transfer property to the other spouse. For a detailed discussion of this area see Klotz, *supra* note 411 especially Chapter 11.

spouse. Conversely, creditors can gain priority over the spouse in two situations by obtaining judgment and filing a writ of enforcement against land owned by the debtor spouse. In the first situation, the creditor will gain priority if it files the writ of enforcement against the land **before** the non-titled spouse files a certificate of lis pendens against the land pursuant to the MPA. In the second situation, the creditor will gain priority if the non-titled spouse does not file the certificate of lis pendens and if the creditor files a writ of enforcement against the land **before** the court issues a matrimonial property order. The first situation is governed by section 35 of the MPA.[429] The second situation is governed by case law that establishes that matrimonial property legislation does not create property rights in the non-titled spouse until the court orders that certain property of one spouse will vest in the other spouse in partial or total satisfaction of their matrimonial property claim.[430] Until the court order is made, the right is only a right to seek exercise of court discretion in the division of matrimonial property. The matrimonial property order, once made, vests the property in the surviving spouse and removes those assets from the estate. They are no longer available for the satisfaction of the debts of the deceased spouse.

[334] Query whether a court should award *in specie* matrimonial property division if this would adversely affect creditors of the deceased. Clearly this cannot be done if bankruptcy precedes the matrimonial property order. But what should the result be where an insolvent estate is being administered under provincial law? One article suggested that a court would be reluctant to grant such an order if it would result in a preference of the non-debtor spouse over other creditors of the debtor spouse, but cites no authority to support this position.[431] There are, however, several cases in which the vesting of assets in one spouse would certainly affect the creditors of the other spouse.[432] Two recent Alberta decisions also suggest that section 35 of the MPA enables the court to divide the matrimonial property *in specie* even though this defeats the rights of creditors. Of course, creditors can

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[429] See *Markey* v. *M.N.R.*, supra note 204.

[430] See *Maroukis* v. *Maroukis, supra* note 204 and *Deloitte, Haskins & Sells Limited* v. *Graham and Graham, supra* note 204.

[431] V. Jennifer Mackinnon, The Importance of Title to the Matrimonial Home When Bankruptcy Occurs" (1988) 9 Adv. Q. 409 at 413.

[432] *Howard* v. *Howard, supra* note 427 is an example of this. More generally see Klotz, *supra* note 411 at 214-219, "Court Proceedings and Creditor Intervention".

avoid this situation by petitioning the estate into bankruptcy before the matrimonial property order is granted.[433]

[335] Section 35 of the MPA provides that a spouse who commences proceedings under the Act may file a certificate of lis pendens with the Registrar of Land Titles. If a certificate of lis pendens is registered against title to land, any instrument registered after registration of the certificate of lis pendens is subject to the claim of the spouse who filed the certificate of lis pendens. In *Markey* v. *Revenue Canada (Taxation),*[434] the wife commenced a matrimonial property action in 1993 and then filed a certificate of lis pendens against the title to the matrimonial home, which was owned in joint-tenancy with her husband. On June 11, 1996, Revenue Canada filed a writ of enforcement against the title to the matrimonial home, the writ relating solely to a debt owed by the husband. On August 16, 1996, as part of a consent matrimonial property order, the court ordered the husband to transfer his interest in the matrimonial home to the wife subject to certain encumbrances but free and clear of the writ of enforcement. The Court of Appeal held that section 35 of the MPA gives the wife's claim priority over the writ of enforcement filed by Revenue Canada.[435]

[336] In *Pieroway* v. *Pieroway*,[436] a creditor of the husband objected to a matrimonial property order that directed the husband to transfer his interest in the matrimonial home to the wife. The creditor argued that the wife was a mere creditor of the husband and, therefore, should share proportionally with other judgment creditors when the matrimonial home was sold pursuant to a writ of enforcement. The Court followed its decision in *Markey* v. *Revenue Canada (Taxation)* holding that the MPA clearly entitles a trial judge to effect division of the matrimonial property by ordering the transfer of the matrimonial home to the wife, notwithstanding claims of the husband's creditors filed after the certificate of lis pendens filed by the wife.

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[433] *Ibid.*, Klotz at 219.

[434] (1997), 31 R.F.L. (4th) 32 (Alta. C.A.).

[435] The Court of Appeal distinguished the decision of the SCC in *Marouk is* v. *Marouk is* (1984), 41 R.F.L. (2d) 113 because the Ontario legislation that was interpreted in *Marouk is* did not contain a section similar to section 35 of the Alberta MPA.

[436] [1998] A.J No. 203 (Alta. C.A.), online: QL (AJ).

[337] In the following analysis, we will assume that the various claims exist and have been quantified, and that the court has granted a monetary judgment in the matrimonial property order rather than an *in specie* division of assets. The only issue is the order in which the various claimants are to be paid. We will also assume that no one has a trust claim to any of the assets owned by the deceased.[437] Any such claim will reduce the value of property available for distribution. The proposals will NOT deal with the claims of the federal Crown or secured creditors,[438] as they are recognized as taking priority over unsecured creditors.

a. Funeral expenses and cost of administering the estate

[338] In the administration of an estate under the *Bankruptcy and Insolvency Act* or under section 43 of the *Administration of Estates Act*, the payment of funeral and testamentary expenses takes priority over the payment of unsecured creditors.[439] Widdifield explains the logic supporting this priority as follows:[440]

> Although priority among creditors has been abolished [,] because the deceased must be decently and properly buried, and because the executor or administrator is personally liable for the costs of and incidental to the proper administration of the estate, these expenses are a first charge upon the moneys coming to the hands of the personal representative. "It appears to

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[437] If the deceased dies insolvent, the surviving spouse may be better off pursuing trust remedies such as resulting trust and constructive trust as opposed to pursuing a division of matrimonial property.

[438] The category of secured creditor includes the following:

(1) Consensual security interests (ex. any security interest a debtor gives to its bank)

(2) Non-consensual security interests created in favour of various levels of government, Crown agencies, and the Workers' Compensation Board (which is not a Crown agency). See Roderick J. Wood & Michael L. Wylie, "Non-consensual Security Interests in Personal Property" (1992) 30 Alta. L. Rev. (No. 4) 1055.

(3) A surviving spouse who becomes a secured creditor by reason of a charging order given as part of the matrimonial property order: *Bascello* v. *Bascello Estate*, [1997] 33 O.R. (3d) 30 (Ont. Gen. Div.), *Protz* v. *Protz* (1997), 30 R.F.L. (4th) 434 (Sask. Q.B.) but compare with *Re Parton* (1967), 10 C.B.R. (N.S.) 285 (Alta. S.C.). (Of course, if the court divides the property *in specie*, the surviving spouse will take title free of any claims of the unsecured creditors of the deceased spouse as long as such claims have not been reduced to a judgment at the time of the granting of the order.) It is not clear whether a court can or should award in specie division of assets or a charging order when the estate is insolvent. We believe that this is something best left to the court's discretion. A court should be careful in this situation, because a matrimonial property order stripping a spouse (or estate of deceased spouse) of his or her assets, made on an unopposed or consent basis, may itself be challenged as a fraudulent conveyance. (Klotz, *supra* note 146 at 220.)

[439] BIA, ss 136(1) and 141 ; OLRC, *Report on Administration of Estates of Deceased Persons, supra* note 208 at 168-170; *Re Stewart*, *supra* note 199.

[440] Widdifield, *supra* note 199 at 82.

> me," said Jessel M.R., "that the executor is liable to pay the funeral expenses, even without an order on his part, if he has any assets available for the purpose; and it has also been decided that the funeral expenses are a first charge on the assets": *Sharp v. Lush*, 10 Ch. D. 472.
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> Testamentary expenses and the costs of administration are the next charges on the assets of the estate. . . . Costs of administration include whatever sum is allowed an executor or administration for his care, pains and trouble and time in and about the estate.

[339] Without a priority for funeral and testamentary expenses, executors may be unwilling to take on these tasks in situations in which the spouse has a claim for matrimonial property. At worst, executors may refuse to act. At best, it would delay matters because executors would need time to judge whether the estate would be sufficient to pay for the matrimonial property claim as well as funeral and testamentary expenses. Neither situation is acceptable. Funeral and testamentary expenses must take priority over the matrimonial property claim to ensure that the deceased is decently and properly buried and to deal with the matrimonial property claim itself. Practically speaking, the testamentary expenses are necessary costs of resolving the claim of the surviving spouse. Moreover, without the administration of the estate nothing can be transferred to the surviving spouse.

[340] While funeral and testamentary expenses should, as a general rule, be paid in priority to a matrimonial property order, one exception to this rule should be made. An obligation that arises by virtue of a court order that directs the estate to pay the costs of a third party should be treated as an unsecured debt, and not a testamentary expense. All other testamentary expenses would have priority of payment, including the reasonable legal fees incurred by the personal representative in defending any action, including the matrimonial property action or a family relief action.

b. Creditors

[341] There are four options to choose between when deciding on the priority of the matrimonial property claim and unsecured creditors. These include the following:

1. The matrimonial property claim ranks before all unsecured creditors of the deceased.
2. The matrimonial property claim ranks before any unsecured creditor of the deceased or of the estate, except where the court directs otherwise.

3. The matrimonial property claim ranks equally with other unsecured creditors of the deceased.
4. The matrimonial property claim ranks after all unsecured creditors of the deceased.

[342] Each option reflects a philosophy that prevails in various areas of the law: family law, bankruptcy law and the law of constructive trust. Let us look at the options in turn and examine the advantages and disadvantages of each.

1.The matrimonial property claim ranks before all unsecured creditors of the deceased.

[343] This option elevates matrimonial property rights to the status of property rights and creates an interest akin to those created by a community of property regime. The advantage of this option is that it goes the furthest to recognize the contribution of both spouses to the marriage. Nevertheless, with this option come several disadvantages. First, this option deviates from the underlying premise of the MPA. The MPA is a deferred sharing regime by which the accumulated wealth of the marriage is divided. The Act was never intended to interfere with the rights of creditors. Second, this option would dramatically affect existing lending practices. Instead of being able to rely on title, a lender making a loan to one spouse would always have to consider the claim of the other spouse. The lender could protect itself in a variety of ways, including: seeking more security, imposing stricter lending requirements, seeking a postponement of the other spouse's interest, insisting that both spouses be liable for the debt, or seeking a legal opinion that the spouse's claim will not adversely affect the lender's ability to collect the debt. Now this is not to say that in certain situations lenders do not even now consider the potential claim of a spouse. It merely says that this option would make such an inquiry prudent practice in every commercial transaction involving a married person. The third disadvantage would be that the personal representative could not pay creditors unless it was clear that the estate had sufficient assets to satisfy the matrimonial property claim as well as other debts. A prudent executor might delay payment of creditors until a surviving spouse's claim for unequal division of the matrimonial property was resolved.

[344] One commentator supported this option.

2. *The matrimonial property claim ranks before any unsecured creditor of the deceased or of the estate, except where the court directs otherwise.*

[345] The second option enables the court to evaluate the equities of the situation and to exercise its discretion in respect of priorities. This is the approach that some writers advocate when it comes to deciding when a court should impose a constructive trust in face of the creditors of the constructive trustee.[441] A similar approach could be adopted in respect of the question of priorities between matrimonial property claims and third party creditors. In support of such an approach, one Australian judge argues as follows:[442]

> Even the most cursory reading of the authorities in this area of the law makes patently obvious the fact that any attempt to impose a strict order of priorities, be it in favour of the third party creditors or in favour of spouses, must inevitably come to be regarded as repugnant to the courts' ability to do justice to the individual circumstances of each case. Just as vexed a question as the one facing the courts in trying to balance the competing legal rights of the parties then, is the question of trying to strike the necessary social balance between the two. The most important concepts here are those of necessity and balance. It would appear unfair that a spouse who has been employed over a long period in home duties should be arbitrarily relegated to a position of priority below that of the unsecured creditor to such an extent that his or her claim under s. 79 of the Act is diminished or even extinguished altogether. Similarly, spouses who allow the property of the marriage to be maintained in the sole name of their partner often find themselves the victims of what has become colloquially known as "sexually transmitted debt", and are left in a position far worse than those who hold joint legal title in the property. It seems unfortunate on the face of it then that mothers and wives should be forced to pay the price for what often are, "the sins of the fathers". But the public policy argument is by no means so simply stated or one-sided.
>
> Balanced against the rights of the spouse is the fact that the Family Court has in the application of the basic rule, already shown a preparedness to assign liabilities to one party alone or to discount a liability altogether where appropriate. Neither can it be said that spouses are by any stretch of the imagination always "innocent" victims of their partners' dealings. Spouses have often enjoyed the pre-insolvence prosperity and lifestyle that their partner's business ventures have brought. Having previously received the benefits of such success, the so-called "roller coaster" principle dictates that they should thus be prepared to share in the "down side" of such ventures. While I would suggest that the needs of the spouse to be able to survive financially must in the end outweigh the rights of unsecured creditors, the over-riding principle is that of balance. But to achieve that, the Family Court

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[441] David M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" 68 Can. B. Rev. 315.

[442] Justice T.E. Lindenmeyer "A Question of Priorities: Wives or Unsecured Creditors" (1992) 6 Austl. J. Fam. L. 239 at 245-46.

> needs to have access to all of the circumstances of each case. Any attempt to achieve this, is at present hamstrung by the limited jurisdiction of the Family Court to deal with bankruptcy matters.

[346] The advantage of this option, which incidently Saskatchewan has adopted, is flexibility and the court's ability to do justice in each circumstance. For example, the court could give the matrimonial property order priority over all debts of the deceased spouse that are not taken into account in the calculation of the matrimonial property claim. Some disadvantages of this option are that it will initially create uncertainty as to how the court will exercise its discretion, and it does not provide the certainty that both spouses and lenders need in order to plan their affairs. A further disadvantage is that this approach gives no guidance when the equities of the spouse and the creditor are equal. This option could also delay payment of creditors when the sufficiency of the estate to pay both the matrimonial property claim and other liabilities is unclear.

3. The matrimonial property claim ranks equally with other unsecured creditors of the deceased.

[347] The third option has its roots in bankruptcy law and creditor-debtor law, both of which hold that unsecured creditors should be treated equally.[443] One advantage of this option is that it gives recognition to the claims of both the spouse and creditors, all of whom should be aware of the possible existence of the others' claims. Unsecured creditors take the risk of the deceased spouse being insolvent, and the same can be said for marriage. Marriage is no guarantee of an accumulation of wealth; a spouse takes the good with the bad. Another advantage of this option is that it reflects the general rule that operates in bankruptcy,[444] thereby removing the need of the spouse to place the estate in bankruptcy to obtain this result. One disadvantage of this rule is that it does not give the protection to the surviving spouse that a property or trust claim would give. It also might delay the payment of creditors until the personal representative of the deceased is

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[443] See the discussion by Klotz, *supra* note 411 at page 119 in which he criticizes the OLRC's proposal for not allowing the claim of a surviving spouse to share equally with creditors of the deceased spouse.

[444] In a bankruptcy, most unsecured creditors are treated equally: s. 141, BIA, R.S.C. 1985, c. B-3, as amended and renamed by S.C. 1992, c. 27. Several notable exceptions have been created by s. 136(1) of the BIA, including the recently created priority for maintenance arrears introduced by s. 136(1)(d.1) of the BIA.

confident that the estate is sufficient to satisfy funeral and testamentary expenses, debts and liabilities, and the matrimonial property claim.

[348] Four commentators supported this option, although one would give child support payments priority over unsecured creditors.

4. The matrimonial property claim ranks after all unsecured creditors of the deceased.

[349] The fourth option, which is the choice of Manitoba and the OLRC, reflects the policy of a deferred sharing regime. Such a regime is designed to distribute the gains acquired over the course of the marriage and is not intended to interfere with the rights of creditors. Given this policy, payment of all debts and liabilities that are in existence at the time of death, whether they are or are not taken into account in the matrimonial property division, must have priority over payment of the matrimonial property order. The advantages of this option are that it reflects the principles of matrimonial property that underpin the MPA and it encourages efficiency in commercial transactions. The disadvantage of this option is that it places the onus on spouses to protect themselves by ensuring that they are a co-owner of the property or by establishing a resulting trust or constructive trust to preserve their position. These were two things the MPA was designed to overcome, at least, as between the parties themselves.

[350] Three commentators supported the fourth option. One of these commentators argued that the spouse's entitlement under the MPA is only to one-half of the net assets accumulated over the course of the marriage and that all debts and liabilities should be deducted in quantifying the matrimonial property entitlement. Therefore, the matrimonial property entitlement should be paid after all other creditors of the estate.

[351] This issue generated disagreement among Board members of the ALRI, which resulted in there being a majority and a minority view. Using a process of elimination, the majority finds the third option to be the best. Option 1 will cause lenders either to lend to both spouses or to ask the non-involved spouse to give a postponement of his or her rights or to seek a legal opinion that the matrimonial property claim will not detrimentally affect the rights of the lender. This would complicate every commercial transaction just to assist in those rare cases involving

death in which a court, for whatever reason, declines to treat a debt as a matrimonial debt. Option 2 is too uncertain and comes with all of the problems of option 1. Option 4 fails to recognize the claim of the surviving spouse and forces the surviving spouse to assign the estate into bankruptcy in order to rank equally with other creditors. Option 3 strikes the proper balance between recognizing the claim of the surviving spouse and the claims of the deceased's creditors. It also reflects what usually happens upon marriage breakdown when one spouse must enforce a money judgment granted in a matrimonial property order.[445]

[352] The minority, however, approaches this issue from a different perspective. In the opinion of this group, the matrimonial property entitlement of the surviving spouse is akin to a property right and should be treated as such for most purposes. Therefore, the matrimonial property entitlement should be paid in priority to all unsecured creditors of the deceased spouse. If it is otherwise, the law effectively uses the assets of the surviving spouse to pay the debts of the deceased spouse. (Notwithstanding the difference of opinion on this matter, agreement was reached on the remaining issues that relate to priority of payment.)

[353] Unlike Manitoba or Saskatchewan, we see no reason to give the matrimonial property order priority over: (1) maintenance obligations that bind the estate and (2) claims made under the *Fatal Accidents Act*. Although these are debts that do not arise in the normal course of the marriage – maintenance obligations arising before marriage and the fatal accidents claim arising out of negligence of the deceased – they are debts of the deceased spouse nonetheless. The only justification for treating maintenance obligations as subject to the matrimonial property order is that these obligations are akin to claims by dependants for family relief and should be treated on a similar basis. One problem with this justification is that it fails to recognize the difference between a debt in existence and a potential claim for family relief. Another problem with treating maintenance obligations differently is that such treatment fosters the idea that these obligations are different from other "debts" and need not be honoured. In our opinion, the matrimonial property order should rank equally with all other unsecured debts.

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[445] This assumes that the class of competing unsecured debts does not include a maintenance order.

[354] The next question is whether maintenance orders should continue to have priority of payment over unsecured debts of the deceased spouse, including the matrimonial property claim. In other words, should a priority rule that is designed for the living apply on death? In our opinion, the two situations differ and the same priority rule should not apply on death. Death of the deceased spouse eliminates future earning potential and often triggers payment of debts that might not otherwise be payable in full at that time. Death may also give rise to competing claims of the first family, by way of maintenance obligations, and the second family, by way of a matrimonial property claim. We see no reason to prefer one family to the other or to ignore other debts of the deceased spouse where no future income will be available to pay those creditors. In our opinion, all unsecured debts of the deceased spouse should rank equally on death, including maintenance obligations, the matrimonial property claim and other unsecured creditors.

[355] The reform we envision on the issue of priorities will involve the revision of sections 15 and 35 of the MPA, section 43(1) of the *Administration of Estates Act*,[446] and section 15 of the *Maintenance Enforcement Act*.[447] What must be made clear is that in the event that the claims being brought against the estate exceed the value of the estate, and the *Bankruptcy and Insolvency Act* does not apply, section 43(1) of the *Administration of Estates Act* will govern. The rule will be equal treatment of unsecured creditors. As among unsecured creditors, no special priority will be given to unsecured debts owed to the provincial Crown, maintenance payments, a money judgment in a matrimonial property order notwithstanding that a certificate of lis pendens has been filed, or a creditor who has undertaken execution proceedings but who has not received payment before the date of death. This reform will not, however, prevent a court from dividing the matrimonial property *in specie* to the extent it is entitled to do so under the MPA.

c. Beneficiaries of the estate and claims of dependants for family relief

[356] In this part, we examine the priority between payment of the matrimonial property order, and claims of beneficiaries under the will (or upon intestacy) and claims of dependants for family relief. At this point we will only consider beneficiaries who are the recipients of a gift, and not those who have entered into a

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[446] R.S.A. 1980, c. A-1.

[447] S.A. 1985, c. M-0.5.

contract whereby the deceased promised to leave certain property to the beneficiary by will. Alberta, Manitoba, Ontario and Saskatchewan give a matrimonial property order priority of payment over a claim of a beneficiary under a will or upon intestacy. It is obvious that payment of the matrimonial property order must have priority over beneficiaries under a will or in the event of intestacy. If this is not so, the entire estate will be distributed according to the will or intestacy rules and nothing will be left to satisfy the matrimonial property order.

[357] These four provinces also give the matrimonial property order priority of payment over claims made under family relief legislation. This reflects the principle that the contribution of the surviving spouse to the relationship and to the accumulation of assets should be recognized in priority to the claims of other dependants. The only question is whether an exception should be made for claims for family relief brought by a child of the deceased spouse.

[358] Both the MLRC and the OLRC have considered this issue. The MLRC considered whether giving priority to an equalization claim of the spouse would put dependant children of the deceased in jeopardy.[448] For the following reasons, the MLRC was satisfied that this would not occur. First, if the surviving spouse is the parent of the minor children, this spouse has a legal obligation to support them. Second, a minor child from another relationship can still seek relief under the *Dependants Relief Act* and the assets remaining after an equalization payment would be available to satisfy this claim.

[359] The OLRC saw no reason to treat dependant children differently from other dependants under Part V of the *Succession Law Reform Act*. Since such claims are based on need, no dependant should be preferred to another. The need of a dependant child could be less than the need of other dependants, such as parents. The OLRC recommended that all dependants be treated the same and that the equalization entitlement have priority over all such claims. It reasoned that the Act gives the spouse the right to one-half of the wealth accumulated during the marriage in compensation for a deemed equal contribution. This policy is undermined if dependant relief claims take priority over the equalization entitlement. Moreover, potential liabilities under Part V of the *Succession Law*

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[448] Manitoba Report, *supra* note 6 at 85.

Reform Act are not considered upon division of property on marriage breakdown.[449]

[360] Given that the spouse's claim is based on equal contribution to the relationship, it should have priority over claims that are based on dependence only. No change should be made to the existing law that gives priority of payment to the matrimonial property order over claims brought under the *Family Relief Act.*

d. Contracts to leave property by will

[361] For centuries courts have enforced contracts whereby an individual has promised to leave property by will to another. In return for the promise, the individual usually received support and services during his or her lifetime.[450] Still such promises will only be enforced if they are valid contracts. The usual issues that arise in these cases are:[451] intention to create legal relations,[452] certainty,[453] part performance or compliance with section 4 of the Statute of Frauds,[454] and the need for corroboration.[455]

[362] Assume that the deceased spouse has entered into an enforceable agreement to leave property by will to a third party.[456] Upon the death of the deceased spouse,

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[449] Ontario Report, *supra* note 133 at 126-7.

[450] The cases frequently arise in the context of a farm where in exchange for a younger person working on the farm for most of their life the owner of the farm promises to leave the farm to the younger person on his or her death.

[451] For a good overview of these issues see the annotation to *Racette* v. *Bearden* (1977), 1 E.T.R. 211 commencing at 211.

[452] For example see *Ross* v. *Dodd's Estate* (1989), 98 A.R. 229, *Meisner* v. *Bourgaux Estate* (1994), 4 E.T.R. (2d) 295 (N.S.S.C.), *Morochove* v. *Adams Estate* (1996), 13 E.T.R. (2d) 95 (Ont. Gen. Div.).

[453] For example see *Racette* v. *Bearden*, *supra* note 451, *Leeson* v. *Brentz* (1978), 3 E.T.R. 161 (Ont. Surr. Ct.), *Phillips* v. *Spooner* (1980), 7 E.T.R. 157 (Sask. C.A.).

[454] For example see *Deglman* v. *Guaranty Trust Company*, [1954] S.C.R. 725, *Devereux* v. *Devereux* (1978), 2 E.T.R. 164 (Ont. S.C., H.C.J.), *Re Mandyk* (1980), 6 E.T.R. 104 (Sask. Q.B.).

[455] For example see *Swan* v. *Public Trustee*, [1972] 3 W.W.R. 696 (Alta. S.C.), *Harvie and Hawryluk* v. *Gibbons* (1980), 12 Alta. L.R. (2d) 72 (C.A.), *Meisner* v. *Bourgaux Estate*, *supra* note 452.

[456] The existence of the claim may also be taken into account in the matrimonial property claim. The question is whether this liability is a "marital debt" or not. Our discussion does not cover this issue. The assumption is made that the estate has to deal with two quantified claims: the contract to leave property by will and the matrimonial property claim.

does this contract have priority over the matrimonial property claim or is the contract subject to the matrimonial property claim? A similar problem arises in the context of family relief. Will the asset that is the subject of such a contract be available for the benefit of dependants or not? The Privy Council addressed this issue on two occasions and came to two conflicting results in *Dillon* v. *Public Trustee of New Zealand*[457] and the subsequent decision in *Schaefer* v. *Schuhmann*.[458] The decisions and the competing theories that underlie each decision have been described as follows:[459]

> A. The Creditor Theory
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> The Privy Council in *Schaefer v. Schuhmann* held that one who takes a benefit under a will pursuant to a contract to devise or bequeath is to be regarded as being in the position of an estate creditor. As such he or she is entitled to be satisfied ahead of ordinary beneficiaries and applicants under the family protection legislation. According to this view, called the "creditor theory", the promisee receives under the contract a right to an effectual transfer of the relevant asset or a legacy under the promisor's will. The promisee is to be treated as a person having rights to the nominated benefit arising independently of the will. The promisee is, therefore in the position of a creditor. And the common law relating to contractual benefits applies. . . .
>
> B. The Beneficiary Theory
>
> The contrary view, termed "the beneficiary theory" and approved by the board in *Dillon* is that a promisee under a contract has nothing more than a right to be named as a beneficiary in the promisor's will. Once the testator has gone through the formalities of naming the promisee as beneficiary in his will in respect of the asset, he has fulfilled his obligation. The promisee, having been named as a beneficiary in the testator's will, will then be subject to the normal disabilities of one who is a donee under a will, including the jurisdiction of the court to make a family provision order.

[363] Alberta has developed a third approach in section 12 of the *Family Relief Act*, which reads as follows:

> 12 When a testator
>
> (a) has, in his lifetime, in good faith and for valuable consideration entered into a contract to devise and bequeath any property real or personal, and
>
> (b) has by his will devised and bequeathed that property in accordance with the contract,

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[457] [1941] A.C. 294.

[458] [1972] A.C. 572.

[459] A.W. Sheppard, "Contracts to make wills and the *Family Protection Act 1955*: is the promisee a creditor or a beneficiary?" (1985) 15 V.U.W.L.R. 157 at 158 to 160.

> the property is not subject to an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the testator.

[364] The question is whether the priority scheme should treat the promisee as a creditor or as a beneficiary or as a combination of creditor and beneficiary. If the promisee is treated as a creditor under the priority scheme, payment of the "creditor" will rank equally with payment of the matrimonial property claim. If the promisee is treated as a beneficiary, the matrimonial property claim will thereby have priority over the claim of the beneficiary. If the promisee is treated as a creditor, but only to the extent of the value of the consideration given for the promise, then, to that extent, this claim will rank equally with the matrimonial property claim.

[365] The third option strikes the proper balance between sanctity of contract and need for protection of the surviving spouse. Although this option does involve an examination of the adequacy of consideration, which is not always an easy task, this is necessary to strike that balance. Valuing the services provided to the deceased is often done in quantum meruit actions. A similar process will be followed in judging the adequacy of the consideration given for the contract. Moreover, this option reflects what is done under the *Family Relief Act*.

[366] To ensure that the promisee is not better off when the testator breaches the contract, a similar rule should apply to an action for breach of a contract to leave property by will. Such a damage claim would rank equally with the matrimonial property claim only to the extent of the value of consideration given for the contract. This recommendation met with the approval of all commentators who gave comment on this issue (seven of seven).

4. Proposed order of payment

RECOMMENDATION No. 22

(a) This recommendation applies when the surviving spouse seeks division of matrimonial property on the death of his or her spouse.

(b) Subject to the claims of the federal Crown and secured creditors, the estate of the deceased spouse should be distributed in the following order:

(i) reasonable funeral expenses,
(ii) reasonable testamentary expenses,
(iii)debts and liabilities in existence at the time of death, whether considered in the matrimonial property action or not, including:

- **debts payable in full as of death, including debts owed to the provincial Crown;**
- **debts for future payment that bind the estate, such as spousal support, child support or loan repayment that does not become payable by reason of death;**
- **contingent liabilities such as guarantees or claims under the *Fatal Accidents Act*; and**
- **a money judgment created by a matrimonial property order;**

(iv) family relief order, if any, and, finally,
(v) distribution of estate under will or upon intestacy.

RECOMMENDATION No. 23

(a) For the purposes of the preceding recommendation, when a deceased spouse

(i) has, in his or her lifetime, in good faith and for valuable consideration entered into a contract to devise or bequeath any property real or personal, and
(ii) has by will devised or bequeathed that property in accordance with the contract,

the recipient of that property shall be treated as a creditor of the deceased spouse to the extent of the value of the consideration given for the contract.

(b) If the deceased spouse does not comply with the contract and the promisee has a claim for breach of contract, the damage claim should rank equally with the other unsecured debts but only to the extent of the value of consideration given by the promisee for the contract.

D. Must the personal representative notify the surviving spouse of the right to make a claim under the *Matrimonial Property Act*?

[367] Section 7 of the *Administration of Estates Act*[460] requires that the personal representative of the deceased spouse notify the surviving spouse of his or her rights under the *Family Relief Act* and the MPA whenever the surviving spouse is not the sole beneficiary under the will or under the *Intestate Succession Act.* A judge, however, may dispense with service of the notice in respect of the MPA if "he is satisfied that the spouse does not have a right to make a claim under the *Matrimonial Property Act* against the estate of the deceased."[461]

[368] The need for notice becomes even more important if death of a spouse itself becomes grounds for an application under the MPA. This section should continue to be the law subject to one change that is needed to accommodate recommendations we will make in Chapter 7 in respect of assets that pass outside the estate. The personal representative should always give the surviving spouse notice of his or her rights under the MPA. The only situation in which the surviving spouse would not require notice is where the surviving spouse is the sole beneficiary under the will (or under the *Intestate Succession Act*) plus the sole recipient of all assets that pass outside the estate. The subsection allowing for dispensation of the MPA notice will be of very limited application under the new proposals.

> **RECOMMENDATION No. 24**
> **Section 7 of the *Administration of Estates Act* should be amended to require the personal representative to give the surviving spouse notice of his or her rights under the *Matrimonial Property Act*. The only situation in which the personal representative should not be required to give notice is where the surviving spouse is the sole beneficiary of the will (or the *Intestate Succession Act*) and the sole recipient of all will substitutes.**

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[460] R.S.A. 1980, c. A-1.

[461] *Ibid.*, s. 7(3).

E. When can the personal representative distribute the estate?

[369] Sections 12 to 14 of the MPA determine when a personal representative can distribute the estate of the deceased spouse. These sections read as follows:

> **12** The Court may make an order suspending in whole or in part the administration of the estate of the deceased spouse until an application for a matrimonial property order has been determined.
>
> **13**(1) Until the expiration of 6 months from the date of issue of the grant of probate or administration of the estate of a deceased spouse, the executor, administrator or trustee shall not distribute any portion of the estate to a beneficiary without the consent of the living spouse or an order of the Court.
>
> (2) If
>
> (a) an executor, administrator or trustee distributes a portion of the estate contrary to subsection (1), and
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> (b) the Court makes a matrimonial property order with respect to property in the estate of the deceased spouse,
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> the executor, administrator or trustee is personally liable to the living spouse for a loss to that spouse as a result of the distribution.
>
> **14** (1) If an application for a matrimonial property order is made or continued by a spouse, the executor, administrator or trustee of the deceased spouse shall hold the estate subject to any matrimonial property order that may be made, and the executor, administrator or trustee shall not proceed with the distribution of the estate other than in accordance with the matrimonial property order.
>
> (2) If an executor, administrator or trustee distributes a portion of the estate contrary to subsection (1), the executor, administrator or trustee is personally liable to the living spouse for any loss to that spouse as a result of the distribution.

[370] Manitoba, Ontario and Saskatchewan have legislation that, while different in wording, brings about the same result.[462] The Ontario legislation also provides that nothing prevents the personal representative from making reasonable advances to the deceased's dependants.

[371] We recommend that sections 12 to 14 continue to be part of the law. The distribution of the estate must be postponed until after the expiry of the limitation period to ensure that the matrimonial property claim is not defeated by premature distribution of the estate. Of course, if the surviving spouse does commence the action within six months from the grant of probate or administration, the personal

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[462] *The Marital Property Act*, C.C.S.M., c. M45, s. 32; *Family Law Act*, R.S.O. 1990, c. F-3, s. 6(14)-(20); *Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, ss 33-34.

representative cannot distribute the estate and must hold the estate subject to any matrimonial property order that may be made and shall not distribute the estate other than in accordance with the matrimonial property order.

[372] We also recommend that these sections be moved to the *Administration of Estates Act*, since they relate to the distribution of the estate and do not define the matrimonial property rights of the spouses.

RECOMMENDATION No. 25
(a) Sections 12 to 14 of the *Matrimonial Property Act* should continue to govern the obligations of personal representatives.
(b) These sections should be placed in the *Administrations of Estate Act*.

F. In what circumstances will the personal representative be liable for harm to the surviving spouse caused by premature distribution of the estate?

[373] Sections 13 and 14 of the MPA impose personal liability upon personal representatives who distribute the estate prematurely or who distribute the estate other than in accordance with a matrimonial property order. The personal representative cannot distribute the estate to beneficiaries within six months of the grant of probate or letters of administration unless he or she has the consent of the living spouse or a court order. Should the personal representative distribute the estate before the expiry of six months from the grant of probate or administration and should the spouse obtain a matrimonial property order, the personal representative is personally liable to the living spouse for a loss to that spouse resulting from the premature distribution.[463] Once the surviving spouse brings a matrimonial property action, the personal representative must hold the estate subject to any matrimonial order that may be made and must distribute the estate in accordance with such order. If the personal representative fails to do this, he or she is liable to the surviving spouse for any loss to that spouse that results from the distribution.[464]

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[463] MPA, R.S.A. 1980, c. M-9, s. 13.

[464] *Ibid*., s. 14.

[374] These sections should continue to be the law of Alberta. They make it clear that personal representatives who fail to respect the rights of a surviving spouse will be held personally accountable. As already discussed, these sections are more connected with the administration of estates than the creation of matrimonial property rights and, as such, should be moved to the *Administration of Estates Act*.

G. Can the surviving spouse be the personal representative of the estate?

[375] Many spouses appoint their surviving spouse as the executor of their will. Therefore, the question arises as to whether it is appropriate for the surviving spouse to act as the executor if he or she is also going to pursue a claim under the MPA. There are two views on this issue.

[376] The OLRC thinks that it is inappropriate for the surviving spouse to act as the personal representative of the estate once he or she elects to receive the equalization entitlement.[465] Acting in such a capacity creates a direct conflict of interest. The OLRC did not, however, want to delay representation of the estate until the surviving spouse had had time to determine whether to take the equalization or succession entitlement. Therefore, it recommended that the surviving spouse could apply for letters probate or letters of administration. Once the spouse elects equalization, Part I of the Act should preclude the surviving spouse from receiving a grant of probate or administration in the estate of the spouse. If the grant has already been made, the Act should provide for the removal of the surviving spouse as personal representative.[466] Nevertheless, the OLRC recommends that the surviving spouse still be entitled to act as guardian or trustee if so appointed by the deceased spouse.

[377] The other view is that the surviving spouse should act as the executor because he or she will be the most familiar with the affairs of the deceased spouse. The conflict of interest can be handled as it now is in situations where the surviving spouse is the executor under the will and decides to bring an application as a dependant under the *Family Relief Act*.[467] One lawyer would bring an action

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[465] Ontario Report, *supra* note 133 at 119.

[466] *Ibid.* at 120.

[467] In such a situation, the conflict is handled by appointing two lawyers. One lawyer acts for the surviving spouse in his or her personal capacity as dependant under the *Family Relief Act*. The other

under the MPA or *Family Relief Act* or both on behalf of the surviving spouse in his or her personal capacity. The other lawyer would defend the actions on behalf of the estate and take instructions from the personal representative, the surviving spouse. Additional protection arises from the fact that the beneficiaries of the estate would be parties to the application for family relief and could make representation to the court. If additional safeguards are needed, the legislation could make court approval a precondition to any settlement reached by the personal representative with the surviving spouse where all beneficiaries do not agree with the settlement. This will be discussed later in this chapter.

[378] Most commentators are of the opinion that while the device of appointing two lawyers is adequate to deal with the conflict of interest that arises when the spouse is the personal representative and a claimant under the *Family Relief Act*, it is NOT adequate to deal with the conflict of interest that arises when the spouse is the personal representative and a claimant under the *Matrimonial Property Act*. The difference perceived between the two situations is described as follows. The estate has no interest in the outcome of the family relief application, and as a result, the estate takes a neutral position in such an application. Therefore, the surviving spouse does not give any instructions to the estate vis-a-vis that action. This is not the case, however, when a surviving spouse commences a matrimonial property action. In the face of such an action, the estate will have an obligation to defend and preserve the assets of the estate and this will entail defence of the matrimonial property action and arguments as to unequal division and so on. In this situation, the spouse is in a clear conflict of interest. How can the surviving spouse as personal representative instruct the estate adequately when the surviving spouse is bringing the matrimonial property action?

[379] The conflict of interest between acting as the personal representative of the estate and pursuing a claim against that estate under the *Family Relief Act* or MPA is obvious. One must either prohibit the spouse from acting as executor or else have two lawyers appointed in order to address this conflict. We see no difference between the conflict of interest that exists where the surviving spouse is the personal representative and chooses to bring a family relief application, and the conflict of interest that exists when the surviving spouse is the personal

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lawyer acts for the spouse in his or her capacity as executor and represents the interest of the estate.

representative and chooses to bring a matrimonial property action. Since Alberta has an established practice in matters involving claims for family relief by the spouse who is also the personal representative, this should be applied to claims brought under the proposed MPA. It merely applies existing procedure to a similar problem. Further protection will be provided by requiring the spouse to serve the statement of claim commencing the matrimonial property action on the beneficiaries of the estate, and allowing the beneficiaries to participate as parties to the action if they so choose.

[380] In summary, when a conflict exists because of the spouse's right to seek division of matrimonial property and the spouse's duties as personal representative of the estate, different lawyers should act on behalf of the spouse in his or her personal capacity and in his or her role as personal representative of the estate of the deceased spouse. To provide additional protection for the beneficiaries of the estate, they should be served with the statement of claim and be allowed to participate in the action if they so choose.

RECOMMENDATION No. 26

The existing practice governing conflicts of interest that arise when a spouse acts as the personal representative of his or her deceased spouse is adequate to deal with a situation in which the surviving spouse acts as the personal representative and commences an action for division of matrimonial property. In addition, beneficiaries of the estate should receive notice of the action and be allowed to participate as parties to the action if they so choose.

H. Must a court approve of any settlement reached by the personal representative and the surviving spouse?

[381] The various matrimonial property statutes differ widely on whether a court must approve a settlement reached by the personal representative and the surviving spouse. Some statutes, like those of Alberta and Ontario, are silent on this point. This must mean that the personal representative can settle the claim just like any other claim made against the estate. The Nova Scotia statute expressly contemplates that the personal representative of the deceased spouse may reach a

settlement agreement with the surviving spouse.[468] The Saskatchewan statute, on the other hand, provides that no settlement or agreement made by a personal representative respecting an application is valid as against a surviving spouse unless it is confirmed by court order.[469] The Manitoba legislation takes a middle position by requiring court approval of a settlement only in situations in which one of the beneficiaries is a minor or in which one of the adult beneficiaries does not consent to the settlement.[470]

[382] The Manitoba section is based on a recommendation of the MLRC. The MLRC rejected the notion of court approval in every situation because of the expense and inevitable delay such a procedure would create. It was concerned, however, with the situation in which the surviving spouse was also the personal representative of the deceased. Although it recognized the spouse's conflict of interest in this situation, it did not view this as posing any real danger where all of the named beneficiaries consent to the proposed distribution. The conflict of interest does, however, pose a real danger where such consent is absent.

[383] The approach of the MLRC strikes the proper balance. Clearly, if the personal representative is someone other than the spouse, court approval of the settlement between the personal representative and the surviving spouse is unnecessary. The personal representative will be accountable to the beneficiaries for his or her actions. If the spouse is also the personal representative, court approval of the settlement is unnecessary when all the adult beneficiaries agree to the settlement. The need for court approval arises only in those situations in which one of the beneficiaries is a minor or in which one of the adult beneficiaries does not agree with the settlement.

RECOMMENDATION No. 27

Where the surviving spouse is the personal representative of the deceased spouse, the court must approve a settlement reached by the surviving spouse and the personal representative of the estate only in situations in which:

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[468] *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 27(1).

[469] *The Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, s. 34(3).

[470] *The Marital Property Act*, C.C.S.M., c. M45, s. 32(3).

(i) one of the beneficiaries is a minor and the Public Trustee does not consent to the settlement, or
(ii) one of the adult beneficiaries does not consent to the settlement.

CHAPTER 7. AVOIDANCE TECHNIQUES AND TRANSITION

A. Introduction

[384] The MPA anticipates that not all spouses may agree with the principles underlying the Act and that some spouses may take extreme measures to defeat their spouse's claim under the Act. To discourage such behaviour, section 10 of the MPA empowers a court to set aside certain transactions that were undertaken in an effort to defeat a claim under the Act.[471] The Act also has mechanisms to deal with dissipation of assets and gifts of matrimonial property made to third parties. It does not, however, have specific provisions that deal with assets that the deceased had substantial control of until death but which do not form part of the estate.

[385] In this chapter, we evaluate the existing anti-avoidance provisions. We will then consider whether the surviving spouse will need additional protection in respect of assets that become property of third parties upon the death of the deceased spouse, and if so, in what situations. Transition is also addressed.

B. Avoidance Techniques

1. Gifts, transfers at less than fair market value, and dissipation

[386] Generally speaking, the only property that is available for distribution under the MPA is the property owned by both spouses or either of them as of the valuation date, which is usually the date of trial. This general rule is subject to three exceptions: (1) fraudulent transfers that fall within section 10 of the MPA, (2) gifts and transfers to persons who are not bona fide purchasers for value, and (3) dissipation of assets. The means of dealing with these avoidance techniques were discussed in detail in Chapter 3.[472]

[387] In our opinion, the MPA deals adequately with transfers, gifts and dissipation of assets where these events take place during the joint lives of the spouses. The application of these rules upon death should work equally well where assets of the

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[471] See *Stone* v. *Stone*, *supra* note 282 for an example of a situation that section 10 of the MPA was designed to remedy. Without such a section, a court must resort to the law of fraudulent preference, as it did in this Ontario decision.

[472] See discussion in Chapter 3 beginning at para. 108.

deceased spouse do not pass outside of the estate or where the surviving spouse is the sole recipient of any property that passes outside the estate of the deceased spouse. The only change that is necessary relates to section 10. Recognizing that death will cause delays in pursuing a matrimonial property action, we recommend that the limitation period in respect of section 10 be one year before death, instead of one year before the action is commenced.

RECOMMENDATION No. 28
Where an action is commenced after the death of one of the spouses, section 10 of the *Matrimonial Property Act* should apply with one variation. Subsection 10(1)(d) should be replaced with: "the transfer or gift was made not more than one year before the death of the spouse".

[388] The existing rules are insufficient to deal with assets that pass outside the estate to a third party by reason of the death of the deceased spouse. This is discussed in detail under the next heading.

2. Will Substitutes

a. Introduction

[389] Jurisprudence[473] illustrates the many ways of ensuring that assets do not form part of the estate of a spouse yet remain within the substantial control of that spouse until death. Collectively these methods are referred to as will substitutes[474] and include: life insurance proceeds payable to a named beneficiary,[475] property

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[473] Most of the cases arise in the context of family relief applications, but there are also several Saskatchewan cases involving division of matrimonial property on death. See *Olsen* v. *Olsen Estate* (1990), 30 R.F.L. (3d) 447 (Sask. Q.B.), *Garvey* v. *Garvey* (1987), 12 R.F.L. (3d) 122 (Sask. Q.B.), *Ferguson* v. *Ferguson Estate*, *supra* note 278. In the context of family relief cases, assets pass outside the estate and are no longer available for the satisfaction of a family relief order. In the context of matrimonial property cases, the assets pass outside the estate and are not treated as matrimonial property because it is not property owned by either spouse on the valuation date. In Saskatchewan, the valuation date is the date the application is brought, and the application is always brought after the death of the deceased spouse where death of the spouse is the grounds for the action.

[474] The MLRC defines will substitutes as arrangements whereby a spouse retains benefits or control over property until death but the property does not form part of the deceased's estate at death. A lengthy description of commonly used will substitutes is found at page 136 of the Manitoba Report, *supra* note 6.

[475] *Kerslake* v. *Gray*, [1957] S.C.R. 516 and *Re Naylor*, [1940] 1 D.L.R. 716 (Ont. S.C.).

held in joint tenancy with a third party,[476] an *inter vivos* trust with income paid to the settlor during his or her life,[477] and survivor's benefits payable under a pension to a named beneficiary.[478]

[390] Uncertainty exists as to whether the ability to designate a beneficiary of proceeds of a registered retirement savings plan removes the proceeds from the estate and, therefore, uncertainty exists as to whether a registered retirement savings plan is a will substitute.[479] Four decisions, including an unreported Alberta decision, have held that such a designation does not remove the proceeds from the estate and that the proceeds vest in the estate and are to be paid to the designated beneficiary as a specific legacy.[480] This does not, however, prevent a financial institution from transferring the registered retirement savings plan to the designated beneficiary. It merely allows creditors or dependants of the deceased to seek a declaration that the designated beneficiary holds the registered retirement savings plan on trust for satisfaction of debts or obligations of the deceased. One case disagrees, saying that the designation removes the proceeds from the estate just like a beneficiary designation for a life insurance policy.[481] As already discussed, we will not resolve this issue in this report. Instead, we are content to include a retirements savings plan, a retirement income fund or an annuity in the

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[476] *Re Maxwell Estate* (1961), 38 W.W.R. 23 (Sask. Q.B.).

[477] *Collier* v. *Yonkers* (1967), 61 W.W.R. 761 (Alta. S.C.A.D.).

[478] *Re Young*, [1955] O.W.N. 789 (C.A.) and King v. *King* (1990), 40 E.T.R. 85 (Man. Q.B.).

[479] For a general discussion of this issue, see ALRI, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of The Trustee Act* (Report No. 68, 1993) at 14-18.

[480] *CIBC* v. *Besharah* (1989), 68 O.R. (2d) 443 (Ont. H.C.J.) , *Waugh Estate* v. *Waugh* (1990), 63 Man. R. (2d) 144 (Man. Q.B.), *Clark Estate* v. *Clark*, [1997] 3 W.W.R. 62 (Man. C.A.) and *Re Estate of Eleanor Chamberlain* (May 15, 1998) ES-01-087683 (Alta. Surr. Ct.). See also *Pozniak Estate* v. *Pozniak* (1993), 88 Man. R. (2d) 36 (Q.B.). *Re Estate of Eleanor Chamberlain* is an unreported decision of Justice Forsyth in which he approved of the reasoning in *CIBC* v. *Besharah*. Justice Forsyth held that RRSP funds remain part of the estate of the deceased spouse. Section 47(11) of the *Trustee Act*, R.S.A. 1980, c. T-10, which deals with RRSP beneficiary designations outside a will, is insufficient to remove the RRSP funds from the estate. If the Legislature had this intent, it would have used wording similar to that found in section 265(1) of the *Insurance Act*. He declared that the RRSP funds form part of the deceased's estate and should be held by the trustee pending determination of the claims under the will. The husband of the deceased brought the application because he wanted to make application for relief under the *Family Relief Act*. The oral judgment of Justice Forsyth was taped and later transcribed at the request of the husband's lawyer.

[481] *Daniel* v. *Daniel* (1986), 41 Man. R. (2d) 66 (Man. Q.B.).

category of will substitute to the extent that the beneficial interest passes to the designated beneficiary upon the death of the owner of the plan or fund.

[391] Where a third party is the recipient of the will substitute, the fact that the will substitute does not form part of the estate affects a claim for division of matrimonial property on death at two levels: calculation of the claim and satisfaction of the claim. Examples taken from Saskatchewan and Ontario will illustrate these interconnections. In Saskatchewan, property that passes to a third party at the moment of death is not owned by either spouse when the action is commenced after death and, therefore, is not subject to a matrimonial property order.[482] If the value of the asset that passes outside the estate is large, this will substantially reduce the share of the surviving spouse. The only way to bring such assets back into the matrimonial property pool is to seek a remedy under section 28 of the Saskatchewan *Matrimonial Property Act, 1997*. This section deals with dissipation, transfer or gift of matrimonial property within the two years preceding the application and often does not remedy the situation.

[392] In Ontario, the valuation date is the date before the date of death. Therefore, the estate of the surviving spouse must list as property of the deceased all property owned on that date by the deceased. This is the case even though the property will pass on death to a third party by right of survivorship[483] or by beneficiary designation under a pension or annuity. (The only exception arises in situations in which a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse. In that situation, the joint tenancy is deemed to have been severed immediately before the time of death.) The result is that an estate may have to pay an equalization entitlement calculated on the value of assets owned by the deceased spouse on the valuation date when some or all of those assets no longer form part of the estate. The ability to pursue a claim against an estate that cannot satisfy it is of little value, and the surviving spouse has no remedy against the recipient of the will substitute.

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[482] See *Olsen* v. *Olsen Estate*, *supra* note 473, *Garvey* v. *Garvey Estate*, *supra* note 473 *Ferguson* v. *Ferguson Estate*, *supra* note 278.

[483] Where the spouse and a third party own the beneficial interest in land as joint tenants, the spouse must account for one-half of the value of the land in a division of family property on marriage breakdown. If the spouse dies, the estate must also list this as an asset of the deceased spouse even though title vests in the third party by right of survivorship.

[393] In this part, we will examine how the matrimonial property legislation of Saskatchewan, Manitoba and Ontario deal with will substitutes that pass to third parties. We will then examine whether protection against such will substitutes is needed in Alberta, and if so, what the nature of the protection should be.

b. The law in other provinces

[394] Legislation and jurisprudence in other provinces differ as to the anti-avoidance protection, if any, that is offered. A review of such legislation and jurisprudence illustrates the options available. It also illustrates the nature of the problem and the numerous means a spouse can use to defeat the legitimate expectations of his or her surviving spouse to a fair share of the matrimonial property accumulated over the course of the marriage.

i. Saskatchewan

[395] In Saskatchewan, matrimonial property includes all property owned by each spouse on the date the action was commenced.[484] Where the surviving spouse commences an action after the death of the spouse, the property that passes to a third party at the moment of death is therefore not matrimonial property and, as such, is not subject to a matrimonial property order. On this basis the following property has been held not to be matrimonial property:

- insurance proceeds payable to a third party,[485]
- joint property owned by the deceased spouse and a third party,[486] and

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[484] *The Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11, s. 2(1) defines "matrimonial property" as 'any real or personal property, regardless of its source, kind or nature, that, at the time an application is made pursuant to this Act, is owned, or in which an interest is held, by one or both spouses, or by one or both spouses and a third person . . . ' Section 2(1) defines value as 'the fair market value at the time an application is made pursuant to this Act, or at the time of adjudication, whichever the court thinks fit . . .' The courts prefer to use the date of application as the valuation date unless special circumstances make the date of trial more appropriate. Special circumstances include steep deflation in value between the date of application and the date of trial or situations where the best evidence of value is evidence as of the date of trial. Whichever date is used, the courts must value all matrimonial property as of that date. See McLeod & Mamo, *supra* note 66 at S-21 to S-22.

[485] *Olsen* v. *Olsen Estate et al.*, *supra* note 473. But the result was different in a situation in which the matrimonial property action was commenced before death and the husband learned of his terminal illness before his death. In that situation, the term life insurance policy was treated as matrimonial property of husband and valued on the basis that it acquired a value after he learned of his illness. See *Paterson* v. *Remedios*, [1999] 11 W.W.R. 442 (Sask. Q.B.).

[486] *Garvey* v. *Garvey Estate*, *supra* note 473.

- the portion of pension fund death benefits that accumulated during marriage and were payable to a third party.[487]

[396] Saskatchewan does not have anti-avoidance protection specifically designed for will substitutes. Moreover, section 28,[488] which deals with dissipation, transfers of property at less than fair value with the intention to defeat a claim of the other spouse, and substantial gifts, does not usually provide a remedy. The result is that a spouse who wants to defeat the purpose of the Saskatchewan *Matrimonial Property Act, 1997* can easily do so by using will substitutes to accomplish this purpose. Three reported decisions illustrate this point.

[397] *Ferguson* v. *Ferguson Estate*[489] involved a second marriage for both parties that began in 1974 and ended in 1991 with the death of the husband. Within six months of the date of probate, the wife commenced an action. The husband was a police officer who contributed to an employment pension from 1948 until his death. This plan required the employee to designate a beneficiary and allowed the employee to change this designation at any time during his life. Upon death, the plan paid the designated beneficiary the employee's contributions plus interest. Before his second marriage, the husband had named his first wife as the designated beneficiary and had never changed the designation. The court held that the portion of the pension fund death benefit that accumulated during the second marriage was

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[487] *Ferguson* v. *Ferguson Estate*, *supra* note 278.

[488] Section 28 of the *Matrimonial Property Act, 1997*, S.S. 1997, c. M-6.11 is anti-avoidance protection. By virtue of this section, the court is empowered to review certain transactions that take place in the two years before the day on which the application is commenced. These transactions include:

- dissipation of matrimonial property,
- transfer of matrimonial property to a third party for less than adequate consideration with the intention of defeating a claim that the other spouse may have under the Act, or
- a substantial gift of matrimonial property made to a third party without the consent of the other spouse.

If any of these transactions have occurred, the court can make an order regarding the transactions. Most often the court will deem the transferred property to be a part of the share of the offending spouse. In some situations, the court may make an order against the donee or transferee. Where the spouse made a gift or sold property for less than adequate consideration, the court can add the donee or transferee as a party to the action and order the donee or transferee to pay or transfer all or part of the matrimonial property to the spouse. The court can also give judgment against the donee or transferee in favour the spouse. Such orders can be made against a transferee only where the transferee knew at the time of the transfer that the transfer was made with the intention of defeating a claim a spouse may have under the Act.

[489] *Supra* note 278.

NOT matrimonial property. The court also held that the husband's designation of a third party beneficiary under the pension plan was not a dissipation of assets. Even if it were, it was not done within the two years before the application was brought.

[398] Although the judge does not explain his first finding, it must flow from the definition of matrimonial property. Matrimonial property is defined as all property owned by either spouse at the time of the application. Upon death, the death benefit became the property of the ex-wife. Since the application was begun after the death, neither spouse had any interest in the death benefit on the day the action was commenced.

[399] In this case, the second wife received $100,000 as the beneficiary of the group term insurance on the life of the deceased husband. The court held that what is now section 23(3)(b) of the Saskatchewan *Matrimonial Property Act, 1997* excludes the proceeds of life insurance from distribution. The proceeds are exempt property as are any assets acquired by these funds.

[400] In *Garvey* v. *Garvey Estate*,[490] the home that the husband and wife lived in was actually owned in joint tenancy by the husband and a woman with whom he had lived outside marriage for 22 years. The only asset the husband had was his interest in the home. Upon his death, title to the home vested in the surviving joint tenant. The surviving wife, who first learned of the joint tenancy after the death of the husband, brought an application under the Act seeking unequal division of the home under section 22. The court held that the surviving spouse had no claim under the Act because as the home passed by right of survivorship to the surviving joint tenant, there was nothing in the estate to make a claim against.

[401] The surviving spouse also sought a declaration that the surviving joint tenant held the home as constructive trustee for the benefit of the surviving spouse. Considering that most of the value of the home was attributable to improvements paid for by the surviving spouse, the court declared that the surviving joint tenant held the home in constructive trust for the surviving spouse in the amount of $22,000, being the cost of the improvements.

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[490] *Supra* note 473.

[402] Since the joint tenancy existed at the time of the marriage, it could not be challenged as a transfer or dissipation of assets under section 28 of the Act. Query whether the surviving spouse could have brought such a challenge if the deceased spouse had created the joint tenancy in the two years before the application was brought.

[403] In *Olsen* v. *Olsen Estate*,[491] the wife petitioned for a divorce and sought an equal division of matrimonial property. Shortly thereafter, the husband changed the designated beneficiary of his life insurance policy from the wife to a third party. He died before the matter got to trial and his wife continued the matrimonial property application after his death. The only real asset was the life insurance proceeds of $50,000.

[404] The court held that the proceeds of life insurance were not matrimonial property because the proceeds, not being payable until the death of the insured, did not exist on the date the application was commenced. As such, they did not fall within the definition of matrimonial property as set out in the Act.[492] It also held that the policy itself was matrimonial property and was owned by the husband, but that there was no point in valuing the policy because it was academic in this case.[493] On the question of value of the policy, the court stated:[494]

> Insurance policies on the life of one or another spouse are often dealt with as matrimonial property. A value is placed on them. I do not know that it has ever been done, but the right to designate a beneficiary and even the right to proceeds of a designated beneficiary could be valued. The value would depend on the facts in each case. Both rights would be valuable in relation to the face value of insurance if it is known that the insured is about to die, and that the insurance is valid and in force. The point is, however, academic in the present case. So is the fact that the Act, if it entitled her at all, would not, except on proof of special circumstances, entitle the plaintiff to more than one half of the proceeds.

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[491] *Supra* note 473.

[492] Since the insurance proceeds were not payable to either of the spouses, they did not fall within the exemption created by section 23(3)(b).

[493] The court did not explain why it was academic to value the life insurance policy as of the date of the application. Perhaps it had no value as of that date. Perhaps valuing the policy would be of no benefit to the surviving spouse given the fact that there were no assets in the estate that could satisfy any matrimonial property order. Perhaps the death was accidental and there was no forewarning that the husband was going to die.

[494] *Supra* note 473 at para 12.

[405] The wife argued that the husband dissipated matrimonial property when he changed the beneficiary designation on the life insurance policy. The court rejected this argument. As owner of the policy, the husband was free to change the designated beneficiary until the moment he died unless restrained by an order of the court. Having changed the beneficiary designation, the proceeds became payable to the beneficiary the moment he died. By virtue of section 158(1) of The Saskatchewan *Insurance Act*, the proceeds never formed part of the husband's estate and were never his property. Changing the designation was not a dissipation of anything and did not fall within section 28 of the Act.

[406] In obiter, the court held that the result would be the same if the husband had initially designated the third party as the beneficiary or if the wife had commenced the application after death. The proceeds of insurance are never the property of the policy owner. Immediately upon death, they become the property of the named beneficiary.

[407] The court held that the Act provides no protection to the wife in this situation except that it allows the wife to apply to the court for an order preventing the husband from dealing with the policy. It also suggested that the wife could take out insurance on her husband's life or insist that the husband make an irrevocable designation of herself as the beneficiary. The result was that the third party was entitled to retain the insurance proceeds that had been paid under the life insurance policy.

[408] In *Paterson* v. *Remedios*,[495] a different result was reached where the husband learned of his terminal illness shortly before death. The couple married in 1988 and separated in March 1997. In July of 1997, the husband commenced a matrimonial property action. The husband learned of his terminal illness in May of 1998, and shortly thereafter, changed the beneficiary designations on four life insurance policies from his wife to his daughter or girlfriend. The couple was divorced in August 1998, and the husband died in September 1998. On his death, the jointly-owned home worth $225,000 passed by right of survivorship to his ex-wife, and insurance proceeds totalling $449,700 were paid to his daughter and

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[495] [1999] 11 W.W.R. 442 (Sask. Q.B.).

girlfriend. The estate consisted of assets worth $34,895, which was insufficient to pay the debts of the deceased.

[409] The wife argued that, at the time the application was commenced, the husband owned a group life insurance policy that insured his life in the amount of $314,000. Since this policy became valuable when the husband learned of his terminal illness, and since that increase in value occurred after the husband commenced the application, the court should value the policy as of the date of adjudication, as opposed to the date of commencement of the action. The husband's share of the matrimonial property should be credited with the full face value of the property ($314,000), which he chose to give away on the day he designated his girlfriend as the beneficiary.

[410] The court accepted the wife's argument as to the valuation date and valued the policy as of the date of adjudication. While recognizing that term policies do not usually have a value, it held that this policy attained value the day the husband learned of his terminal illness. Reasoning that the policy must have been worth at least half of its face value once the husband learned of his terminal illness, the court valued the policy at $150,000. On this basis, the estate would have to make a small equalization payment to the wife. Yet, given the poor financial position of the estate, the wife waived any equalization payment that was owing to her. From the wife's perspective, the purpose in valuing the policy was to ensure that the wife could retain the matrimonial home and not have to make an equalization claim to the estate.

[411] The weakness in the court's reasoning is that the policy was not worth anything as of the date of adjudication, since the proceeds had already been paid out to his girlfriend. While saying that it is valuing the policy as of the date of adjudication, the court seems to be valuing the policy as of the date the husband learned of his terminal illness. The case also shows the importance of being able to follow the insurance proceeds into the hands of the recipients where a judgment is given against an insolvent estate.

ii. Manitoba

[412] Manitoba takes a very different approach to will substitutes and its *Marital Property Act* has sections[496] that deal specifically with will substitutes. If the spouses were cohabiting with each other on the date of death, certain assets, or a portion thereof, must be taken into account in the calculation of the matrimonial property entitlement. To accomplish this, the estate must include certain assets as assets of the deceased spouse even though they have passed to others on death of the deceased. The estate need only account to the extent that the deceased spouse did not receive adequate consideration in respect of the asset. Those assets are listed in section 35(1)(a)-(f) as follows:

> (a) a gift mortis causa by the deceased spouse to a person other than the surviving spouse;
> (b) subject to subsection (3), property that, at the time of the death of the deceased spouse, was held by the deceased spouse and a person other than the surviving spouse, with a right of survivorship;
> (c) a retirement savings plan, retirement income fund or annuity, or a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees or former employees, payable to a person other than the surviving spouse on the death of the deceased spouse;
> (d) where a life insurance policy owned by the deceased spouse is payable to a person other than the surviving spouse, the cash surrender value of the life insurance policy immediately before the death of the deceased spouse;

This list includes all will substitutes except *inter vivos* trusts set up for the benefit of the deceased spouse.

[413] Several exceptions are created to the general rule established in 35(1)(d) in respect of life insurance. By virtue of subsection 35(2), the cash surrender value of certain types of life insurance payable to third parties is not treated as an asset of the deceased spouse. These include life insurance for business purposes and life insurance that is in compliance with a court order made under the *Divorce Act* or *The Family Maintenance Act* or in compliance with a maintenance agreement. Consequently, the cash surrender value of life insurance policies purchased to fund spousal support and child support or to fund business interests will not be treated as the property of the deceased spouse.

[414] In addition, subsection 35(3) establishes rules to determine the percentage of the value of a jointly-owned asset that must be shown as an asset of the deceased spouse. In the case of bank accounts, the funds that were the property of the

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[496] *The Marital Property Act*, C.C.S.M., c. M45, ss 35 and 41(3).

deceased spouse immediately before they were deposited are deemed to be an asset of the deceased spouse. In the case of real property, the property is deemed to be an asset of the deceased spouse "to the extent of the ratio of the contribution of the deceased spouse to the contribution of other parties, multiplied by the fair market value of the property on the day the spouse died."[497] [Note that this equation is inaccurate. It should be the ratio of the contribution of the deceased spouse to the contribution of all parties, including the deceased.] The surviving spouse has the onus of proving the extent of the deceased's interest in a bank account or real property held jointly with a person other than the surviving spouse.[498]

[415] The fact that the section deems certain assets to be assets of the deceased spouse does not mean that the assets form part of the estate or that the assets can be attached by creditors of the estate. If the estate is not sufficient to satisfy the equalization claim of the surviving spouse, the persons entitled to the assets listed in section 35(1) must pay the deficit.[499] The recipients of the property must pay in proportion to the value of their interest in the assets transferred by will substitute. This, of course, assumes that the recipients received the assets as a gift. If they paid money or exchanged valuable services for the property, then the recipient's share is calculated on basis of the value of the asset less the consideration paid for it.

iii. Ontario

[416] Ontario's approach to will substitutes is to adopt as the valuation date the "date before the date on which one of the spouses dies leaving the other spouse surviving."[500] This choice of valuation date addresses the problem of will substitutes in the following manner:[501]

> We understand that this date was chosen to overcome the problem that arises when a spouse dies owning an interest in property other than a matrimonial home as joint tenant with a third party. If that spouse dies before the other joint tenant, the latter acquires the property by survivorship on the death of the spouse. Thus, the deceased spouse would have no property

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497 *Ibid*., s. 35(3)(b).

498 *Ibid*., s. 35(4).

499 *Ibid*., s. 41(3).

500 *Family Law Act*, R.S.O. 1990, c. F-3, s. 4(1).

501 Ontario Report, *supra* note 133 at 104.

> interest in the property at death and, therefore, no interest that could be shared with the surviving spouse. Such a result would leave a surviving spouse substantially worse off than if she had separated prior to death. The choice of an earlier date overcomes this problem.

[417] This approach provides a solution only where the estate contains sufficient assets to satisfy the enhanced equalization entitlement. It provides no solution where all of the deceased spouse's assets pass outside the estate. This is so because the choice of valuation date does not affect the common law right of survivorship. The joint tenancy is severed only where the property involved is the matrimonial home.[502] The result is that where all of the assets pass outside the estate, the claim against the estate is of no value and the surviving spouse has no remedy against any recipient of a will substitute.[503]

[418] The choice of valuation date has provided only a partial solution to will substitutes and has caused several other problems. Recognizing this, the OLRC has recommended that the valuation date be changed to the moment after death and that the Act provide for a claw-back of will substitutes as is done by section 72 of the *Succession Law Reform Act*.[504] This section is the anti-avoidance protection included in the part of that Act that deals with family relief. It deems certain property that passes outside the will to be part of the estate of the deceased and makes it available to be charged for payment of a claim made by a dependant.[505] Property held in joint tenancy is included in the estate to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held in joint tenancy was furnished by the deceased.[506]

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[502] *Family Law Act*, R.S.O. 1990, c. F-3, s. 26(1).

[503] *Cimetta* v. *Topler (Cimetta Estate) et al.* (1989), 20 R.F.L. (3d) 102 (Ont. H.C.J.).

[504] Ontario Report, *supra* note 133 at 108-10.

[505] The property listed in section 72 includes:
* gifts *mortis causa*
* money held by the deceased in trust for another
* joint bank accounts
* any property held in joint tenancy
* revocable trusts
* life insurance
* pensions, annuities and RRSPs.

[506] *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 72(2).

[419] In an effort to address the problem of will substitutes being used to defeat the claim of the surviving spouse, the Commission recommended:[507]

> that the definition of "net family property" in section 4(1) of the *Family Law Act* should be amended to provide that property other than property excluded under section 4(2) which the deceased spouse was competent to dispose immediately before death should be included in that spouse's net family property at its value on the valuation date, except to the extent that the property is otherwise included in the net family property of the surviving spouse.

c. The need for reform: the case in principle

[420] Over the course of a marriage, the property owned by the spouses will change on a day-to-day basis as the spouses accumulate, spend and give away the assets. But generally speaking it is only property that is owned by both spouses or either spouse on the valuation date that is distributable under the MPA. When the surviving spouse commences the action after death, the valuation date will usually be the date of trial, and on that date, the third party will own the will substitute. If the will substitute that passes to a third party is not taken into account in the matrimonial property calculation, the surviving spouse loses his or her right to share in property that the spouses acquired over the course of the marriage. Even if the will substitute is taken into account in the calculation, the estate may be insufficient to satisfy the matrimonial property claim, and the surviving spouse has no remedy against a third party unless the transaction falls within section 10 of the MPA.

[421] The existing law is inadequate to deal with these problems. In many situations, the will substitute is a transfer of property to the third party for no consideration, and as such constitutes a gift. By virtue of subsection 8(h), a court can consider the fact of a gift when exercising its discretion to divide the matrimonial property unequally, but that subsection does not empower the court to treat the value of the gifted property as property of the donor spouse.[508] Under the existing law, the only way to bring the will substitute into the accounting is to consider the will substitute to be property of the deceased spouse. But this is only possible if the will substitute is a gift or transfer that falls within section 10 or if

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[507] Ontario Report, *supra* note 133 at 110.

[508] *Mazurenko* v. *Mazurenko, supra* note 7.

the court views the will substitute as a dissipation of assets.[509] Neither event is likely given the narrow application of section 10 and the Saskatchewan cases in which the courts have refused to treat the creation of will substitutes as dissipations of assets.[510] Furthermore, even if the court takes the will substitute into account in the calculation of the claim, this does not make the property in the hands of the third party available for distribution under the MPA. Recovery of a gift can only take place under section 10.[511] This section, however, provides no remedy where the required intent to defeat a claim is missing or where the will substitute was put in place outside the short period prescribed by the section.

[422] In our opinion, the death of a spouse should not defeat the central principle underlying the MPA. The surviving spouse should be entitled to share in all of the property that the spouses acquired over the course of marriage and owned at the end of the marriage. To bring about equitable division of these assets, the MPA should deem will substitutes that pass to a third party to be property of the deceased spouse for the purpose of calculating the matrimonial property entitlement of the surviving spouse. The will substitutes will not, however, become part of the estate of the deceased spouse and will remain property of the third parties. Will substitutes that pass to a third party should be taken into account when determining the claim of the surviving spouse, and if necessary, be available to satisfy that claim. This must be done if the surviving spouse is to be in the same position that a spouse is upon marriage breakdown and it must be done if the law does **not** wish to invite easy circumvention of the MPA in the context of death.

[423] This approach met with the approval of some but not all of the commentators. Five commentators agree that there is a need for protection against will substitutes, three commentators think such protection is unnecessary, and three commentators are in favour of a narrower type of protection than that proposed in RFD No. 17. Those that oppose protection against will substitutes that pass to a third party are uncomfortable with "deeming" will substitutes to be property for the purposes of calculating the matrimonial property entitlement of the surviving spouse. They were also concerned that a personal representative would

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[509] See discussion in Chapter 3 beginning at para. 108.

[510] See discussion in Chapter 3 at paras. 108-19 and in this chapter at paras. 395-411.

[511] *Mazurenko* v. *Mazurenko*, *supra* note 7.

face increased risk of liability if he or she was unable to discover an existing will substitute. Those that argue in favour of limited protection point to the need for certainty in estate planning. They think that protection should arise only in respect of will substitutes created in the few years preceding death or those put in place to defeat the claim of the surviving spouse. Comments directed specifically to life insurance will be dealt with later in this chapter.

[424] While the concept of "deeming" will substitutes to be property of the deceased spouse for the purposes of calculating the matrimonial property entitlement of the surviving spouse may seem novel to some, it is not without precedent. Since 1978, Ontario has allowed courts to treat will substitutes as assets of the deceased for the purposes of ascertaining the value of the estate when making family relief awards and has allowed dependants to look to those will substitutes for satisfaction of the order.[512] And since 1993, Manitoba has deemed certain will substitutes to be assets of the deceased spouse for the purpose of calculating the equalization payment of the surviving spouse under the *Marital Property Act*.[513] Deeming will substitutes to be property of the deceased spouse for the purpose of calculating the matrimonial property entitlement of the surviving spouse is a necessary part of providing protection against will substitutes.

[425] Some may see this interference with will substitutes that pass to third parties as going too far to effect equal division of matrimonial property. In our opinion, however, this interference is justified because will substitutes are, in effect, quasi-testamentary dispositions, and the recipient of the will substitute is akin to a beneficiary of the estate. Taking will substitutes into account when calculating and satisfying the matrimonial property order is consistent with interfering with gifts in the will in order to serve the principles underlying the MPA.[514]

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[512] *Succession Law Reform Act*, R.S.O. 1990, c. S-26, Part V, Support of Dependants, section 72. Section 72 provides that the capital value of certain will substitutes "shall be included as testamentary dispositions as of the date of death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 62(2)(f)..."

[513] C.C.S.M. c. M-45, s. 35.

[514] Ontario Report, *supra* note 133 at 109.

[426] We do not think that this type of protection will impose an unreasonable burden on the personal representative of the estate. Presently, the personal representative must use due diligence in locating the assets of the estate and is not liable, if after using due diligence, he or she failed to locate an asset. Drawing an analogy to this situation, the personal representative would have to use due diligence in discovering the existence of will substitutes. The personal representative would not, however, be responsible if, after using due diligence, he or she failed to identify the existence of such an asset. The normal review of the deceased's records and contact with employers, banks and insurance companies should disclose most will substitutes that were in existence at the time of death. Moreover, this cannot be an insurmountable problem as some provinces require such disclosure in other contexts.[515]

[427] Those that wish to see a more limited scope of protection argue that a balance must be sought between the need for protection against will substitutes and the need for certainty in estate planning. In their opinion, Albertans who use will substitutes should be confident that after a certain period, say two to three years, their estate plan is beyond attack except where there is clearly an intention to defeat the matrimonial property claim of the surviving spouse.

[428] We agree that certainty in estate planning is necessary, but we do not agree that limiting the scope of protection against will substitutes is the only way of achieving this goal. It must always be kept in mind that as a general rule the surviving spouse is entitled to one-half of the matrimonial property acquired over the marriage. This still leaves room for the deceased spouse to create will substitutes with exempt property or with his or her share of the non-exempt matrimonial property. Therefore, fair distribution of property as between the spouses will be one means of ensuring that an estate plan will not be upset. If additional certainty is needed, couples can incorporate a matrimonial property agreement under sections 37 and 38 of the MPA as part of their estate plans. Alternatively, couples in second marriages may wish to make pre-nuptial agreements that make it clear how they wish to treat property acquired before marriage and property acquired over the course of the marriage.

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[515] For example, in probate applications brought in Saskatchewan certain will substitutes must be listed in the probate application.

[429] While we agree that limited protection from will substitutes is better than no protection, we are still concerned that limited protection will be insufficient to prevent injustice. Our concern arises from the fact that estate planning is done on a longer time line than a review period of two or three years suggests. It is also very difficult to determine if a will substitute was created with the intention of defeating the claim of the surviving spouse. The fact is that under the existing law, the giving of non-exempt matrimonial property to third parties by way of will substitutes defeats the claim of the surviving spouse and fails to recognize the contribution of the surviving spouse to the marriage. Gifts to third parties made by way of will substitutes should take place subject to the claim of the surviving spouse.

[430] If the deceased had effective control over the asset during his or her life, then the asset should be included in a division upon death, subject to any claim for exemption that is available. Refinements and exceptions to this general principle will be required, but this should be the starting point.

d. Analysis

[431] This part examines the various levels of protection that can be created and works from the premise that some protection against will substitutes is necessary.

i. Which will substitutes should be treated as assets of the deceased spouse for the purposes of the matrimonial property calculation?

[432] Let us now review each category of will substitute and determine the mechanics of taking that will substitute into account. The method chosen will depend upon whether the asset changes in nature or value upon death.

[433] The fact of death does not affect the nature or value of certain will substitutes such as gifts *mortis causa*, registered retirement savings plans, and registered retirement income funds. These are assets that were owned entirely by the deceased spouse before death and that should, to the extent that they are property of the third party by reason of the death, be brought into the accounting on death. The estate should list these assets as deemed assets of the deceased for the purpose of calculating the matrimonial property entitlement. As with other assets, they will be valued as of the valuation date. As noted earlier, some case law suggests that section 47(11) of the Trustee Act is insufficient to remove registered retirement savings plans and registered retirement income funds from the estate of the

deceased spouse. If this is the case, they are not will substitutes and would be treated like other property of the deceased spouse. Should the contrary view be accepted by other Alberta decisions, these assets should be deemed to be property of the deceased spouse for the purposes of calculating the matrimonial property entitlement.

[434] Treatment of the other types of will substitutes is not as simple, and we will address each in turn. Life insurance raises two interesting issues: should it be taken into account at all, and if taken into account, how should this be done? Some commentators view life insurance as a protection against premature death and not something that is earned over the course of the marriage. They noted that often the premiums paid for life insurance are less than the proceeds paid under the policy. These commentators do not want proceeds of life insurance that is paid to a third party under a contract owned by the deceased spouse to be deemed to be property of the deceased spouse. In their opinion, this would unduly interfere with the operation of the *Insurance Act* and is unnecessary given that the proceeds are not acquired over the course of the marriage. In their opinion, a spouse should be able to meet moral obligations to others by use of life insurance without interference from his or her spouse.

[435] Other commentators view life insurance as an asset acquired over the course of the marriage because premiums are paid during the course of the marriage. The fact that the proceeds may exceed the premiums paid does not mean that it is different in kind than other assets. These commentators are of the view that will substitute protection should be broad enough to cover life insurance policies owned by the deceased spouse.

[436] Having considered both views, we prefer the view that life insurance is an asset acquired over the course of the marriage and should be taken into account in the will substitute protection we propose. But how should this be done? Should one take into account the entire insurance proceeds, or only the cash surrender value of the policy as valued just before death? The latter is what is done in situations of marriage breakdown. Therefore, choosing this method would ensure that the surviving spouse is treated in the same manner on death as on marriage breakdown. The problem with this approach is that it ignores the fact that on death the cash surrender value no longer measures the value of the life insurance policy.

For this reason, we believe that the entire life insurance proceeds must be brought into the accounting.

[437] Transferring property into joint tenancy with a third party would be an easy way to circumvent the MPA. To prevent this result, such property must be taken into account in the matrimonial property calculation. This raises the question of the extent to which jointly owned property should be brought into the calculation. The goal is to bring into account the beneficial interest that the deceased owned immediately before death. The extent of this interest will vary depending upon the facts and the method used to value the interest created in the particular case. In certain situations, the creation of the joint tenancy is for the convenience of the spouse and no beneficial interest passes to the third party.[516] In other situations, the spouse will intend to give an immediate beneficial interest to the joint tenant upon the creation of the joint tenancy so that immediately before the death of the spouse, each joint tenant owns a beneficial interest in one-half of the property.[517]

[438] The statute could simply direct the estate to value the beneficial interest that the deceased owned in the property immediately before death. Then the law of resulting trust, the presumption of advancement and the evidence in the given case will determine the extent of the beneficial interest of the deceased spouse. Alternatively, the statute could give more specific instructions as is done in *The Marital Property Act* of Manitoba in the case of joint bank accounts and property held in joint tenancy. Assume that the deceased held a joint bank account with a third party and that upon death the money passed to the third party by right of survivorship. Under the Manitoba Act, the bank account is deemed to be an asset of the deceased spouse to the extent that the funds were the deceased's funds immediately before deposit into the account. In the case of jointly held real property, the property is deemed to be the property of the deceased spouse to the extent of the ratio of the contribution of the deceased spouse to the contribution of other parties.

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[516] Joint bank accounts set up by an elderly parent with a child are often created on this basis.

[517] For example see *Mazurenko* v. *Mazurenko, supra* note 7. In this case the title to a house was registered in the name of the husband and his two daughters as joint-tenants. In the absence of any further evidence as to value, the court valued the husband's interest in the house as one-third of the fair market value of the house.

[439] We recommend adoption of the Manitoba model.[518] This model ensures that the interest of the deceased spouse that is brought into account is the interest that was paid for by the deceased spouse and was enjoyed by the deceased spouse until his or her death. We recognize that this model will override any immediate gift that the surviving spouse may have intended to bestow upon a joint tenant when the joint tenancy was created. In our opinion, this is an acceptable consequence of making matrimonial property principles apply on death. It is also necessary to ensure that the use of joint tenancy does not become an easy means of depriving the surviving spouse of his or her fair share of property acquired over the course of marriage.

[440] One refinement we would add to the Manitoba model concerns the concept of contribution. In our opinion, the contribution must relate not only to acquisition costs but also include the costs of maintenance and repair. It must also be clear that contribution will include valuable services as well as money contributions. This should enable a court to consider the contribution, if any, made by family members to jointly-owned property. This will be important where, for example, the family cottage was for many years before the death owned by the spouse and his or her children, as joint tenants.

[441] Another means of depleting an estate is to create an *inter vivos* trust of certain assets. These trusts come in a variety of forms, with some removing control of the assets from the settlor and some leaving control with the settlor. Such trusts have been used effectively in the United States to defeat claims of the surviving spouse.[519] Assume that a spouse creates an *inter vivos* trust for certain assets and that the immediate beneficiary of the trust is the settlor spouse. If the settlor spouse no longer has control of the trust assets, the creation of the trust is akin to a gift or *inter vivos* transfer that takes place during the joint lives of the spouses. The spouse who disapproves of the creation of such a trust must deal with it in the same way as he or she would respond to a gift or *inter vivos* transfer. If the settlor spouse retains control of the trust assets, such a trust can defeat the legitimate expectations of the surviving spouse on death. These trusts would include any

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[518] Although accepting the Manitoba model, we would correct the error in the formula found in section 35(3)(b) of the Manitoba *Marital Property Act*.

[519] W.D. MacDonald, *Fraud on the Widow's Share* (University of Michigan, 1960) generally and Chapter 13 in particular.

revocable trust, or irrevocable trust in which the trustees have the power to consume or dispose of the capital for the benefit of the spouse who created the trust. The assets that are the subject of such a trust must be taken into account in a matrimonial property action and be treated as the asset of the deceased spouse, which will be valued as of the valuation date.

[442] One commentator wants it to be made clear that will substitute protection will not apply to a family trust created by a third party that gives the deceased spouse a power of appointment under the family trust. This is a good suggestion and will be incorporated into our final recommendation.

[443] The other class of will substitute that must be brought into account includes annuities, pensions, and similar plans. These assets present difficulties in that they change in nature upon death. For example, a pension benefit paid to the deceased spouse during his or her life becomes a survivor's benefit paid to the surviving spouse or a designated third party. It is very important that these assets be brought into account in the matrimonial property action, but what must be brought into account is the benefit as it exists after death. This is not only practical, but it also reflects the nature of the asset as it will exist on the valuation date, being the date of trial.

RECOMMENDATION No. 29

(a) For the purposes of calculating the matrimonial property entitlement under the *Matrimonial Property Act*, all property that was owned by the deceased spouse immediately before death and which became the property of a third party on death is deemed to be property of the deceased spouse, including but not limited to:

(i) a gift *mortis causa* by the deceased spouse to a person other than the surviving spouse;

(ii) property that, at the time of the death of the deceased spouse, was held by the deceased spouse and a person other than the surviving spouse, with a right of survivorship;

(iii) a retirement savings plan, retirement income fund or annuity payable to a person other than the surviving spouse on the death of the deceased spouse where the beneficial interest in the asset

passed to the third party upon the death of the deceased spouse;
(iv) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees or former employees, payable to a person other than the surviving spouse on the death of the deceased spouse;
(iv) proceeds payable to a third party upon the death of the deceased spouse under a life insurance policy owned by the deceased spouse or under a policy taken out on the lives of a group of which the deceased is a member;
(v) assets that were disposed of by the deceased spouse in trust or otherwise, to the extent that the deceased spouse retained during his or her lifetime, either alone or in conjunction with others, a power to revoke such a disposition or a power to consume or dispose of the principal thereof for his or her own benefit.

(Hereafter, the assets listed above will be referred to as will substitutes.)

(b) Where a deceased spouse at the time of his or her death held real property or personal property, jointly with a person other than the surviving spouse, the property shall be included in the statement of property of the deceased spouse,
(i) in the case of funds in a bank account, to the extent that the funds were the property of the deceased spouse immediately before the funds were deposited; and
(ii) in the case of other property, to the extent of the ratio of the contribution of the deceased spouse to the contribution of all joint tenants, multiplied by the fair market value of the property on the day the spouse died.

(c) Contribution includes maintenance and repair costs as well as acquisition costs and may take the form of valuable services as well as money contributions.

(d) The Statement of Property filed by the estate in the matrimonial property action should contain a list of all

property described in subsection (a) that is deemed to be property of the surviving spouse. A distinction should be drawn in the Statement of Property between the property that is in the estate and that which is deemed to be part of the estate.

ii. Should certain will substitutes be treated as exempt assets?

[444] The MPA directs the court to "make a distribution between the spouses of all the property owned by both spouses and by each of them"[520] and then goes on to exempt certain property from distribution. The exemptions target property that has not been acquired over the course of the marriage by the efforts of the parties. Exempt property includes gifts acquired by one spouse from a third party, an inheritance, property acquired before marriage, an award or settlement for damages in tort in favour of one spouse, and proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for loss to both spouses. As discussed in Chapter 4, these exemptions, subject to a change in respect of life insurance payable to the surviving spouse and gifts made by one spouse to the other, should continue to apply to situations involving division of matrimonial property on death. The result is that the deceased spouse would be entitled to an exemption for any exempt property that can be traced into a will substitute received by a third party.

[445] Nevertheless, other exemptions will be needed to accommodate will substitutes in the context of division of property on death. Division of matrimonial property on death, while similar to division on marriage breakdown, is not identical. Unlike marriage breakdown, death can trigger payment of an existing debt, give rise to a liability,[521] increase the value of an asset,[522] or make an asset disappear.[523] Many people plan for such events with the use of will substitutes

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[520] MPA, R.S.A. 1980, c. M-9, s. 7(1).

[521] For example, partners may be required by agreement to carry insurance such that insurance proceeds are payable to the surviving partner so that partner will have funds to purchase the interest of the deceased partner. This ensures the survival of the business run by the partnership and provides protection to the family of the deceased partner.

[522] For example, a life insurance policy owned by the deceased spouse that insures the life of the deceased and is payable to the estate.

[523] For example, an annuity may come to an end upon the death of a deceased spouse if there is no guaranteed period of payment.

payable to third parties. Frequently, people have insurance so that upon their death certain debts, such as a mortgage or bank loan, are paid. Life insurance policies are also used to fund ongoing support obligations. In other situations, a will substitute may be the means used to transfer an asset to a third party to serve a legitimate business purpose. For example, corporate planning makes use of life insurance policies owned by a spouse that are payable to a third party. Some of these policies are put in place to allow third parties to purchase the business interests that are owned by the deceased spouse. Others are there to ensure that a business can continue after the death of a key officer of the company and thereby maintain the value of the deceased's interest in the company.

[446] The goal is to bring into account gifts that are made to a third party by way of will substitutes while not interfering with will substitutes that are used to satisfy debts and liabilities or that serve a legitimate business purpose. To catch only gifts made by way of will substitutes, the following "assets" of the deceased spouse must be exempt from "distribution":

> (a) a will substitute that is used to satisfy an existing debt or liability.
>
> (b) a will substitute where its purpose is to provide:
>
> > (i) money or property that the beneficiary of the will substitute will likely require, or
> >
> > (ii) compensation for loss that the beneficiary of the will substitute will likely suffer,
>
> in respect of a business undertaking upon the death of the deceased spouse.

[447] Into the first category will fall any arrangement by which assets pass outside the estate to a creditor to satisfy a debt of the deceased spouse. This would include mortgage insurance or life insurance purchased to satisfy ongoing spousal support payments that bind the estate by virtue of court order or settlement agreement. The exemption is not limited to life insurance and would include other will substitutes that serve the same purpose. This category of exemption is really a recognition that there is no need to take the asset into account where it has satisfied a debt or liability of the deceased spouse. The second exception allows for legitimate corporate planning that is necessary in the event of the death of a person involved in a business undertaking. Neither class of transaction amounts to a gift of an asset.

[448] If the value of the will substitute exceeds the debt or liability owing, the excess should be treated as non-exempt property of the deceased spouse for the purposes of calculating the matrimonial property claim. The business purpose exemption requires a similar examination of the value of the will substitute as compared to what the beneficiary will likely need or will likely suffer in the business undertaking as a result of the death of the deceased spouse. Such an examination will prevent the "gifting" of assets to a business partner by way of will substitute just for the purpose of defeating the claim of the surviving spouse. Nevertheless, judging the adequacy of consideration may be difficult. It may not always be easy to determine if the value of the asset received by way of will substitute is equivalent to what the beneficiary needs or suffers in the business undertaking as a result of the death of the deceased spouse. If this comparison is to be avoided, the exemption could extend to all will substitutes that were created in satisfaction of a *bona fide* contract entered into by the deceased spouse and the third party who receives the will substitute.[524] This does, however, introduce the possibility of a contract being used to cloak what is actually a gift. For this reason, the examination of the adequacy of consideration is preferable.

[449] This recommendation met with the approval of the commentators, although several commentators would like to expand the category of exemptions. Three commentators would like to exempt all life insurance proceeds payable to a third party. This is just another argument that life insurance proceeds paid to a third party should not be taken into account. Three other commentators suggest that a court be given the discretion to exempt any will substitute used to meet a moral obligation of the deceased spouse as long as this does not create undue hardship for the surviving spouse. In our opinion, the mere fact that a will substitute is used to satisfy a moral obligation is not sufficient reason to allow it to be exempt property, or even to allow a court a discretion to declare the property exempt. A deceased spouse must use his or her share of the matrimonial property to meet moral obligations, not their spouse's share of the matrimonial property. On marriage breakdown, a court is not concemed with the moral obligations of either

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[524] A similar recommendation was made by the ALRI in *Family Relief* (Report No. 29, 1978) at page 125. The recommendation was made in respect of will substitutes that are used to deplete the estate and thereby deprive dependants of support. It read as follows:

> (6) An amount payable under a policy of insurance shall not be subject of an order under this section where such amount is payable to a third party pursuant to a **bona fide** contract with the deceased.

spouse, only the debts that they owe. The same should be the case in the division of matrimonial property on death.

[450] There are two ways to create exceptions to the general rule that will substitutes are deemed to be the property of the deceased spouse for the purposes of calculating the matrimonial property entitlement. On the one hand, one can deem all will substitutes to be property of the deceased spouse for the purposes of the calculation and can then treat certain will substitutes as exempt assets. On the other hand, one could say that certain will substitutes will not be deemed to be property of the deceased spouse. We have taken the first approach because this should result in the disclosure of all will substitutes in the Statement of Property and allow the surviving spouse to make arguments as to whether the will substitute is exempt.

RECOMMENDATION No. 30

In addition to the exemptions suggested in recommendation 10, the following assets should be exempt for the purposes of the matrimonial property accounting on death:

(i) a will substitute that is used to satisfy an existing debt or liability of the deceased spouse, and

(ii) a will substitute where the purpose of the will substitute is to provide:

(A) money or property that the recipient of the will substitute will likely require, or

(B) compensation for loss that the recipient of the will substitute will likely suffer,

in respect of a business undertaking by reason of the death of the deceased spouse.

iii. Should the surviving spouse have a remedy against the recipient of assets that pass outside the estate?

[451] We emphasize that will substitutes will not become part of the estate even though they are treated as assets of the deceased spouse for purposes of calculating the matrimonial property claim. These assets will be paid to the third party as they now are and will **not** be available for the payment of debts of the estate or dependants' claims under the *Family Relief Act*.

[452] This raises the question of whether the surviving spouse should be able to look to the recipients of the will substitute for satisfaction of the portion of the

claim that the estate is unable to satisfy. The surviving spouse could do one of the following: (1) look to the estate, and only to the estate, or (2) look first to the estate, but if the estate is insufficient, look to the recipients of the will substitutes for the deficiency. Within the second option are two variations. The right to seek payment of any deficiency from the third party might be automatic, or it might be reserved only for those cases in which the deceased wanted to defeat the claim of the surviving spouse and the recipient of the asset knew or ought to have known of this intention.

[453] The first option is similar to that now found in Ontario where the net family property of the deceased spouse includes assets that do not form part of the estate. If the assets remaining in the estate are sufficient to pay the claim, the contribution of the surviving spouse to the accumulation of assets over the course of the marriage is recognized. Where, however, the estate is small in comparison to the value of assets that pass outside the estate, the claim of the surviving spouse will be defeated by use of the will substitutes. The second option responds to the criticism that it is unreasonable to include will substitutes as assets of the deceased spouse, calculate the claim of the surviving spouse on this basis, and then only look to the estate for payment, because this will not provide protection in those situations in which all the assets pass outside the estate. The second option is preferable because it provides protection and a remedy in such a situation where it is most needed.

[454] This issue divided opinion among the commentators. Where the estate is insufficient to satisfy the matrimonial property order, five commentators would allow the surviving spouse to look to the recipient of the will substitutes for payment of the deficiency. Five commentators would not allow the surviving spouse to look to the recipient of will substitutes for satisfaction of any deficiency. One commentator would allow the surviving spouse to look to the recipient of the will substitute only when the recipient was party to the deceased spouse's attempt to 'cut-out' the surviving spouse.

[455] Even if the second option is chosen, when should the surviving spouse be allowed to recover the deficiency from the recipients of the will substitute? Should the recipients be treated like beneficiaries of the will with the result that the claim of the surviving spouse always has priority? Is this interfering too much with the

expectations of the recipients who may have made decisions on the basis that the will substitute was their property? Perhaps the remedy against the third party should only exist where the deceased spouse had used the will substitute as a means of defeating the claim of the surviving spouse and the recipient knew of this intention.

[456] For the following reasons, we recommend that the spouse be able to look to the recipients of will substitutes for satisfaction of any deficiency in payment of the matrimonial property order. First, most will substitutes are in substance gifts made upon death and the recipient will have provided no consideration for them. The recipients of these assets are the same in kind as beneficiaries under the will and should be treated in a similar fashion. Second, will substitutes can easily defeat the claim of the surviving spouse if the surviving spouse is restricted to pursuing the estate of the deceased spouse. To give adequate protection against will substitutes, the will substitutes must be taken into account in the calculation of the matrimonial property entitlement and must be available to satisfy this claim should the estate prove insufficient. Just taking them into account for the purposes of the calculation provides no protection when the estate has been stripped of its assets through the use of will substitutes. It is in just those situations that protection is most needed. Third, it is often very difficult to prove that the deceased intended to defeat the claim of the surviving spouse. For example, if a wife ensures that everything passes outside her estate and vests in her children from an earlier marriage, is she showing her love for her children or her intention to defeat her husband's claim? Even if her intention is to defeat the claim of her husband, will her children know of this intention or will they just assume she was showing her great love for them?

[457] Assuming that the estate is insufficient to pay the claim and the recipients of the will substitutes must pay the deficiency, what would be the contribution expected of each recipient? A good starting point would be that the recipients of the property pay in proportion to the value of the asset they received. This, of course, assumes that the recipients received the assets as a gift and that the asset could not be traced to an exempt asset. If the recipient did contribute towards the purchase or maintenance of the asset, or if all or part of the will substitute derives from an exempt asset, then the recipient's share should be calculated on the basis

of the value of the asset less the contribution given by the recipient and less the value of any applicable exemption.

[458] This model works well when all of the recipients have retained the will substitute. But what happens when one recipient is not able to contribute his share because he has spent the money received and has no other means of satisfying the obligation? Should the other recipients have to satisfy the claim of the surviving spouse from the will substitutes in their possession? Who should suffer the loss, if any, arising from the squandering of the will substitute? Clearly, a choice must be made between the surviving spouse and the other innocent recipients. However, we think the balance points in favour of the other innocent recipients who should be liable only for their proportionate share of the claim.

[459] In making these recommendations, the other concern we have is for the recipient of the will substitute who spends the money or consumes the property in the mistaken belief that the property is his or hers to spend. Should the recipient have a defence similar to that of change of circumstances that exists in equity? The defence of change of circumstances is an equitable defence that can be raised in the face of a claim for money paid under a mistake of fact. The mere fact that the money is spent without knowledge of the claim does not give rise to a defence. The recipient must show that his or her circumstances changed because of receipt of the money or property. A change of circumstances occurs if the recipient spends the money on items that the recipient would not ordinarily have bought.[525] No change of circumstances occurs if the recipient spends the money on normal expenditures[526] because the return of the money leaves the recipient in the same position he or she was in before receipt of the money. Of course, the defence is not available if the money is spent with the knowledge of the facts entitling the other to restitution.[527]

[460] In RFD No. 17 we invited comment on whether recipients of will substitutes should be able to raise the defence of change of circumstances. Four commentators are of the view that the defence of change of circumstances should be available to

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[525] *RBC Dominion Securities Inc.* v. *Dawson* (1994), 111 D.L.R. (4th) 231 (Nfld. C.A.).

[526] *Rural Municipality of Storthoaks* v. *Mobile Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1 (S.C.C.).

[527] *RBC Dominion Securities Inc.* v. *Dawson*, *supra* note 525.

recipients of will substitutes. Three commentators see many difficulties in the practical application of this defence and consider it to be unnecessary.

[461] This same division of opinion is held by Board members of the ALRI. The minority consider it fair to allow the defence because recipients of will substitutes may not be aware of a potential claim by the surviving spouse. It should be left to the surviving spouse to notify the recipient of the spouse's potential claim as soon as possible after the death of the deceased spouse. The defence is not open in respect of money spent by the recipient after notice of a claim in respect of the assets.

[462] The majority are of the opinion that there should be no defence of change of circumstances because the claim of the surviving spouse must have priority over the claim of the recipient of the will substitute if the principles underlying the MPA are to be served. Moreover, the recipient of a will substitute should be on notice that if they receive a gift on death, either by will or by way of will substitute, it comes subject to the claim of the surviving spouse. It will simply be a question of knowing if a surviving spouse exists and knowing the period in which such a claim can be brought.

[463] To ensure that these recommendations do not interfere with the transfer of will substitutes to third parties, the MPA should make it clear that nothing in the Act prevents a corporation or person from paying or transferring any funds or property to any person otherwise entitled thereto unless they have been personally served with a suspensory order granted by a court. The MPA should also empower the court to grant such an order when it would be appropriate in the circumstances. The proposed amendments must also make it clear that the will substitutes do not form part of the estate and that they do not affect the rights of creditors of the estates.[528]

RECOMMENDATION No. 31
Where the estate is insufficient to satisfy the matrimonial property order, the deficiency shall be paid by persons who received will substitutes in proportion to and to the extent of

[528] Similar provisions are found in s. 72(5) - (7) of the *Succession Law Reform Act*, R.S.O. 1990, c. S-26. This section deals with anti-avoidance protection in the context of family relief.

the value of their respective interests in those assets. The value of their respective interests equals the fair market value of the asset less the value of any contribution provided by those persons respectively to or on behalf of the deceased spouse and less the value of any applicable exemption.

RECOMMENDATION No. 32
The defence of change of circumstances should not be available to a recipient of a will substitute.

RECOMMENDATION No. 33
(a) The recommendations made in respect of will substitutes do not prevent any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on the corporation or person a certified copy of a suspensory order.
(b) The will substitutes will not form part of the estate of the deceased spouse and the recommendations concerning will substitutes will not affect the rights of creditors of the deceased spouse.

C. Transition

[464] As noted in Chapter 2, the proposed recommendations will not affect the large numbers of spouses who give their entire estate to the surviving spouse. The spouses who will be most affected are those who disinherit their surviving spouse or those who give some, but not all, of their estate to their surviving spouse by will. Yet even in these situations, an application brought under the *Family Relief Act* can presently bring about the sharing of matrimonial property under the principles set out in *Tataryn* v. *Tataryn Estate*. Nonetheless, *Tataryn* does not deal with many of the issues that must be dealt with on a division of matrimonial property upon death. Our proposals, therefore, would bring about a change to the existing law.

[465] Albertans will require a reasonable period to consider the amendments and redraft their wills if they so choose. The need to give people time to adapt to the amendments must be balanced with the need to have the amendments apply to all

spouses within a reasonable period. To accomplish this, we recommend that the amendments apply in the following situations:

> (a) to all individuals who die intestate after the date the amendments come into force,
>
> (b) to all individuals who die with a will wherein it is expressly stated that the will is made in contemplation of the proposed amendments, and
>
> (c) to all individuals who die on or after a certain date, that date being two years from the date the amendments come into force.[529]

[466] Under the proposals, the provisions dealing with division of matrimonial property upon death will not apply if the spouses had previously divided their assets by an agreement made in compliance with sections 37 and 38 or by court order, and they did not reconcile. Logically, this bar to an action on death should flow from settlement agreements and court orders made before and after the amendments come into force. Once a spouse's contribution to the marriage is recognized by agreement or court order, further division of matrimonial property upon death is unnecessary as long as the couple has not reconciled in the meantime.

> **RECOMMENDATION No. 34**
> **The proposed amendments should apply in the following situations:**
>
> **(i) to all individuals who die intestate after the date the amendments come into force,**
>
> **(ii) to all individuals who die with a will wherein it is expressly stated that the will is made in contemplation of the proposed amendments, and**
>
> **(iii) to all individuals who die on or after a certain date, that date being two years from the date the amendments come into force.**

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[529] This recommendation received unanimous support among the commentators who commented on it.

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C.W. DALTON
A. DE VILLARS
A.D. FIELDING
N.A. FLATTERS
W.H. HURLBURT
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CHAIRMAN

DIRECTOR

May 2000

PART IV — DRAFT LEGISLATION

Sections 11 to 18 of the MPA should be repealed and replaced with:

PART 1.1

MATRIMONIAL PROPERTY ON DEATH

Application by spouse of deceased

11(1) Subject to this section, an application for a matrimonial property order may be made by the surviving spouse after the death of the other spouse if

(a) the spouses were married at the time of death of the deceased spouse, or

(b) a judgment of divorce was granted or a declaration of nullity of marriage was made with respect to the marriage not earlier than 2 years before the death of the deceased spouse.

(2) A matrimonial property order may not be made under this Part if, before the death of the deceased spouse, the spouses

(a) divided their property pursuant to a matrimonial property order made under Part 1, or

(b) lived separate and apart and divided their property pursuant to an agreement entered into under section 37.

(3) Notwithstanding subsection (2)(a), a matrimonial property order may be made under this Part if after the matrimonial property order was made under Part 1 the spouses resumed cohabitation for a period of more than 90 days with reconciliation as its primary purpose unless the spouses were divorced at the time of the deceased spouse's death.

(4) Notwithstanding subsection (2)(b), a matrimonial property order may be made under this Part if after the agreement was entered into under section 37 the spouses resumed cohabitation for a period of more than 90 days with reconciliation as its primary purpose unless

(a) the spouses were divorced at the time of the deceased spouse's death, or

(b) the agreement specifically provides that no matrimonial property order may be made under this Part in the event the spouses resume cohabitation.

(5) An application for a matrimonial property order made under Part 1 may be continued under this Part by the surviving spouse after the death of the deceased spouse.

Application of Part 1

11.1(1) Subject to subsection (2), sections 3 and 7 to 10 apply with necessary modifications in respect of a distribution of property under this Part.

(2) For the purposes of this Part, section 10(1)(d) is to be interpreted as if "one year before the date on which either spouse commenced the application for the matrimonial property order" read "one year before the death of the deceased spouse".

Form of application

11.2 An application for a matrimonial property order under this Part must be made by statement of claim.

Limitation period

11.3 An application for a matrimonial property order under this Part may not be commenced later than 6 months after the date of issue of the grant of probate or administration of the estate of the deceased spouse.

Continuation of action by estate

11.4(1) Notwithstanding the *Survival of Actions Act* but subject to subsections (2) and (3), the rights conferred on a person by this Act do not survive the death of the person for the benefit of the person's estate.

(2) Where a person dies after commencing an action under Part 1 or this Part,

(a) the action may be continued under this Part by the estate of the deceased person, and

(b) the rights conferred on that person under Part 1 or this Part before that person's death survive that person's death for the benefit of that person's estate.

(3) Where a person dies after the person's spouse has commenced an action under Part 1,

(a) the personal representative of the deceased spouse may file a statement of defence and counterclaim in the action,

(b) the personal representative of the deceased spouse may continue to defend the action, and

(c) the surviving spouse may not discontinue the action after the death of the deceased spouse without the consent of the personal representative of the deceased spouse except with leave of the Court.

Property of surviving spouse and deceased spouse

11.5(1) For the purposes of this Part, property of the surviving spouse includes

(a) property that, at the time of the death of the deceased spouse, was held jointly by the deceased spouse and the surviving spouse with a right of survivorship,

(b) a benefit payable to the surviving spouse on the death of the deceased spouse under a plan as defined in section 47 of the *Trustee Act*, and

(c) proceeds payable to the surviving spouse on the death of the deceased spouse under a policy of life insurance that was

(i) owned by either spouse, or

(ii) taken out on the lives of a group of persons of which the deceased spouse was a member.

(2) For the purposes of this Part, property of the deceased spouse includes

(a) proceeds payable to the estate of the deceased spouse on the death of the deceased spouse under a policy of life insurance that was

(i) owned by either spouse, or

(ii) taken out on the lives of a group of persons of which the deceased spouse was a member,

and

(b) any other proceeds payable to the estate of the deceased spouse on the death of the deceased spouse.

(3) The Court shall distribute the property referred to in subsections (1) and (2) in accordance with section 7(4).

Value of certain transactions deemed part of estate

11.6(1) For the purposes of this Part, all property that was owned by the deceased spouse immediately before the deceased spouse's death that passed on death to a person other than the surviving spouse is deemed to be the property of the deceased spouse to the extent that the deceased spouse did not receive adequate consideration for the property, including but not limited to the following:

(a) a gift made in contemplation of, and intended only to take effect on, the death of the deceased spouse;

(b) subject to subsection (2), property that, at the time of the death of the deceased spouse, was held jointly by the deceased spouse and a person other than the surviving spouse with a right of survivorship;

(c) a benefit payable to a person other than the surviving spouse on the death of the deceased spouse under a plan as defined in section 47 of the *Trustee Act*;

(d) proceeds payable to a person other than the surviving spouse on the death of the deceased spouse under a policy of life insurance that was

(ii) owned by the deceased spouse, or

(ii) taken out on the lives of a group of persons of which the deceased spouse was a member;

(e) property that was disposed of by the deceased spouse, in trust or otherwise, to the extent that the deceased spouse retained during the deceased spouse's lifetime, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the principal of the property for the deceased spouse's own benefit.

(2) If a deceased spouse dies holding property jointly with a person other than the surviving spouse with a right of survivorship, the property is deemed to be property of the deceased spouse

(a) in the case of funds in a bank account, to the extent that the funds were the property of the deceased spouse immediately before the funds were deposited, and

(b) in the case of any other property, to the extent of the ratio of the contribution of the deceased spouse to the contribution of both persons, multiplied by the fair market value of the property.

(3) The property referred to in subsection (1) does not form part of the estate of the deceased spouse and is not subject to attachment by any creditor of the deceased spouse.

(4) In this section, "contribution" means money, goods or services for the purchase, maintenance or repair of property.

Exempt property

11.7 For the purposes of this Part, in addition to the property referred to in section 7(2), the following property is exempt from distribution:

(a) property referred to in section 11.6(1) that is used to satisfy an existing debt or liability of the deceased spouse;

(b) property referred to in section 11.6(1) that is used to provide

(i) money or other property that the recipient of the property will likely require, or

(ii) compensation for loss that the recipient of the property will likely suffer,

in respect of a business undertaking by reason of the death of the deceased spouse.

Payment of deficiency by recipients of property

11.8(1) If the property of the estate of the deceased spouse is not sufficient to satisfy a matrimonial property order made under this Part, those persons, if any, who have received property referred to in section 11.6(1) shall pay the deficiency in proportion to and to the extent of the value of their respective interests in that property less

(a) the value of any consideration provided by those persons respectively to or on behalf of the deceased spouse, and

(b) the value of any property exemption under section 7(2) or 11.7.

(2) The defence of change of circumstances is not available to a person who has received property referred to in section 11.6(1).

Suspensory order

11.9(1) Section 11.6(1) does not prevent any person from paying or transferring any funds or property, or any portion of any funds or property, to any person otherwise entitled to them unless there has been personally served on the person a certified copy of an order made under section 12 enjoining the person from making the payment or transfer.

(2) Personal service of an order made under section 12 on a person holding any funds or property referred to in subsection (1) is a defence to any action or proceeding brought against the person with respect to the funds or property during the period the order is in force.

Suspension of administration of deceased's estate

12 The Court may make an order suspending in whole or in part the administration of the estate of the deceased spouse until an application for a matrimonial property order has been determined.

Consent to distribution of estate

13(1) Until the expiration of 6 months from the date of issue of the grant of probate or administration of the estate of the deceased spouse, the personal representative shall not distribute any portion of the estate to a beneficiary without the consent of the surviving spouse except with leave of the Court.

(2) If

(a) the personal representative of the deceased spouse distributes a portion of the estate contrary to subsection (1), and

(b) the Court makes a matrimonial property order with respect to property in the estate of the deceased spouse,

the personal representative is personally liable to the surviving spouse for any loss to the surviving spouse as a result of the distribution.

Distribution in accordance with Court order

14(1) If an application for a matrimonial property order is made or continued under this Part by the surviving spouse, the personal representative of the deceased spouse shall hold the estate subject to any matrimonial property order that may be made, and the personal representative shall not proceed with the distribution of the estate other than in accordance with the matrimonial property order.

(2) If the personal representative of the deceased spouse distributes a portion of the estate contrary to subsection (1), the personal representative is personally liable to the surviving spouse for any loss to the surviving spouse as a result of the distribution.

(3) An agreement in settlement of an action commenced or continued under this Part is not valid unless approved by the Court where a beneficiary of the estate

(a) is a minor whose interest in the estate is affected by a distribution of the property under the agreement, or

(b) does not consent in writing to a distribution of the property under the agreement.

Property deemed never part of estate of deceased spouse

15(1) Money paid to a surviving spouse or property transferred to a surviving spouse under a matrimonial property order is deemed never to have been part of the estate of the deceased spouse with respect to a claim against the estate by

(a) a beneficiary under a will,

(b) a beneficiary under the *Intestate Succession Act*, or

(c) a dependant under the *Family Relief Act*.

(2) Where the Court orders the estate of a deceased spouse to pay money to the surviving spouse, the amount fixed by the order is a debt of the deceased spouse and ranks in priority of payment equally with other unsecured debts of the deceased spouse.

(3) Where the Court orders the estate of a deceased spouse to pay money to the surviving spouse and charges property with payment of all or part of the payment to be made, the amount fixed by the order is a secured debt of the deceased spouse.

Proportionate burden of matrimonial property order

16(1) In the absence of a specific direction in the will of the deceased spouse as to the manner in which satisfaction of a matrimonial property order affects the interests of the beneficiaries under the will, the burden of a matrimonial property order falls ratably on all the beneficiaries of the estate of the deceased spouse in proportion to their respective interests after payment of all funeral and testamentary expenses and all debts and liabilities of the estate.

(2) An order declaring that the surviving spouse has an interest in property that was the subject of a specific bequest or devise under the terms of the will of the deceased spouse does not prevent the beneficiary of that property from receiving the value of what that beneficiary would otherwise have received if no matrimonial property order had been made under this Part, less the proportionate burden of the matrimonial property order.

Rights of surviving spouse under will or on intestacy

17(1) Any right that the surviving spouse has to ownership or division of property under this Act is in addition to the rights that the surviving spouse has by reason of the will of the deceased spouse or on the intestacy of the deceased spouse.

(2) The Court shall not, in making a distribution of property pursuant to an application for a matrimonial property order made or continued under this Part, consider

(a) the amount payable to the surviving spouse on intestacy, or

(b) any gifts made to the surviving spouse under the terms of the will of the deceased spouse.

Effect on Family Relief Act

18**(1)** Nothing in this Act affects the right of a surviving spouse to make an application under the *Family Relief Act.*

(2) An application by a surviving spouse under the *Family Relief Act* may be joined with an application under this Part.

NOTE: Other consequential amendments will be made to other sections in the Act, but the bulk of the recommendations would be implemented by enacting the proposed Part 1.1.

APPENDIX

Individuals Who Responded to Report for Discussion No. 17

1. John C. Armstrong, Q.C.
2. Jane C. Carstairs
3. The Honourable Mr. Justice J.E. Côté
4. Jean K. Coutts
5. Professor D. Christine Davies, Q.C.
6. Christopher R. Head
7. Barbara A. Krahn
8. Eugene Kush, Q.C.
9. Professor Leonard J. Pollock, Q.C.
10. Karen M. Rackel
11. Kenneth M. Rowe
12. Frans F. Slatter
13. Remi J.G. St. Pierre
14. Yolanda S. Van Wachem
15. The Honourable Mr. Justice W.E. Wilson