MATRIMONIAL PROPERTY REFORM

FOR

NEW BRUNSWICK

DISCUSSION PAPER

Office of the Attorney General
~~LAW REFORM DIVISION~~
DEPARTMENT OF JUSTICE
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This paper reflects tentative positions adopted by the Department of Justice with respect to the reform of matrimonial property law in New Brunswick. It has been prepared as a basis for discussion with interested groups and individuals prior to the implementation of legislative change.

Anyone who wishes to make submissions to or to engage in discussions with the Department of Justice on this subject is invited to write or telephone the Law Reform Division, Department of Justice, P. O. Box 6000, Fredericton, N. B., E3B 5H1 (453-2569).

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Introduction

Over the past few years considerable study has been given in Canada and elsewhere to laws dealing with the ownership of property by husbands and wives. There has been general recognition that these laws no longer meet the needs and expectations of many married people, and that changing social attitudes and patterns necessitate a restructuring of our rules for determining ownership of property and the right to its possession.

Recognizing the importance of this subject, the Law Reform Division in 1974 commissioned a study of matrimonial property in conjunction with a more general survey of the law of real property, and a number of recommendations were made in a report submitted by Dean Alan M. Sinclair of the U.N.B. Law School in 1976. The Law Reform Division has given consideration to these recommendations, as well as to those contained in reports published by other law reform commissions, and has formulated a tentative approach to changing the law of New Brunswick.

The Existing Law

The existing law of New Brunswick starts from the position that men and women have equal rights to own property, whether separately or jointly; the historical limitations on a married woman's legal right to own property

have been abolished for many years, leaving us with a system of property law that is, on its face, equitable. The spouse who pays for property, or directly contributes to its acquisition, acquires a right of ownership, singularly or jointly.

As it is applied to actual situations, however, the perfect equality of the law often generates inequity, mainly because it doesn't always give equal recognition to the different, yet essential, roles that marriage partners fulfill in most marriages. Often only one spouse contributes financially to the marriage. The other spouse may contribute in the areas of homemaking and child raising. In these situations assets like cars, furniture and luxury items tend to be purchased by the spouse who earns the money. And under our system of separate property, the person who pays for property is normally considered to be the owner. The fact that the other spouse may have foregone the opportunity to acquire similar financial benefits in order to supervise the home and to raise the children of the marriage has little bearing on the question of who owns this property.

Even where both marriage partners contribute financially to the marriage, as seems to be occurring more and more frequently, the opportunity of the wife to acquire separate property is frequently not equal to that of her husband. For one thing, it is well documented that women do not command the share of the national wealth or

the job market that men do. For another, it is not unusual to find women using the money they earn to buy necessaries of life for the family, like food and clothing, while her husband's earnings go to the acquisition of tangible assets and investments. The fact that the wife has furnished the groceries for the family table will not strengthen her claim to a share of the ownership of the family car. This situation will, of course, be reversed in other cases where the wife is purchasing the items of value. The point is that under our system of separate property, even where both spouses are contributing financially to the marriage, the extent to which they will share the important assets will depend largely on the way in which they set up their household accounts. The family is not treated as an economic unit. Only where property is placed in joint names is there a reasonable prospect of shared ownership. But even here a court may decide that one of the joint owners simply holds his share in trust for the other. Evidence as to the intentions of the person purchasing the property, and as to the extent to which both spouses contributed financially, is of no small importance.

What is also apparent is that the law focuses on considerations (e.g. who paid for the assets?) that often would be considered irrelevant by the spouses themselves when the property was acquired, and only assumes importance when the relationship begins to disintegrate and

they seek to ascertain their respective "legal rights". It is at this point that the spouses become aware that in order to acquire a property interest some thought has to be given to the manner in which the property is to be held. Marriage contracts may be desirable. Ensuring that property is placed in the names of both spouses, and that a portion of the earnings of each is diverted into all assets acquired for family use, would be advisable. Records of these contributions should be kept or else one or other of the spouses, and more often the wife, may be left without any interest in the property acquired during the marriage. Yet to force married people to go to such lengths to ensure that the interests of both will be adequately protected would seem to be not only an unrealistic, but also a highly undesirable, approach to the property rights of married people.

We do not mean to imply in this discussion that one spouse, and more often the wife, receives no protection from the law. Courts are continuously faced with the problems of settling the affairs of spouses who no longer wish to live with or be married to one another. Frequently this involves making orders requiring one spouse to maintain the other for a period of time, and in some cases the transfer of property is seen as a way of ensuring that a spouse will be adequately maintained. While it is a common criticism that wives

are dealt with in these adjustments in a less than adequate way, there is considerable evidence that courts are becoming increasingly generous in their maintenance awards, particularly where there are small children involved. In effect, it appears that courts have found, through their jurisdiction to award maintenance, an avenue for bringing about an appropriate adjustment of the accumulated resources of the marriage.

While we recognize the efforts that some courts have made in this regard, we are quick to point out that we do not see maintenance as an appropriate way of accommodating the inadequacies of our law in relation to the ownership and sharing of matrimonial property. Maintenance implies dependency, not entitlement, and we believe the law should recognize that both parties are entitled to a share of the property as of right. It is not enough, in our view, that a wife can say: "If my marriage breaks down the law will force my husband to use his property to support me". She should be able to say: "Whatever the future holds for our relationship, I have my share of the resources of the marriage to fall back on". It is not enough for the law to provide maintenance at the end of a marriage. The law must also extend rights to both spouses throughout a continuing marriage, even though it will usually be unnecessary to exercise those rights unless the relationship comes to an end. We believe this to be a vitally important distinction and one that underlies much of the social

discontent about our laws relating to matrimonial property.

In principle, therefore, *we recommend that the law of New Brunswick be changed to reflect a policy under which marriage is recognized to be, among other things, an economic partnership involving rights and obligations to share equally all property used by the spouses in maintaining a home together, or produced by either or both of them during the course of the marriage, regardless of which spouse acquires the property or in whose name the property may be.*

Choosing An Approach

There are three well-recognized approaches that could be taken to bring about such a change in New Brunswick law:

1. Community of property
2. A separate property system with deferred sharing according to fixed rules (deferred sharing approach).
3. A separate property system with sharing in accordance with judicial discretion (discretionary approach).

These three approaches have been ably described in other reports, notably the Working Paper of the Law Reform Commission of Canada on Matrimonial Property. Excerpts from that report can be found in the Sinclair report to the Minister of Justice for New Brunswick. The following explanation, however, may serve to dis-

tinguish these approaches.

Community of property is a well established property system, existing in several European countries and in eight of the states of the United States. Until recently it was the standard system for holding property in Quebec. Under this system whatever the spouses earn and purchase with their own money after marriage becomes community property, sharable equally when the community is terminated. While simple in principle, the system contains many detailed rules for establishing what property is included and what property is excluded, how separate property can be proven, what bills are payable out of the community, who can manage the property under what circumstances, and so on. The community usually extends to all property of the spouses, including property used for business; it is not limited to what might ordinarily be regarded as family assets.

Major criticisms of the system focus on its comprehensiveness and on the complexity of its rules. As well, being foreign to our common law heritage, the adoption of this approach would require significant changes to many other laws dealing with succession, property ownership, creditor's rights, commercial transactions and insurance. In the eyes of many, such a shift would entail such radical changes in our legal system as a whole that its benefits would be outweighed by its disruptive effects.

The deferred sharing approach is in many ways similar in effect to community of property. On the happening of specified events, for example death or dissolution of marriage, property of the marriage is shared in accordance with detailed, fixed rules. A substantial difference between the two systems, however, is this: Under a community system each spouse has a present interest in the property. Under a deferred sharing approach, property is still held separately by the person who would be owner under the ordinary rules relating to property. The interest of the other spouse is deferred, or postponed, until the happening of the event that triggers the sharing (e.g. death or dissolution). Therefore, there are no problems about managing the property during marriage such as exist under a community approach. Each spouse is free to buy and sell his or her property freely during marriage. In the event of dissolution of marriage, each spouse would simply total up his assets and the spouse with the greater assets (after payment of liabilities) would pay an amount to the spouse with the lesser assets.

Detailed rules are necessary, however, to delimit the property that is subject to deferred sharing and to determine the manner in which assets are to be calculated. The system can involve detailed record keeping by the spouses so that separate ownership of excludable property can be traced and the value of the property at various times ascertained. An appreciation of the detailed

rules necessary under the deferred sharing approach can be gained from an examination of the various recommendations included in the Sinclair Report, which were based largely on the recommendations of the Ontario Law Reform Commission. Generally, however, the deferred sharing approach, although complex, is regarded by most authorities as being less complicated than a community system. And because of its preservation of the concept of separate property it would be much easier to integrate a deferred sharing approach into our existing legal rules for the ownership of property.

The third approach, the discretionary approach, proceeds on the idea of a judicial division of property. Under this approach there are no fixed rules. A court will exercise its discretion in redistributing property between the spouses in a manner regarded by it as being fair under the circumstances of each case. While giving the necessary flexibility to take into account the special circumstances arising in each case, a discretionary system would not extend the same defined rights as would a deferred sharing approach. A spouse's proprietary expectations would be based not on fixed rules but on a hope that the equity of the case would be seen by the presiding judge. This has been viewed by some as a major drawback of the discretion model. Different judges might exercise their discretion differently in similar situations, leaving uncertainty as to the way property would be shared in

any given case. The discretionary system would, however, be much simpler to put into place than either of the other two systems and this, coupled with its flexibility to adapt to the needs presented in each case, is a major point in its favour.

An Approach for New Brunswick

Choosing an approach for New Brunswick is no easy task. Each approach has its advantages and disadvantages, and each has countless possible variations that make it less or more appealing and serviceable. One recommendation we have formulated, however, is that, with the exception of the matrimonial home (to be discussed below), the community of property approach be discarded, largely because of the difficulties that would be encountered in adapting such a system to New Brunswick law.

Choosing between a deferred sharing approach and a discretionary approach is more difficult. For one reason, because they are both premised on separate property and on the concept of an eventual division (in equal portions or otherwise) the systems are not entirely different. There exists, for example, in most deferred sharing systems, a judicial discretion to soften the effect of fixed rules in given situations. Taking into account the difficulties noted earlier with respect to each approach, the solution, in our view, lies in finding a middle ground that avoids

excessive reliance either on fixed rules or on discretion. It is important that the law be capable of being understood by citizens and of providing reasonably clear indication of how a situation is likely to be treated, yet be flexible enough to take into account the individual circumstances important to many situations.

What we propose for New Brunswick, therefore, is an approach that recognizes aspects of all three approaches just outlined. In skeleton form, the approach we are suggesting is the following:

1. That the principle of joint ownership be adopted with respect to the matrimonial home and household goods.

2. That the principle of deferred equal sharing be adopted with respect to all other "family assets".

3. That courts be given a discretion (a) to decide what, in the circumstances of each case, should be taken into account in calculating the "family assets", and (b) to increase and reduce the shares which the respective spouses will actually realize.

4. That the discretion of the court be limited by legislative guidelines outlining (a) the considerations it must take into account in calculating the "family assets", and (b) the circumstances which it must take into account in increasing and reducing the shares of the respective spouses.

5. That work be continued after implementing the above recommendations towards the eventual adoption

of more precise rules to narrow the scope of discretion given to the court and to place deferred sharing on a more defined basis.

Rather than to provide rules for dealing with every conceivable situation, our approach would be to establish in legislation a number of clear principles for the sharing of property. It would be left to the courts to work out, in accordance with legislative guidelines, any property division that could not be settled by the spouses themselves. Our objective would be to provide a reasonably simple and understandable law that would set out the basic rules for sharing without removing the capability of the court to provide an equitable solution in a difficult or unusual case.

The Matrimonial Home and Household Goods

If marriage is to be accepted as an economic partnership it follows that the spouses should be viewed in law as having, under most circumstances, equal shares in the matrimonial home. In our view most people now accept the appropriateness of co-ownership of this asset. This is borne out by the large numbers of married couples who voluntarily accept title to their home in joint tenancy. And while it is true that in many cases one of the spouses contributes all or most of the finances necessary to acquire the home, and that even where both spouses contribute financially

to the purchase of the home it is a rare occasion when they contribute equally, nevertheless both can be seen as contributing in different ways towards maintaining the physical premises as a home.

In our view it is feasible to create a present interest in the matrimonial home in both spouses. Recognizing co-ownership, or a community in this limited asset, does not encumber the normal transaction of business by the spouses or call into play the reasons earlier cited for disregarding the notion of a full community of property regime for all matrimonial assets. Recognizing co-ownership does, however, give immediate recognition to the contribution both spouses are making to the acquisition and maintenance of this asset. And it does give added protection to a spouse against an irresponsible squandering or encumbering of the asset by the other spouse.

In our view the basic rules with respect to the matrimonial home should be the following:

1. Co-ownership in the spouses would exist by virtue of the occupation of property owned by one of them as a matrimonial home, regardless of which one paid for the property. Once occupied as the matrimonial home it would continue as such even where one of the spouses ceased to live in it. More detailed rules would, however, be necessary to define precisely what a matrimonial home was (e.g., in some cases

there might be two matrimonial homes, for instance where spouses were caught with two houses in the course of buying and selling houses. Also, the matrimonial home would not include premises rented as a home).

2. Co-ownership would imply that the spouses hold as owners in equal shares and that the surviving spouse would succeed to the other spouse's share on his or her death.

3. Co-ownership in equal shares would apply notwithstanding that one spouse owned the matrimonial home prior to the marriage, or received it by gift or devise to himself or herself and not to the other spouse. Here a discretion would have to be given to the court to adjust the respective shares of the spouses after taking into account two factors: first, the duration of the marriage, and, second, the extent of the contribution of the other spouse to the maintenance or improvement of the home. This would alleviate the possibility of a windfall arising out of a short marriage.

4. A wife would no longer acquire a dower interest in her husband's property (i.e., a life interest in one-third of the lands owned by her husband during marriage).

5. Subject to the rights of third parties without notice, a matrimonial home registered in the name of one spouse could only be conveyed or dealt with by

both spouses, except in limited circumstances where a judicial order permitted a transfer by only one spouse.

6. Third parties without notice of the right of co-ownership would not be prejudiced in dealing with the registered owner of the property. But to protect unregistered co-owners the law would require a person wishing to convey property to attest by affidavit that the property had not been occupied as a matrimonial home. The law would also enable a statutory co-owner to file a caveat in the Registry Office advising the public of his or her interest in the property, and would establish a procedure for determining the validity of a caveat.

7. Proceeds of the sale of a matrimonial home would be deemed to be held in the same shares as the property itself.

8. The principle of co-ownership in the matrimonial home would extend to the household goods. Personal property contained in the home and ordinarily used in the course of maintaining a household for the spouses and their children (e.g. furniture, appliances, utensils, ornamental pieces) would be co-owned. Personal objects (e.g. jewellery, cameras, and similar items) owned by one of the parties would not be viewed as co-owned simply because they were physically located within the matrimonial home (although in some cases they may be taken into account under the rules applying to the

overall sharing of "family assets" by the spouses). Household goods, being co-owned, could not at any time during the marriage be sold or removed from the home by one spouse without the other spouse's consent.

9. Household goods that were owned by one of the spouses at the time of marriage, or were gifts received during marriage by one of the spouses under circumstances that, in the opinion of the court, indicated that they were given to that spouse alone rather than the spouses jointly, would not be considered co-owned household goods, although they would be dealt with under the rules relating to "family assets".

10. While these legal principles would govern the question of ownership of the matrimonial home and the household goods, a discretion would be given to the court to determine rights of possession. Where a marriage was breaking down, it would sometimes be necessary for a court to rule that one of the two co-owning spouses was entitled to an exclusive right to possess the matrimonial home and/or the household goods for a specified period. This would be especially so where there were children of the marriage. Under some circumstances the spouse in possession would have to compensate the spouse for the use of his or her property interest, although in many cases this might be regarded as part of the maintenance obligation of that spouse toward the other spouse and/or the children.

11. The rules with respect to the matrimonial home would apply even where the property was held by the spouses jointly as tenants in common (which would otherwise give to each spouse the right to alienate by deed or will his or her interest). Only where the spouses had by appropriate agreement contracted out of these rules would they be permitted to hold or acquire property on a different basis.

Family Assets

Property other than the matrimonial home and household goods would be dealt with under different rules. The basic principle would be that "family assets" would be subject to deferred sharing in equal shares. So would "family debts". When a suitable agreement could not be reached by the spouses themselves the court would be given the discretion to determine what comprised the family assets and family debts.

The court would first identify what, in its opinion, constituted the product of the marriage. Under normal conditions items like savings, investments and personal property (such as the family car) owned by or for the benefit of both spouses would fall into this category. So would real property like summer cottages. "Family assets" would embrace property jointly owned by the spouses as well as property owned by one spouse or the other. It would embrace property acquired by either spouse through any earnings or income, or any savings, received or accumulated during the marriage.

In general, "family assets" would embrace all property acquired by either spouse in the course of the marriage. There would, of course, be exceptions and these would be covered by guidelines to be discussed shortly.

"Family debts", on the other hand, would include those incurred by both spouses, or by one of them, in the acquisition, maintenance, or disposal of the matrimonial home and household goods, or of family assets, or in pursuance of any endeavour with respect to the maintenance of the matrimonial home, or the support, education or recreation of any member of the family. Debts not incurred for those purposes would not be taken into account in the division of property.

In more detail, the court would essentially be given three tasks:

1. To compute the value of the sharable assets and debts;

2. To determine what property is to remain with each spouse; and

3. To calculate the amount one spouse must pay the other to equalize their respective positions.

To assist the court in exercising its discretion as to what should be treated as "family assets", we would suggest the inclusion of a number of guidelines in the legislation. Those that to us at this time seem appropriate are the following:

1. In determining the contribution of each spouse to the ownership or maintenance of an asset a court should not be restricted to considering financial contribution but should consider work expended and responsibility undertaken with respect to that asset.

2. Property owned by one spouse prior to the marriage should not be considered a "family asset" except to the extent that, in the opinion of the court, the property was paid for or maintained out of assets that would otherwise fall within that category, or to the extent that, in the opinion of the court, the other spouse in some way contributed to its ownership or maintenance. This exclusion from "family assets" would extend to property substituted for previously owned property and to clearly identifiable proceeds from the sale of such property.

3. Property that, in the opinion of the court, was a gift from one spouse to the other, would not be considered a "family asset".

4. Property that, in the opinion of the court, was a gift or bequest from a third party to one spouse rather than to the spouses jointly, would not be considered a "family asset" except to the extent that it was maintained out of assets that would otherwise fall within the category of family assets, or except to the extent that the other spouse in some other way contributed to its maintenance.

5. Property that, in the opinion of the court, was owned by one spouse in connection with a business would not be considered a "family asset" except to the extent that it was paid for or maintained out of family assets, or to the extent that the business was carried on in conjunction with the other spouse or the other spouse contributed to the ownership or maintenance of the property.

6. Investments that, in the opinion of the court, were held by one spouse in a business carried on by that spouse would not be considered "family assets" except to the extent that they were paid for out of family assets, or to the extent that the business was carried on in conjunction with the other spouse.

While the foregoing guidelines were designed to assist the court in determining what property of the spouses should be considered as "family assets", a number of additional guidelines would seem to be warranted to assist the court in making a fair disposition of property claims:

1. Where a court is in doubt as to whether, under the previous guidelines, property should be included in "family assets", the inclusion or exclusion of the property should be decided in a way the court considers to be fair and equitable, taking into account all the circumstances of the case.

2. The onus should be on the spouse seeking to exclude property from "family assets" to adduce evidence supporting a claim for its exclusion.

3. Where a court is satisfied that the respective contributions of the spouses were so disproportionate that it would be inequitable to divide the "family assets" equally, it may divide them in shares it considers to be fair and equitable taking into account the circumstances of the case.

4. Where a court is satisfied that the right of one spouse to an equal share of the product of the marriage has been prejudiced by the conduct of the other spouse leading to the alienation or disposition of assets belonging to the spouses, or either of them, or to the accumulation of debts, the court may include within the property to be shared by the spouses any of the alienated or disposed of property. It may also include any property of the offending spouse that would not otherwise be available for sharing by the spouses, and may award to the offended spouse such share of that property as is necessary, in the opinion of the court, to place the offended spouse in the position in which he or she would otherwise have been. This would extend as well to action taken by one spouse resulting in the frustration of the purposes of this law by acquiring or controlling property through a corporation.

5. Where the spouses have been separated for a prolonged period of time prior to the application for an order settling the property, and the circumstances of the case are such that, in the opinion of the court, it would be more fair and equitable to divide the family assets on the basis of the situation at the time of separation, or anytime between the time of the separation and the

time of the application, the court may calculate and divide the family assets as of that date.

6. While the rules of separate property apply to the ownership of specific goods included within "family assets", the court may, by order, effect a transfer of property, or any interest in property, from one spouse to the other in order to give effect to the apportionment of property in accordance with these guidelines.

Application to Existing and Future Marriages

A proposal such as this would, if applied to existing marriages, significantly alter the basis upon which property is owned by husbands and wives. In some cases this would seriously affect the expectations of the spouses, especially a spouse holding a sizable amount of property. But in other cases, we suspect, the proposals would largely accord with either an express or tacit understanding of the parties about how their property would be shared on dissolution of the marriage.

To change the rules only for future marriages would not, we believe, be a sufficient response to the shortcomings of the existing law. Even though there is an element of retrospective application in placing existing marriages under the new regime we believe that, on balance, this is the preferred starting point. Our proposal is that a period of one year be established after the law is changed to allow any spouse who was married at the time the legislation was passed to elect

unilaterally not to be governed by the new regime. An appropriate form for such an election could be filled out and filed with the Registrar of Vital Statistics, and a copy given to the other spouse.

The effect of the filing would be to ensure that previously acquired property of the spouses was dealt with under the old law, although even here we would recommend that that law be reformed to allow courts to take into account more than financial contribution in ascertaining whether one spouse has an interest in property held in the other spouse's name.

An election such as we have discussed above would not, however, affect the application of the new law to assets acquired by either spouse after the passing of the recommended legislation. These would be shared in accordance with the principles already outlined.

We also believe that the new law should allow for considerable flexibility. Spouses who do not wish to come under the new regime, and who agree to be governed by the strict rules of separate property or by special rules agreed to in a private arrangement, should be permitted to do so, whether they were married before or after the new legislation was passed. Spouses should be allowed to enter into private arrangements with respect to all or any part of their property. A court should be required to recognize

private arrangments of this kind, subject only to an overriding discretion to set aside an agreement where it was, in the court's view, obtained under circumstances that rendered it unconscionable.

Application to "Common Law" Marriages

We also believe that some of these rules should apply to people who cohabit as spouses over a period of time sufficiently long to give rise to the problems of property ownership alluded to in this paper. Where two unmarried people have cohabited as man and wife for a period of, say, two years, the right to apply to a court for a property settlement should arise. While the commitment involved in such an arrangement is not sufficient, in our view, to warrant the concept of the matrimonial home applying to such relationships (especially in view of our recommendation that property acquired by one spouse before marriage should be capable of being treated as a matrimonial home), the provisions dealing with distribution of the "family assets", the product of the marriage, should be applied. The considerations that support reform of the property law affecting lawfully married men and women appear to apply equally to men and women who live together in a similar relationship implying the sharing of benefits and responsibilities.

Time for Distribution

Although the major problems of interspousal property distribution occur when the marriage is

terminated by divorce, this is not the only point at which a spouse's property position may become important. Death is another crucial point. In most cases, however, if spouses have cohabited until one of them dies, the surviving spouse will be amply covered by the deceased spouse's will. Where there is no will there are intestate succession laws that extend considerable protection to spouses. Where there is a will, but adequate treatment is not given to the surviving spouse, there are legislative provisions that allow the surviving spouse to apply to a court for special relief from the terms of the will.

It is significant, however, that our present legislative provisions contemplate one spouse benefiting the other spouse with his or her property through the application of legal rules that entitle a surviving spouse to the property of the deceased spouse. They do not reflect a principle of sharing, derived from mutual contributions of the marriage partners. It is our view that the law should reflect this principle. True, where the deceased spouse leaves everything, or almost everything, to the surviving spouse he or she can more easily take his or her benefits under the will than by negotiating an agreement with the deceased spouse's executor, or by approaching a court to have a portion of the estate set aside as his or her exclusive property as an equal partner in marriage. But where the estate of the deceased spouse

does not provide in a comprehensive way for the surviving spouse, it would seem preferable to give the surviving spouse the option of seeking a declaratory order from a court establishing the portion of the deceased spouse's estate that is payable to him or her in respect of his or her share of the family assets, instead of invoking the succession laws relevant to the distribution of the estate of the deceased spouse. (Wholly apart from the possibility of applying for an order in respect of "family assets", the matrimonial home and its contents would pass automatically to the surviving spouse by virtue of the succession provisions earlier recommended for those assets.)

Where, however, it is the surviving spouse who holds the larger share of the property we would recommend that the estate of the deceased spouse not be entitled to pursue a claim for the division of property under the principle of equal sharing. Normally the surviving spouse would be the principal beneficiary in any event, making such a division redundant. But where the surviving spouse is not the principal beneficiary, we believe it would be unfair to require him or her to liquidate part of his or her own holdings in order to benefit the estate, and beneficiaries, of the deceased spouse. This, then, constitutes a rather major exception to the principle

of equal sharing. As a matter of policy we support preferred treatment for surviving spouses in these circumstances. The only exception to this might be where it was necessary to provide support, out of the estate, for a dependent of the deceased spouse who was not in law a dependent of the surviving spouse.

Recognizing the right of one spouse to share equally in the family assets would not normally interfere with the right of the deceased to make specific bequests of his separate property to whomever he wished. It is important to appreciate that our recommendation for the equal sharing of family assets involves a sharing of the total assets, not a sharing of each specific item separately owned by one or the other spouse. Only where the testator attempted to dispose of most of his separate property through specific bequests would it be necessary for a court to frustrate his intention by interfering to protect the interests of the surviving spouse.

Divorce and death are not, however, the only occasions on which a division of family assets might have to take place. It may also be necessary to allow a spouse to seek an order for the division of family assets prior to a divorce. A separation might, under some circumstances, be a sufficient reason for an application. Where the spouses wished to divide their property on separation but could not agree on a division, or where one of the spouses wished to move away from the jurisdiction

with his or her property, a judicial property division might well be warranted. In order to discourage premature property divisions, however, it would seem to be desirable to establish a qualifying period of separation (say, one year) and to require the court to satisfy itself of the unlikelihood of a resumption of cohabitation.

Even in instances where the spouses have not formally separated, the intervention of a court may be necessary to preserve the expectations of one of the spouses with respect to his or her share of the property. The other spouse might be proceeding to alienate or dissipate family assets or to transfer household goods without the consent of the other spouse. Under these circumstances an offended spouse ought to be given the right to apply to a court for a division of property.

We propose, therefore, that the court be empowered to order a division of property on the application of one spouse:

1. Where the marriage has terminated by reason of death or divorce;

2. Where the parties have separated and, in the opinion of the court, the case is a suitable one for dividing the property.

3. Where one of the spouses has dealt with, or threatened to deal with, matrimonial property in a manner that is prejudicial to the expectations of the other spouse with respect to the sharing of that property.

The court should also be authorized to act where the spouses, on ceasing cohabitation, present a joint application for a division of matrimonial property.

Third Parties

A scheme for the sharing of matrimonial property must take into account third parties. Most spouses, either separately or jointly, owe debts to creditors; many enjoy property in which security interests are held by creditors. Dividing the matrimonial property, then, would often involve the satisfaction of third party interests.

Under our proposal the debts of each spouse, as regards his or her creditors, would remain his or hers personally. While, as between the spouses themselves, the debts would be shared, the sharing would be reflected in the overall equalization of assets and debts, and would not affect the liability of the debtor spouse to satisfy his creditor as a matter of contractual obligation. If, for example, the family car were in the husband's name only, and he were contractually liable to pay for it, the wife would not become personally liable to the seller.

A problem arises, however, where property is transferred from one spouse to another by the court in working out a settlement. If the wife is awarded the family car but contractually the husband is liable to pay for it, an arrangement has to be worked out with

respect to the responsibility for the periodic payments. In our view, the most satisfactory approach would be to require the person to whom the asset is transferred to assume all future responsibility for it. Accordingly, if a $5,000 car with $4,000 owing on it is transferred from a husband to a wife, the value of the asset for purposes of the sharing of the property should be considered $1,000. The wife, as between herself and her husband, should be liable to pay the $4,000 owing. While the husband would remain contractually liable to the seller or finance company he would have the right to recover from his wife in the event he was sued for the balance. Ordinarily this would not be a problem since the wife would presumably not want to have the car repossessed for non-payment. This approach seems preferable to treating the car as a $5,000 asset and requiring the husband to continue to make the payments. Not only would the wife be forced to chase the husband through the courts if he defaulted, she could end up making the payments herself in order to avoid losing the use of the car because of its repossession for non-payment. The former solution seems more practical and equitable.

Where property was transferred from one spouse to another in these situations it would, however, be necessary to ensure that the transferee/wife be given the same rights in relation to the seller that the purchaser/husband had. The same would be true where

the property in question was the matrimonial home or household goods, in which the other spouse would be given a statutory joint interest. A spouse with a "silent" interest would have to be placed on an equal footing with the spouse in whose name the property was acquired in terms of dealing with the holders of security interests existing prior to the marriage. As far as security interests arising after the marriage are concerned, it would be necessary for sellers and financing institutions to deal with both spouses or else face the consequences of having their security interests made subject to the interest of the spouse who is not party to the contract. A mortgagee, for example, who advanced funds to an absconding husband on the strength of his position as sole registered owner of the matrimonial home would have to wait until the wife's interest in the home was satisfied before realizing on the security interest created under the mortgage transaction.

The position of third parties would also become relevant when one spouse made gifts or sales of property in which the other spouse had a silent, but statutorily established, property interest, or a more general right to an equal share of the total "family assets". Where the third party was aware, or should have been aware, of the other spouse's interest in the property, or that family assets were being freely disposed of or squandered, the court should be empowered to set aside the transaction in order to protect the interest of that spouse. It would be necessary,

however, to protect the interests of third parties who acted in good faith, even though the transaction in question involved an improper squandering of "family assets" by one of the spouses.

Applying Legal Rules in a Mobile Society

Fewer and fewer married couples live their lives in one spot. Many move from province to province and from country to country. This can have a significant effect on the distribution of the property of the spouses either during or upon the dissolution of marriage. Property regimes, and the rules that exist under them, vary from jurisdiction to jurisdiction. The law of New Brunswick attempts to accommodate these differences by providing further rules by which courts decide whether the laws of one province rather than another, or one country rather than another, will be applied in the resolution of property disputes arising out of the marriage.

Implicit in this is the fact that not all residents of New Brunswick presently have their property disputes decided under the same rules. People who were married and took up their initial residences in a country having a community of property regime will in most instances under present law continue to be covered by that regime even after moving to New Brunswick. Because of the lack of uniformity in law, and because of the general respect most legal systems have for legal relationships

and interests created under other legal systems, there is little prospect that simple solutions to these rather complex technical legal problems can be imposed by a single jurisdiction like New Brunswick. Legislation in this area will, nonetheless, have to address itself to these complex inter-jurisdictional problems of private international law and attempt to provide equitable solutions that give due regard to the reasonable expectations of the parties and to the integrity of foreign legal systems.

There is, unfortunately, every likelihood that the existing problems raised by our mobile society will become more intense. Presently the law in the nine common law provinces is roughly equivalent. For persons born and raised somewhere in Canada the major problems have arisen with respect to individuals moving to or from the province of Quebec from or to a common law province. There is every indication, however, that the nine common law provinces are themselves moving in somewhat diverse directions in this area of law, with the possible result that there will be even less uniformity in the future than there is now. This is a matter of concern to us, although in the absence of agreement on a common approach to the problems of matrimonial property the result is unavoidable.

While the approach laid out in this paper would not, therefore, apply to everyone in New Brunswick

or in every case in which the question of the division of matrimonial property arose in a New Brunswick court, we believe that every effort should be made to bring situations under New Brunswick law wherever the matrimonial dispute is between people who have chosen to make a home in New Brunswick on something other than a temporary basis. This would include people who establish a home here after moving from some other jurisdiction. Subject to vested rights that have already been acquired under some other legal system, and subject to the right of the spouses to agree to their respective property interests, the division of property ought to be governed by the law of the jurisdiction in which the spouses have their habitual residence, even though this may change from time to time during the course of the marriage. While this approach would require special rules to govern special situations, for example where the spouses do not make their habitual residence together in the same province or state, we believe it is an appropriate starting point for defining the group to whom the rules outlined in this paper would apply. Accordingly, the principal test for determining whether the rules outlined in this paper would apply to persons seeking the assistance of a New Brunswick court would be, subject to appropriate exceptions, whether the spouses, at the time the basis for the application to the court arose, maintained their habitual residence within the province.

Maintenance

The recommendations made in this position paper are based on a clear distinction between the concepts of matrimonial property and maintenance. It is important, therefore, to look at the rela_ionship between the two concepts and, more specifically, to attempt to define the implications of our proposed matrimonial property regime upon the court's role in awarding maintenance.

Our law presently contemplates maintenance to be awarded either during or upon the dissolution of marriage. Under the federal Divorce Act maintenance can be awarded against either spouse after the marriage has been dissolved. Before the marriage is dissolved, however, the only award a court can make is against the husband in favour of the wife, under the Deserted Wives and Children Maintenance Act. While this may have been appropriate when our law tended towards the ownership of property by husbands, we believe this to be inappropriate to a regime based on an equal sharing of property. In today's society either spouse may be in need of support and we recommend the reform of the existing law to allow orders to be made against either the husband or the wife.

It is also of note that maintenance before divorce is premised on desertion, although in recent years the meaning of desertion has been expanded to

embrace situations that are somewhat removed from the ordinary sense of the word. We believe the concept of desertion should be abandoned and that a system of maintenance based on reasonable needs should be established.

We would also recommend that interspousal maintenance awards be tied closely to the process for the division of matrimonial property. Within an existing marriage maintenance should initially be treated as an interim measure to accommodate a spouse's needs until property interests can be settled and the more long term needs of the dependent spouse established. It will be recalled that one of our earlier recommendations was that a division of property be available after a year's separation where there are no reasonable prospects for the resumption of cohabitation. By establishing this opportunity for a spouse to claim property (as long as there is property, which will by no means be true in all cases) the dependency status of the spouse seeking relief can perhaps be reduced in some cases.

The principle becomes more evident where maintenance is sought at the time the marriage is dissolved. Here we see a need for a mechanism to allow a court granting a divorce to divide the property in accordance with the recommendations we have

made before making an award of maintenance. Maintenance should reflect the needs of the dependent spouse taking into account that spouse's share of the matrimonial property. In this regard, we endorse the following position taken by the Law Reform Commission of Canada in its report on family law, at pages 40-41:

"The main purpose of financial provision on dissolution of marriage should be to meet the reasonable needs of the spouse who performed, on behalf of both spouses, family functions that carry economic disadvantages. Just as the law should characterize financial provision during marriage as a mutual responsibility, it should also treat the economic advantages accruing to the spouse who performs the wage-earning role on behalf of both spouses as a mutual asset. The right to continue to share in this asset after the partnership ends should last as long as the economic needs following from dependency during marriage continue to exist in the face of reasonable efforts by the dependent person to become self sufficient. The duration of the post-dissolution dependency period should be governed by the principle that everyone is ultimately responsible to meet his or her own needs. The financial guarantee provided by law should be one of rehabilitation to overcome economic disadvantages caused by marriage and not a guarantee of security for life for former dependent spouses. The obligation of the former spouse who is required to pay should be

balanced by the obligation of the other eventually to become self-sufficient, as all other unmarried persons must be, within a reasonable period of time. The law should still provide for the possibility of a permanent obligation where the economic disability of a spouse flowing from the marriage is permanent."

It is apparent as well that the need for maintenance is also highly dependent on the responsibilities assumed by the parties with respect to the children of the marriage, since this will have a bearing on the ability of the dependent spouse to become economically self-sufficient. This is, however, a consideration distinct from maintenance for the children themselves, a matter we have not dealt with in this paper.

Continuing work on the reform of the law respecting maintenance will be carried out by the Law Reform Division with a view to preparing in greater detail a proposal complementary to our changing law of matrimonial property.

Summary

This summary is intended to recapitulate, in a general way, the main recommendations made in this position paper for reform of the law of matrimonial property. Most of the statements made in this summary are qualified and refined in the body of the paper and the reader is advised to consult the more detailed

explanations contained in the body of the paper for an accurate representation of the views summarized.

* * *

The thrust of the proposal for reform is to recognize in our law the principle that marriage is an economic partnership in which both spouses share equally without regard to the specific roles and responsibilities assumed by each. To give substance to this principle we have proposed that matrimonial property fall into two categories:

1. The matrimonial home and household goods
2. Family Assets

Subject to a limited discretion in a court to deal with inequitable situations, both spouses would be deemed by law to have a joint interest in premises owned by either spouse and occupied as a matrimonial home regardless of when the property was acquired, who paid for it and whether it was a gift or inheritance. Spouses would share equally in the ownership and maintenance of the home and would have an equal say with regard to selling it. The same principle would apply to household goods (the normal accoutrements of a home) except where the property was pre-owned by one spouse or was acquired by one spouse by gift or inheritance.

With limited exceptions, all other property

acquired by either spouse after the marriage would fall into the category of "family assets". Property falling into this category could be owned and dealt with by either spouse separately, but there would be a continuing interest in each spouse in an undefined half of the total family assets. Spouses would also share equally the family debts.

* * *

Where the spouses were unable to agree on how the family assets and debts were to be shared, a court could resolve the matter by deciding what assets and debts should be included. The court would exercise this discretion in accordance with legislative guidelines outlining what could and could not be included (e.g. gifts and business assets would, in general, be excluded). The court would have a discretion as well, limited by legislative guidelines, to broaden the scope of family assets and to alter the shares receivable by the spouses where exceptional circumstances, as outlined in the legislation, existed.

* * *

An application could be made to a court for a division of matrimonial property in the event of divorce, death, separation or in any situation in which it was necessary to prevent the squandering of property.

* * *

In dividing the property a court could award specific items to each party, and would, after determining the value of the assets and the amount of family debts, order the spouse with the greater property to make an equalizing payment to the spouse with the lesser property.

* * *

The proposed regime would apply to all persons who make their habitual residence in New Brunswick, except spouses who contract between themselves to be bound by our existing law of separate property or by a private arrangement. A party to an existing marriage would have one year to opt out with respect to previously acquired property, but, in the absence of agreement with the other spouse, would be bound with respect to newly acquired assets by the new law.

* * *

Parties to a so called "common law" marriage would be subject to the recommended rules governing the sharing of "family assets", but not the rules relating to the matrimonial home.

* * *

A division of property should, wherever possible, be effective prior to a determination about maintenance to be paid by one spouse to the other. Maintenance should be based on reasonable needs and should be available to both husbands and wives.