

LAW REFORM COMMISSION OF SASKATCHEWAN

**THE MATRIMONIAL PROPERTY ACT:
SELECTED TOPICS**

REPORT TO THE MINISTER

JUNE 1996

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INTRODUCTION

Saskatchewan's *Matrimonial Property Act* has now been in operation for more than fifteen years. When it was adopted, the *Act* was ground-breaking legislation, the first of its kind in Canada.

It marked a significant change in the status of married women, reversing the paternalism of the common law. The *Act* recognizes that marriage is a partnership of equals in which contributions and benefits are shared. Section 20 states the policy of the legislation clearly and concisely:

The purpose of this Act ... is to recognize that child care, household management and financial provision are joint and mutual responsibilities of spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of matrimonial property, subject to the exceptions, exemptions, and equitable considerations mentioned in this Act:

There can be no doubt that the policy of *The Matrimonial Property Act* has achieved the general goals it was designed to serve. It reflects contemporary community values, and usually produces results most people regard as fair and equitable. The change in philosophy reflected by the *Act* was inevitably controversial, as is any significant shift in social policy and community values. No doubt, the legislation was a shock to people whose views were formed in an era when husbands were undisputed lords of their domains, but such a state of affairs no longer reflects reality. Not surprisingly, most of the controversy that the legislation generated has now dissipated.

It should also not be surprising that *The Matrimonial Property Act* is flawed in certain respects. Although the concepts it embodies are straightforward, implementation in detail was a complicated matter, involving a series of secondary policy decisions that were difficult for the drafters of the *Act* to make. When the legislation was adopted, there were no tested models to assist in making these decisions. The experience of the last fifteen years has pointed to a several examples of what can be characterized as *problems of implementation* inherent in the *Act*. These problems do not raise fundamental issues about the philosophy of the legislation, but can compromise the fairness and effectiveness of the *Act* in individual cases.

The Matrimonial Property Act was adopted in 1979 (S.S. 1979, c. M-6. 1), and came into force in 1980.

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Unfortunately, the controversy that accompanied introduction of the *Act* served as a disincentive to correct the problems of implementation. The *Act* has been amended in a few minor respects, but for the most part, the potential for controversy has discouraged rethinking any of the significant issues raised by the *Act*, even when basic philosophical questions are not involved.²

The mandate of the Law Reform Commission is to "keep under review all the laws of the

Province with a view to systematic development and reform." In the Commission's view, the time has come to build on the experience accumulated after fifteen years of experience with *The Matrimonial Property Act*. With that goal in view, the Commission has reviewed the operation of the *Act*. The review has not concerned itself with the basic philosophy of the legislation, but only with problems of implementation, as defined above.

This report makes specific recommendations for amendment of the *Act* in regard to two matters, the date of valuation of matrimonial property for purposes of division, and the division of gifts and inheritances. Officials of the Department of Justice report more concern from members of the bar and public about these issues than any others. The Commission has sought public input on these matters, and has benefited from the comments of individuals and organizations who responded to our request.

In addition, the Commission has attempted to identify other problems of implementation in *The Matrimonial Property Act*. In most cases, the Commission has concluded that legislative action is not warranted at present. Two examples will illustrate the reasons why we have reached this conclusion.

²For example, In 1984 the Commission issued *Tentative Proposals for Reform of the Matrimonial Property Act* which included both a re-examination of some of the basic tenets of the legislation and recommendations directed toward less controversial, but nonetheless troubling, practical problems. In retrospect, it is apparent that re-examination of the philosophy of the *Act* was premature. In the debate which followed, recommendations of a less controversial nature were largely forgotten. A further report, *Proposals Relating to Matrimonial Property Legislation*, issued in 1985, largely abandoned the recommendations made in the *Tentative Proposals*.

³*The Law Reform Commission Act*, s.6.

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First, consider the division of pensions. Pensions have been held to be divisible under the *Act*, but there are no provisions in the legislation providing explicit guidance to the courts in the task of valuing pensions and settling on a division formula. It is generally agreed that the case law developed by the courts is not entirely satisfactory. However, much of the problem has to do with the complexity of fact situations involved in pension division cases. The nature of the pension plan, the length of marriage, the time that will elapse before the pension is payable, and contingencies that may affect the value of the pension must all be taken into account. Reducing these factors to a workable statutory guide would be difficult, if not impossible. The courts have attempted to achieve fairness in dividing pensions, and should be left to continue in their pragmatic effort to develop practical formulae for pension division without legislative intervention. It should also be noted that in Saskatchewan, Canada Pension Plan benefits may be taken into consideration in dividing properly under the *Act*. In most provinces, CPP benefits are subject to automatic equal division. The Saskatchewan approach has its critics, but in our view, the policy of the *Act* involves matters of Federal-Provincial relations that are outside the scope of the Commission's mandate.

During the first few years of the *Act*'s operation, division of farmland brought into marriage was a controversial topic. Under the *Act*, property brought into marriage is ordinarily exempt from division to the extent of its value at date of marriage.⁴ Increase in value after date of marriage is, however, *prima facie* divisible. Part of the controversy reflected opposition to the basic notion of equal sharing of assets acquired during marriage, but controversy was heightened by the effect of the inflation in land values that occurred in Saskatchewan between 1972 and 1982. It is not uncommon for the court to award one spouse a money judgement rather than dividing the property itself. This approach is particularly attractive to keep a farm or business intact. However, the cost of buying out the non-farming spouse's share sometimes appeared crippling to the farming spouse. Ellen Schmeiser, one of the drafters of the *Act*, admitted that the legislation had failed to anticipate the effects of rapid increases in farmland values. In 1980, she wrote that:

In times of rampant inflation, unless the marriage is of extremely short duration, the exemption ... may be insignificant, and the bulk of the property at its current value is subject to division ... Judicial discretion may be moved to temper the vagaries of the economy.

⁴See section 23.

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The courts responded by making provision for payment of awards over time, and less successfully by interpreting the *Act* in a way that reduced the non-farming spouses' share of inflationary increases in value. The Supreme Court of Canada held that the latter initiative violated the principles of the legislation.⁶ In retrospect, it is apparent that altering the principle of equal division of farmland 'brought into marriage is unnecessary, and inappropriate. If results that many people regarded as unfair were produced by application of the *Act* in the early 1980's, the problem, resulted from hyperinflation. As a practical matter, that is now a matter of history. If unexpected economic conditions once again arise, a legislative solution might be called for. In the Commission's view, however, it would not be wise to devise reforms based on hypothetical and unpredictable contingencies.

There are some problems in addition to those discussed in detail in this report that might warrant amendment of the *Act*. The Commission may consider at least two of them in future reports. One is the division of property upon the death of a spouse. Revision of the provisions of the *Act* applicable in this case would be justified. The relevant provisions lack clarity and appear to rest on uncertain policy assumptions. However, there is not a significant practical problem with division of property upon death of a spouse at present. For that reason, the Commission has deferred consideration of this topic.

The other matter that the Commission has elected to defer concerns application of *The Matrimonial Property Act* to common law relationships. At present, the *Act* does not apply to common law relationships. However, the courts have applied trust law principles to divide property between common law partners where both have made a direct contribution to the property. In the result, a common law spouse has a better claim to property division than a married woman had prior to adoption of *The Matrimonial Property Act*. The Commission sought public input on this issue. We discovered that there is, at least on first consideration, a clear division of opinion. Some people believe it is now time to complete the evolution begun in the courts and recognize that long-term common law spouses have the same rights as married persons.

5 "Saskatchewan", in Alastair Bissett-Johnson and Winnifred Holland (eds.), *Matrimonial Property Law in Canada* (1st ed.), 1980, S-84.

⁶*Farr v. Farr* (1984), 39 RFL 1(SCC).

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If this point of view was accepted, common law spouses who elected not to be governed by *The Matrimonial Property Act* would be required to enter an agreement contracting themselves out of the *Act*. Others argue that common law spouses have, by their decision not to marry, evidenced an intention not to be bound by legislation applying to married couples. If this point of view is deemed to be more acceptable, provision might be made to permit common law spouses to opt into *The Matrimonial Property Act* , but the law would not otherwise be changed. The Commission is not prepared at present to choose one or the other of these approaches, nor is an alternative evident. In our view, further research and consultation with the public is necessary.

SELECTED TOPICS

I. VALUATION DATE

I. The problem

The Matrimonial Property Act establishes a deferred-sharing regime: The property of each spouse remains separate until an application for division is brought under the *Act*. When the court hears the application, the property owned by both spouses is valued and divided between them according to the principles contained in the legislation. In conformity with this concept, "matrimonial property" is defined in clause (h) of section 2 of the *Act* as property owned at the date of application:

"matrimonial property" means any real or personal property whatsoever, regardless of its source, kind or nature, that, at the time an application is made under this Act, is owned, or in which an interest is held, by one or both spouses....

Thus the legislation contains an unambiguous rule for *identifying* matrimonial property. Neither property acquired after the date of application nor property disposed of before that date is matrimonial property

However, it is also necessary to *value* the matrimonial property for purposes of dividing it fairly between the spouses. The *Act* gives the court some latitude in regard to date of valuation. Clause (I) of section 2 provides that:

"value" means fair market value at the time an application is made under this Act, or at the time of adjudication, whichever the court thinks fit, or, where a fair market value cannot be determined, any value at the time an application is made under this Act, or at the time of adjudication, that the court thinks reasonable.

Note carefully that valuation is not synonymous with identification, If an item of property was not owned by one of the spouses at date of application, it is not matrimonial property, and no

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value can be placed on it for division purposes.⁷ On the other hand, if an item of property was owned by one of the spouses on date of application, it can be brought into the division calculation at either its value on that date or at date of adjudication. Thus, for example, in *Osborne v. Osborne*⁸ application was made under the Act in 1983, but the matter did not come to trial until 1986. The court valued the property as of date of trial, but included only property owned by the spouses in 1983 in the calculation. In some cases, the value of property other than matrimonial property as defined in the Act may be relevant, but it is never directly divisible. For example, if a spouse has dissipated property, so that it is no longer available for division, this fact may be taken into consideration in setting the division formula applicable to other property, but the dissipated property itself cannot be divided.⁹

Identification and valuation are distinct, but closely related concepts. It might seem most logical to value property as of the date of application, since it is at that moment that the property relations between the spouses crystallize for the purposes of the Act. In fact, some Queen's Bench decisions have suggested that the date of application should be chosen as a matter of course unless there are unusual circumstances justifying another date of adjudication. However, on its face the Act creates an unfettered discretion in the court. In some decisions, the choice of valuation date appears to have been regarded as simply a matter of convenience. Neither the courts nor commentators have attempted a complete analysis of the issues of policy that the choice entails.

In some cases, choice of valuation date makes little difference. If property values are more or less constant between date of application and date of adjudication, the choice has only trivial significance. Similarly, the form of the matrimonial property order may reduce the importance of

⁷The Court of Appeal has been clear on this point. See *Beaudry v. Beaudry* (1982), 17 Sask. R. 400 (C.A.), and *Schlichting v. Schlichting* (1984), 34 Sask R. 254 (C.A.).
sSask Q.B., April 22, 1986.

⁹See ss 28-29, dealing with dissipation and transfer of property for less than value.

¹⁰See *Ewing v. Ewing* (1986), 51 Sask. R., 51 (QB), and the discussion in Herauf, Wilson and Kovatch, "Saskatchewan" in J.D. McLoed and A.A. Mamo, *Matrimonial Property Law in Canada*, p. S-18, Thompson Canada Ltd., 1993.

11 The factors deemed relevant by the court in this case are discussed below.

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valuation. An order distributing farm land between the parties in equal shares or 'an order for division' of the proceeds upon sale of a matrimonial home is not apt to raise issues concerning the valuation date. In other cases, however, a change in asset value cannot be ignored. For example, if the court elects to preserve a farm or business by ordering that one spouse pay a portion of the property value to the other, the valuation date can have a significant impact on the size of the money judgement. This impact is magnified by the fact that matrimonial property cases are often not brought to trial quickly. In addition to the delays 'ordinarily involved in complex litigation, matrimonial property actions are often delayed by' other actions between the spouses. It is the usual practice to apply for both matrimonial property division and divorce shortly after the parties separate. 'The matrimonial property order is usually made when the divorce is granted. Since a divorce cannot be granted on grounds of separation until a year has elapsed from the date of separation, judgement is usually at least a year after application was made. In the result, the value of property subject to division may change considerably from date of application to date of adj tldication.

Perhaps because valuation date is a rather technical matter, it has attracted little public comment. The Commission has, however, received communications from several individuals with personal experience as parties to matrimonial property actions questioning the choice of valuation date in their cases. The bar is very much aware of the valuation date issue. The lack of clear direction from either the courts or the legislation creates uncertainty. Inconsistent results are, of course, potentially unfair results. In addition, uncertainty can lead to delay and expense. Since the valuation date is uncertain, preparation of financial statements disclosing property values is more difficult that would otherwise be the case. Uncertainty also diminishes the possibility of negotiated settlement, with consequent multiplication of legal costs.

The ambiguity in the way in which the *Act* handles identification and valuation may hide another problem. An asset acquired after date of application is not, by definition, matrimonial property. It may, however, have been acquired from the proceeds of matrimonial property or by use of matrimonial property. It is possible that a court, confronted with appropriate evidence, would trace proceeds of matrimonial property into newly acquired property. There is no clear mandate in the *Act* for such a course of action, however, and no reported decision in which it has been done.

Alternatively, a separate application for division of the asset might be brought, relying on 'the concept of constructive trust rather than *The Matrimonial Property Act* to effect division. The

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doctrine of constructive trust is applicable when the plaintiff has made a direct or indirect contribution to acquisition of an asset owned by the defendant under circumstances in which it would amount to "unjust enrichment" to leave title solely in the defendant's name. If a constructive trust is found, the plaintiff is held to have an equitable interest in the property. Constructive trust is a remedy in any case of unjust enrichment. It is not confined to cases involving property relations between spouses, and has frequently been invoked in Saskatchewan to settle property disputes between unmarried couples. There is no reported decision in the province in which a constructive trust was applied to divide property acquired by a spouse after date of application for division under *The Matrimonial Property Act*. However, it is routinely applied in analogous circumstances in Ontario, and its use for that purpose was approved by the Supreme Court of Canada in a 1990 decision, *Rawlyk v. Rawlyk*.¹²

Constructive trust has become important in matrimonial property cases in Ontario largely because the *Family Law Act* does not have a flexible valuation date. Usually, property is both identified and valued under the Ontario legislation as of date of separation. In *Katz v. Katz*, it was noted that a finding of constructive trust effectively shifts the date of valuation from date of separation to date of trial.¹⁴ In Saskatchewan, the same result could be achieved without recourse to constructive trust. However, a finding of constructive trust will also shift the identification date to date of trial, and thus might have utility in some Saskatchewan cases. The decision in *Rawlyk v. Rawlyk* has the potential to significantly affect the working of *The Matrimonial Property Act* unless the legislation is amended to provide a mechanism for dividing property acquired after application date in appropriate cases.

2. Case Law: Alternative approaches

It is not clear why the drafters of the *Act* conferred a discretion on the court to value matrimonial property on date of adjudication rather than date of application. Two plausible explanations can be suggested, however. Both appear to have been at least implicitly assumed by

12 [1990] 1 SCR 70, confirming (1986), 61 OR (2nd) 637 (Ont. C.A.).

¹³Section 4(1) of the *Family Law Act* defines "valuation date" as the earliest of (a) date of separation; (b) date of divorce or nullity of marriage; (c) date of application in a case of improvident depletion"; and (d) date of the death of a spouse.

14 (1989) 21 RFL (3rd) 167.

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the courts in reported decisions. They deserve consideration for this reason, and in addition may serve to introduce the underlying issues that should guide reformulation of valuation date policy.

Flexibility in choosing a date of valuation may have been regarded as a practical necessity. Evidence of value usually comes from financial statements provided by the parties, and will often be based on the opinion of property assessors. Relating this evidence precisely to date of application may not always be possible. A property assessor can, if instructed to do so, make a reasonable estimate of value as of date of application, but other evidence of value may be less time-specific. The drafters of the *Act* may have thought it wise to permit some latitude in choice of valuation date to simplify reception of a wide range of evidence of value. This rationale for the discretion appears to have been assumed by the court in *Osborne v. Osborne*. In that case, the applicant argued for valuation as of date of application, which was three years earlier than trial of the matter in April 1986. After reviewing the property value evidence, the court chose date of adjudication, noting that

[M]ost of the evidence as to the value of the assets, particularly the real property, related to March or April 1986, values. There is therefore no alternative but to value all matrimonial property as of the date of adjudication.⁵

Whatever the intention, of the drafters of the *Act* may have been, there are some obvious difficulties with the approach adopted by the court in *Osborne v. Osborne*. During the three years from application to trial, property values had changed considerably. Entitlement to matrimonial property should not, in principle, be significantly affected by the delay in bringing an application to trial, yet that is what happened in this case. The percentage split between the parties might have been different if the case had more to trial more quickly. In addition, the problem faced by the court was created in part by the very discretion used to solve it. If a rule ordinarily requiring valuation as of date of application had been in place, financial disclosure statements would have valued the property at 1983 rather than 1986 values, or, failing that, the court could have demanded revised statements.

⁵See above, note 2. The date of adjudication was also chosen in *Wildman v. Wildman* (1984), 35 Sask R. 24 (Q.B.) on the grounds that the best evidence of value related to date of trial rather than date of application.

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It is to be expected that evidence of property values will often be imprecise. The discretion to choose between alternative dates of valuation diminishes the significance of imprecision resulting from the time at which property values were assessed. In practice, the values accepted by the courts are often neither those precisely as of date of application nor date of adjudication, but an interpolation to one or the other from the evidence.¹⁶ But these considerations do not lead to the conclusion that an arbitrary discretion to fix the valuation date is necessary. Unless some factor other than the nature of the evidence of value dictates otherwise, the court should weigh the evidence as best it can to come as close to value at date of application as possible. Evidential problems of this sort are the common currency of judicial decision-making. No special discretion is necessary or desirable to short circuit the problem regarding evidence of value.

A rationale for exercise of the discretion to fix the valuation date that involves more than the convenience of the trier of fact has been recognized in several reported decisions¹⁷, but to date, no attempt has been made to fully examine the policy issues involved. The most useful insight into the issues is perhaps to be found in the comments of Dickson, J. in one of the earliest cases discussing valuation date, *Edie v. Edie*¹⁸. Dickson implicitly accepted the notion that valuation should follow identification of the matrimonial property, and thus begin with the values as of date of application.¹⁹ However, in some cases an adjustment would be appropriate. He explained the discretion to fix valuation date at date of adjudication by considering a case in which property values have increased *after date of application* because of effort and investment made jointly by the spouses *prior to application*. In such a case, it would be unfair to attribute the increase in value solely to the spouse who happened to have title to the property. A similar approach appears to have been adopted in

¹⁶ It might also be noted that "date of adjudication" is usually taken to be the time of trial, rather than the date of judgment, which may be some time after trial.

¹⁷ See above, note 3.

¹⁸ (1981) 12 Sask. R. 15 (U.F.C).

¹⁹ Unfortunately, *Edie v. Edie* was decided before the courts had clearly recognized the importance of the distinction between *valuation* and *identification*. There appears to have been some confusion on this point in the decision.

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several other cases, though without a clearly stated analysis of the problem.²⁰

Note that the approach to the valuation date issue set out above is not simply a covert means of redefining matrimonial property to include property or its value accumulated 'after the statutory identification date. Notionally, the *Act* divides property as of date of application; it is at that point that property rights are deemed to crystallize for purposes of the *Act*. In an ideal regime, division would occur immediately upon crystallization. Each spouse would take title to part of the property, which would become the separate property of each. Any increase or decrease in the value of either share would automatically be shared by the spouses according to the division formula. But division does not occur immediately. During the time between application and the actual distribution of property by court order,' matrimonial property rights are effectively held in suspense. If valuation as of date of application governed in all cases, the manner in which the spouses would share c B an~es in value prior to distribution would be an arbitrai function of the length of the delay between application and division.

3. Policy considerations

(a) Scope of the issues

The basic approach to the valuation problem suggested in *Edie v. Edie* rests on correct identification of the policy considerations that should underlie choice of an appropriate valuation date. In our opinion, uncertainty about valuation dates should be alleviated by amending *The Matrimonial Property Act* to reflect the general approach outlined in *Edie v. Edie*. But formulating a statutory provision for this purpose requires a more complete analysis of the policy issues than was attempted by the court in that case. In particular, it will become clear in what follows that two classes of questions need to be addressed before drafting a new valuation date provision:

(1) The relationship between the date of identification and date of valuation must be reexamined in the light of basic policy. It will be seen that flexibility in choice of valuation date alone will not, in all cases, address the concerns that attracted the court's attention in *Edie v. Edie*.

²⁰e.g. *Medernach v. Medernach* (1985), 40 Sask. R. 269 (Q.B.). This case involved a decrease in property values after date of application.

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(2) The choice of the date of application as the appropriate time for valuation requires reconsideration. In particular, the date of separation of the spouses has at least an *a priori* claim to consideration~

(b) Identification and valuation

In a deferred sharing matrimonial property regime, property remains separate until a triggering event occurs that entitles a spouse to demand a redistribution of property. Under the Saskatchewan Matrimonial *Property Act*, the triggering event is the application for division. Property rights crystallize when the triggering event occurs, and the property of both spouses at that point in time is subject to division. Ideally, property should be identified, valued and divided immediately upon crystallization of property rights for division purposes. Barring adjustments to take into account delay between the triggering event and adjudication, property should be both identified and valued for division purposes as of occurrence of the triggering event.²¹

Adjustments are necessary. To understand why, attention must be focused on the fundamental reason why a matrimonial property regime has been created. Division of property under *The Matrimonial Property Act* rests on the principle that marriage is a species of partnership, a joint undertaking in which both spouses assume responsibilities and make contributions to a common purpose. Both are deemed to contribute, directly or indirectly, to the acquisition and maintenance of matrimonial property. Section 20 of the *Act* rests on the proposition that the mutual responsibilities of the marital partnership "entitles each spouse to an equal distribution of matrimonial property" It follows that the right to share in increases in asset value applies only to value that accrues from the mutual efforts of the spouses. When the marital partnership comes to an end, mutual contribution ceases. An application for division can be deemed to be notice of termination of the partnership. For that reason, it is usually appropriate to identify, value, and divide the property owned by the spouses as of the date of application. However, because actual distribution of the "partnership assets" must await a court order, the partners remain locked in the

²¹In this section of this report, it will be assumed that application for division is an appropriate

triggering event. Whether that assumption is appropriate will be discussed in the next section. However, it should be noted that date of separation could be substituted for date of application in this section without changing the argument in substance.

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marital relationship for at least some purposes until the distribution order is made. To the extent that changes in property value after date of application reflect the results of contributions made and responsibilities assumed at an earlier date, it is both necessary and appropriate to take those changes into consideration.

At least as interpreted in *Edie v. Edie*, the valuation date formula presently allows the courts to bring changes in value after date of application into account by choosing the date of adjudication as valuation date. Properly applied, the discretion to value property at date of adjudication rather than date of application will make possible appropriate adjustments to account for delay between application and adjudication in many cases. For example, if land acquired before application increases in value due to market forces or because of investment of other matrimonial property in it, it would usually be appropriate to value the land as of date of adjudication rather than date of application. The increase in value in this case is a result, albeit delayed, of the mutual efforts of the spouses. On the other hand, if an asset increases in value solely because of labour expended on it by the spouse with title to it after the date of application, the increase cannot be attributed to the marital partnership. In this case, valuation as of date of application would be appropriate.

The policy decisions underlying choice of valuation date have been more explicitly recognized in Ontario than in Saskatchewan. This is likely because choice of valuation date is discretionary in this province. In Ontario, the courts have been forced to justify valuation as of date of trial by finding a constructive trust. In *Rawlyk v. Rawlyk* the court found that a post-separation increase in the value of farm land resulted from the joint efforts of the spouses prior to separation, and imposed a constructive trust. In *Seed v. Seed*, a quarter interest in a machine shop purchased by one of the spouses after separation was awarded to the other spouse because proceeds from the sale of the matrimonial home had been invested in it.²² In *Balogh v. Balogh*, a post-separation inheritance from a relative in Hungary was divided because contributions had been made to the relative out of matrimonial property.²³ In *MacDonald v. MacDonald*, on the other hand, the court applied what it described as a "reverse constructive trust" to justify dividing a farm equally rather than awarding half its value as of separation date to the untitled spouse because of a dramatic

²² (1986) 5 RFL (3rd) 120 (Ont. H.C.)

²³ (1993) 44 ACWS (3rd) 328 (Ont. U'FC).

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decrease in value after separation⁷⁴ The policy considerations underlying these decisions are consistent with the approach adopted by Dickson, J. in *Edie v. Edie*. Whether constructive trust or exercise of a discretion to fix valuation date is used to achieve the result, changes in asset value after date of application should not be ignored when the change has a real connection with the marriage partnership.

Although the Saskatchewan legislation, as it has been applied by the courts, is more satisfactory than its Ontario counterpart, the existing valuation and identification formulae are deficient in several respects. Most important, discretion can be exercised only with respect to valuation. The court has flexibility in choice of valuation date, but only property owned on the date of application is included in the definition of matrimonial property. The date of application is no more or less appropriate as an identification date than as a valuation date. For example, if income earned from matrimonial property is used to purchase new assets after the date of application, the new property is as much a product of the marital relationship as a post-application appreciation in the value of existing matrimonial property. Recourse to constructive trust would likely be necessary to achieve an equitable result in such a case.

The choice of a date of valuation or identification must be fact specific, and must relate to the circumstances of individual assets. For example, if land owned by one of the spouses appreciates in value after application, it might be appropriate to value it as of date of adjudication. But if one of the spouses also owns a bank account that has grown in size after application because in monthly pay cheques have been deposited in it, date of application would be the appropriate valuation date for that asset. Clearly, the underlying policy of the *Act* requires the use of more than one valuation/identification date in some cases. Nothing in the legislation expressly prohibits use of both date of application and date of adjudication as valuation dates in a single case. The Court of Appeal has, however, criticized the practice.²⁵

In the Commission's opinion, amendment of both the definitions of "matrimonial property" and "value" should be modified to more effectively carry the policy of *The Matrimonial Property Act* into effect. The amendment should allow for flexibility in setting the date of both identification

24(1988) II RFL (3rd) 321 (Ont. H.C.)

²⁵*Shockey v. Schokey* (1985), 45 R.F.L. (2nd) 219 (CA.).

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and valuation of matrimonial property, and direct attention to the matters discussed above. If the amendment identifies appropriate cases in which property acquired after date of application can be taken into consideration, it will provide a complete code' from division of property between spouses, and thus forestall application of *Raivlyk v. Rawlyk* in Saskatchewan.

In our view, creating a discretion for this purpose is not necessary. Rather, the formula in the *Act* should define matrimonial property and its value in a way that directs the courts to an appropriate choice of date. This can perhaps best be done by establishing date of application, coupled with a clear exception, as the identification and valuation date.

Recommendation

"matrimonial property" means any real or personal property whatsoever, regardless of its source, kind or nature, owned, or in which an interest is held, by one or both spouses

(a) on the date of application under this Act, or

(b) between the date of application and the date of adjudication, to the extent that the property was acquired with proceeds, income or profits from other matrimonial property.

"value" means fair market value, or, where a fair market value cannot be determined, any value that the court thinks reasonable, determined

(a) on the date of application under this Act, or

(b) if the property has changed in value since date of application for any reason other than the efforts of the spouse who has the title or interest in the property, on the date of adjudication.

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(c) Date of application vs. date of separation

As has been noted above, in Saskatchewan and other provinces with deferred sharing regimes, the triggering event that entitles a spouse to demand a division of property is also implicitly the date on which the marital partnership is deemed to end. It is this fact that makes the triggering event (subject to the adjustments discussed above) an appropriate time for identifying and valuing matrimonial property. The triggering event under the Saskatchewan legislation is the date of application for division of matrimonial property. No doubt, application for division is an act that clearly evidences an intention to end the marital partnership. However, the triggering event in the Saskatchewan *Act* was not chosen primarily for this reason. In most provinces, the triggering event is the separation of the spouses.²⁶ The Saskatchewan *Act* was designed to permit spouses to make application for division without separating. Although there are few cases in which property has been divided between spouses who have not separated, the policy permitting such applications is an integral part of the Saskatchewan regime. Choice of date of application as triggering event is the necessary consequence.

It has been suggested that except in the small minority of cases in which the parties to a matrimonial property application have not separated, the date of separation better reflects the termination of the matrimonial partnership than the date of application. In its 1984 *Tentative Proposals for Reform of the Matrimonial Property*, the Commission argued that "the logic is undeniable: When spouses finally go their separate ways, the marriage partnership is over, and joint contribution has ceased."²⁷ Quarrelling with this proposition in principle is hard. If, for example, a spouse has a bank account and continues to deposit her pay cheque in it after separation, the increase in the balance should be exempted from division from the date of separation, not the date of application for division of matrimonial property. Nevertheless, there is reason to hesitate before adopting date of separation as *prima facie* valuation date.

²⁶Seven of the nine provinces with deferred sharing regimes adopt date of separation as the principal triggering event. Other events are usually applicable in special circumstances. Section 4 I) of the Ontario *Family Law Act* (summarized above) as an example. Only New Brunswick follows Saskatchewan in adopting date of application as the triggering event. Quebec has a community property rather than deferred sharing regime.

27 p. 54.

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Date of separation is less precise than date of application. Determining the separation date has proved 'to be difficult in provinces in which separation is the triggering event. Trial separations are' nor uncommon, leaving the court to determine which of several separation dates to adopt for purposes of identifying and valuing property. The Ontario *Family Law Act* makes separation 'without reasonable prospect of resumption of cohabitation' the triggering event, but provides no guidance to the courts in determining when it is appropriate to find that a separation is permanent. Under the *Divorce Act*, the date of separation is fixed by the initial separation of the parties; brief resumption of cohabitation does not change the date of separation. This formula is designed to encourage reconciliation, and is of no assistance for matrimonial property purposes. Thus adopting date of separation as the valuation/identification date might create more problems than it solves.

The argument in favour of adopting date of separation as the valuation/identification date would be stronger if 'there were no other way to factor in the effect of separation in matrimonial property cases. It is well-established law, however, that the length of separation of the parties is a factor to be considered in determining whether to depart from equal division of matrimonial property. This factor does not directly affect identification or valuation of matrimonial property. It applies to the division formula, not the definition of divisible property²⁸, but the effect is much the same. Thus, for example, in *Criton v. Criton*²⁹, business assets acquired by the husband between date of separation and date of application were divided unequally in the husband's favour. In our opinion, the present treatment of the date of separation makes it unnecessary to incorporate it into the definitions of "matrimonial property" and "value".

²⁸Consideration of the length of separation is justified by section 21(2) (d), which lists "the date on which the property was acquired" as one of the equitable considerations the court may apply in departing from equal division.

29 (1986), 44 Sask. R. 238 (C.A.)

II. GIFTS AND INHERITANCES RECEIVED DURING MARRIAGE

1. The Status of Gifts under the Matrimonial Property Act

Gifts and inheritances received during marriage are not expressly given any special treatment under the *Matrimonial Property Act*. All property "acquired during marriage" is, regardless of its origin is subject to equal division under the Act (section 21(1)). If equal division of a gift or inheritance can be avoided, it is by application of section 21(2)(e), which permits the court to consider

[The] contribution, whether financial or in some other form, made directly or indirectly by a third party on behalf of a spouse to the acquisition, 'disposition, operation, management, or use of the matrimonial property.

The "equitable consideration" in section 21 (2)(e) has been pressed into service by the courts to justify unequal division of property acquired during marriage by one of the spouses as a gift of inheritance. Although the section does not expressly mention gifts and inheritances, such a development is not surprising. It would be hard to quarrel with the proposition that most people regard property acquired as an inheritance (and probably other gifts) as different in some important and relevant way from other matrimonial property acquired during marriage.

Unfortunately, section 21 (2)(e) does not crystallize any particular policy in regard to gifts and inheritances. In fact, it is by no means clear that the section was designed primarily to deal with gifts and inheritances, or even that it was intended to apply to gifts and inheritances at all. It might have been conceived to address cases in which, for example, a father and son have farmed together on land owned in part by the son who becomes a party to a matrimonial property application. Several conflicting lines of authority on gifts and inheritances have emerged from the courts, creating what has been described as a state of confusion that has only partially, and perhaps unsuccessfully been resolved by the Court of Appeal³⁰.

At the root of the problem is the failure of the Act to provide any policy direction. As will ³⁰see Herauf, Wilson, and Kovatch, "Saskatchewan" in J.G. McLoed, *Matrimonial Property Law in Canada*, 5-50 if.

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be shown below, there is no ' simple formula that will adequately encompass all the circumstances worthy of consideration when the division of a gift or inheritance is in issue. The courts have made some progress toward unravelling the problem, but judicial attitudes are perhaps too diverse to have made any definitive consensus possible. A clear and coherent policy can only be put in place by legislation.

2. Judicial policy

Some early cases under the Act did adopt a simplistic approach. Some judges were initially content with the notion that a gift or inheritance is not a product of the marriage relationship and he refore. ought ordinarily to be regarded as something outside of it. In one of the first cases in which an inheritance was at issue, *Raes v. Raes*,³¹ the Court of Queen's Bench held that two quarters of land inherited by the husband were exempt from ~distribution because the bequest named the husband alone. In *Pepper v. Pepper*,³² the Court of Queen's Bench similarly reduced the wife's share of farm land inherited by her husband to 25%. The share she received reflected the increase in value of the property since the date of the inheritance (in the first year of a 26 year marriage).

The notion that circumstances often justify treating a gift or inheritance as *defacto* something other than a matrimonial asset was reflected in a different way in the Queen's Bench decision in *Cyr*

v. Ross.³³ In that case, the entirety of a bequest of money was exempted on the ground that the marriage had deteriorated by the time of the bequest to such an extent that dividing it between the spouses would be inequitable.

A different approach is evidenced in cases decided in the Unified Family Court. Judges of that court early recognized that factors other than the fact of inheritance deserved consideration. In *Leary v Leary* for example, the court noted that a gift or bequest is often made to assist a family unit, even if only one spouse is named in the will or is the legal recipient of the gift. In the result, the

31 (1982),30 RFL (2nd)91

32(1982), 18 SaskR, 144

33unreported, 1984

34 (1983), 25 Sask R. 168

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court declined to depart from equal division unless there was cogent evidence that the testator or donor did not wish to benefit both spouses. Extrinsic evidence that a testator disliked or distrusted the spouse of the beneficiary was identified as a basis for departing from equal division. Presumably, words in a will clearly stating that the benefit of the bequest is intended to go only to the named beneficiary would also satisfy a court that adopted this approach.

Although *Burant v. Burant*,³⁵ was decided in the Court of Queen's Bench, it, like the Unified Family Court decisions, recognized circumstances in which an inheritance should be equally divided. The Court identified the way in which the parties regarded the gift or inheritance as a relevant consideration. In that case, it was found that the husband had, until the marriage deteriorated, treated property inherited by him during marriage as a joint asset of the spouses.

The Unified Family court also took the position that even if circumstances might justify unequal division of a gift or inheritance, it should not be treated as if it were an exemption analogous to property brought into marriage. Thus simply crediting a spouse with the value of a gift or inheritance, as was done in *Raes v. Raes*, would be inappropriate. In *Billo v. Bib*³⁶, the court declined to credit a spouse with the value of small money gifts from his mother over a period of years because it could not be shown that the money could still be identified as matrimonial property at the time of the application. It had presumably been spent long before.

The divergent approaches outlined above were partially resolved by the Court of Appeal in 1985 in *Seaberly v. Seaberly*". The Court rejected the simple notion that section 21(2)(e) *prima facie* creates a quasi-exemption for gifts and inheritances. It criticized decisions such as *Pepper v. Pepper* and *Raes v. Raes*, noting that in these cases

[It] appears that the equitable consideration set up by s. 21(2)(e) is being treated as though it were equivalent to an exemption created by s. 21(1)(b). The two are markedly different and are not to be equated.

35 (1982), 4 WWR 65

36 (1982), 27 RFL (2nd) 150

37 (1985) 44 RFL (2nd) 1

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Section 21(1)(b) exempts the value of property brought into marriage to the extent of its value at date of marriage. In *Pepper v. Pepper*, only the value of an inheritance that had accumulated since the date on which the inheritance was received was treated as divisible property. Further, the Court noted that whereas exempt property is not ordinarily sharable, all property brought into marriage is deemed sharable by the Act. This undercuts the simple policy considerations adopted in cases such as *Raes v. Raes* that justify using section 21(2)(e) to refuse a division on the basis that the bequest had been made to only one spouse. Thus it was held that

[Property] acquired after marriage, by gift or otherwise, is subject to radically different treatment. It is deemed to be sharable (the very opposite of exempt)... and it is to be shared equally unless there is something in all the circumstances--- including but by no means limited to acquisition-- which makes an equal sharing unfair and inequitable. The fact alone that an item of property was acquired through gift by one of the spouses to the exclusion of the other does not in itself render it subject to unequal sharing.

This principle was applied to the facts of the case to order an equal division of the inheritance in question. The husband had inherited farm land in the seventh year of a 22 year marriage. The parties had lived on the land from the date of marriage, and continued to live on it throughout the marriage.

In general terms, the decision in *Seaberly v. Seaberly* vindicated the approach identified above with the Unified Family Court. The facts of the case were similar, on one hand, to *Pepper v. Pepper*, which the Court rejected, and on the other to *Burant v. Burant*, which the Court impliedly approved. Nevertheless, *Seaberly v. Seaberly* is essentially a negative statement. It rejects a simple "exemption" of a gift or inheritance on the basis that it was received by only one of the spouses, but it does not expressly identify factors that would justify applying 21(2)(e) to order an unequal division. A key, but necessarily vague, phrase in the decision is "all the circumstances":

All of the circumstance must be looked at, and only where a spouse making the claim can show that the equal sharing contemplated by the law is unfair and inequitable will an unequal, or fairer, sharing be justified.

Since *Seaberly*, the courts have continued to make unequal division in some cases, but

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not in others. The decision in each case must, of course, be based on regard for "all the circumstances". There remains, however, a wide range of opinion as to the relevance and weight of various "circumstances". Some decisions continue to give more weight to the fact of inheritance by one of the spouses than others. Similarly, although the decision in *Cyr v. Ross* can certainly be reconciled with *Seaberly v. Seaberly*, there have been cases in which even an inheritance acquired after the separation of the parties has been equally divided.

3. Policy issues

(a) Limits set by the underlying policy of the Act

In as far as it goes, *Seaberly v. Seaberly* is almost certainly based on a correct construction of *The Matrimonial Property Act*. Under section 2 1(1), all property acquired during marriage is *prima facie* divisible. The source of the property is irrelevant. Clearly, the onus to show that one of the equitable considerations in section 21(2) justifies departure from equal division must lie on the party who asserts that equal division would be unfair and inequitable. Had it been intended that the fact of inheritance would be, 'in itself, enough to justify departure from equal division, an explicit exception to the rule that source is *prima facie* irrelevant would have been required. In that case, the Act would have set up an exemption for gifts and inheritances analogous to the exemption for property brought into marriage. As the Court in *Seaberly v. Seaberly* observes, the Act cannot be construed as establishing such an exemption.

The presumption in favour of equal division of property acquired during marriage is an essential structural element of *The Matrimonial Property Act*. Its role is expressly stated in section 20 of the Act:

The purpose of this Act ...is to recognize that child care, household management and financial provision are joint and mutual responsibilities of spouses and that inherent in the marital relationship there is a joint contribution, whether financial or otherwise that entitles each spouse to an equal distribution of the matrimonial property, subject to [qualifications set out elsewhere in the Act].

Marriage is recognized as a partnership in which both spouses make the contribution expected of

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them, and share the property accumulated by them as equal partners. The right to share in property acquired by the spouses is based on a partnership model rather than on actual contribution to the acquisition of property or the relative values of each spouse's contribution. This is the reason the source of matrimonial property acquired during marriage is largely irrelevant. In general, it makes no difference in a partnership model of marriage whether an item of property was purchased directly from funds contributed by one or the other of the spouses.

Section 21 of the Act recognizes that strict adherence to the partnership model will sometimes produce results that are "unfair and inequitable". Thus the "equitable considerations" set out in section 21(2) may be invoked to depart from equal sharing. The Act leaves it to the courts to determine when and how to apply the equitable considerations. Most of the 17 clauses in section 21(2) have generated controversy. Clause (e), the focus of our concern here, is atypical only in that the controversy it has generated has been particularly persistent and intractable.

Although the Act does not expressly identify the circumstances in which equal division of a gift or inheritance would be unfair and inequitable, the underlying assumptions of the Act may provide at least some guidance.

As noted above, the source of matrimonial property is de-emphasized by the Act because both spouses are expected to contribute according to their roles in the marital relationship, so that all contribution is deemed to be joint. This policy was adopted because some contributions are vital to the marriage partnership even though they contribute only indirectly (if at all) to accumulation of property. Child care and homemaking are obvious and important examples. As a matter of history, *The Matrimonial Property Act* was a response to *Murdoch v. Murdoch* and other pre-reform decisions that shared property only on the basis of direct contribution and ignored the indirect contribution of farm wives and homemakers³⁸.

The general policy against considering the source of matrimonial property is strongest in cases in which the issue involves the relative contributions of the spouses to acquisition of property. In *Farr v. Farr*, the Saskatchewan Court of Appeal approved what was known as the "capital base

³⁸see the *Report of the Royal Commission on the Status of Women*, Ottawa, 1970 for a succinct statement of the background to matrimonial property law reform in Canada

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theory". This approach would have permitted unequal division of assets accumulated during marriage in favour of a spouse who brought a "capital base" into the marriage. The increased share of the property-owning spouse would have been in addition to the exemption of the value of the property at the date of marriage. The Supreme court, however, rejected the capital base theory. In its view, the theory compromised the basic assumption of joint contribution during marriage on which the Act is grounded. In reaching this conclusion, the Court took particular note of the fact that "equitable considerations" in section 21(2) do 'not include 'any that can be characterized as matters of relative contribution.³⁹

In cases in which relative contribution is not directly in issue, the general policy against considering the source of property is weaker. At least some of the "equitable considerations", including section 21 (2)(e) that justify departure from equal sharing have to do with the source of the property in question. Recognizing that inheritance of property raises issues that are different in some respects from issues of relative contributions of homemakers and income-earners does not necessarily compromise the basic assumptions on which the Act operates, nor does it necessarily devalue the contribution of non-property owning or of none income-earning activities to the marital partnership.

Any approach to gifts and inheritances in the context of the present Act, whether by judicial interpretation or legislative amendment, must be compatible with the principles outlined above. From the point of view of law reform, two significant propositions follow. First, the assumption of equal contribution and the deemphasis of the source of matrimonial property it entails cannot be lightly dispensed with. The basic policy and structure of the Act require that the onus on the party who challenges equal division be retained. Second, however, the onus need not be so heavy as to preclude rebuttal in all but the most unusual cases. Most people regard gifts and inheritances as an anomalous category of matrimonial property meriting special treatment. Appropriate policy toward gifts and inheritances should 'not be assimilated to the considerations that dictated the demise of the capital base theory.

39 (1984), 39 RFL 1

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(b) An approach to identifying policy considerations

Since *Seaberly v. Seaberly*, it has been accepted that the mere fact of receipt of a gift or inheritance by one spouse is not a sufficient reason to deny an equal share of it to the other. However, other considerations relevant to gifts and inheritances have not been definitively identified. This reflects the range of opinions on the bench about the status of gifts and inheritances as matrimonial property. In this respect, judges are no different from the population at large. Reform of the law will require statutory recognition of relevant considerations. The choice of relevant considerations should, in as far as possible, conform to community opinion. However, it will be necessary to resolve conflicts in community opinion. Conflicts should be resolved by choosing the opinion that is most compatible with the goals and principles of matrimonial property legislation.

Reported decisions on gifts and inheritances under *The Matrimonial Property Act* provide a useful guide to the range of opinion in Saskatchewan about the status of gifts and inheritances as matrimonial property. They will be used here as the basis for discussion of policy options.

(c) The wishes of the testator or donor

The decisions in *Raes v. Raes* and *Pepper v. Pepper* suggest support for the notion that the recipient of a gift or inheritance has some claim to 'an exclusive interest in it because he or she was the intended beneficiary. This implies the wishes of the donor should be respected: "The gift was made to A, not to A and spouse". The law generally respects the wishes of donors, who are free to give or withhold their largesse as they see fit. The law of wills rests on this foundation. No doubt, other things being equal, most of us would agree with this principle. The structure of the Act precludes reversing the presumption in favour of equal division in gift and inheritance cases. Nevertheless, the respect usually accorded to the wishes of donors and testators should be taken seriously. Unless other relevant considerations dictate otherwise, the onus on the recipient of a gift or inheritance to justify an unequal division should be easily met.

But the problem cannot be left here. Both the basic principles of matrimonial property law and the public's perceptions of fairness require a more sophisticated policy. The Court of Appeal recognized this in *Seaberly* when it held that "all the circumstances" must be taken into

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consideration. One of these circumstances was identified by the Unified Family Court in *Lea v. Lea*. In fact, a gift or inheritance is often made to a child of the donor for the purpose of assisting the child's family unit. The form of the gift (usually a bequest in a will) may not reflect this fact. It is convenient and conventional to name only the testator's child as beneficiary even when the motive behind the bequest is to confer a wider benefit. Parents are more apt to make gifts or bequests to a child with a family to support than one with no dependents.

It should also be noted that in Saskatchewan there is still a tendency to pass land to a son who wants to carry on the family farm and particularly so if he has married and started a family of his own. Consider for example a farmer who has two sons. One of them leaves the farm. The other stays with his parents. It is common in such circumstances for the farming son to be left enough of the estate to carry on the farming operation. If he is single, some share might be to the other son, expecting that both can come to an understanding. However, if the farming son is married, his obligations may preclude, such an arrangement, and the land would more likely be left to him exclusively to enable him to support his family.

If the testator also has a daughter and he is a traditionalist in his views, he might think it unnecessary to give her a share in the land. If she stays in the rural community, she might be expected to marry a farmer with the capital base necessary to support a family. This sort of logic is increasingly dubious. Many more women are interested in managing farms themselves than in the past, and few are willing to shape their future solely on the ability of a husband to provide for them. Nevertheless, the attitudes of testators are changing only slowly. It is still a general expectation that land left to sons will benefit daughters in the agricultural community.

In *Lea v. Lea*, the court held that equal division should be departed from only if it can be shown that the donor or testator did not want to confer a benefit on the spouse of the beneficiary. This must be evidenced by some positive indication of animus toward to the spouse or an express statement that no benefit is intended. Merely naming only one of the spouses in the will or transfer document is not enough. Generalizing it about the motives behind a gift or bequest is difficult. The examples discussed above suggest, however, that there are cogent reasons why the principle adopted in *Lea v. Lea* deserves legislative recognition. First, it is compatible with the structure and policy assumptions of The Matrimonial Property Act. As the Court of Appeal in *Seaberly v. Seaberly* noted, any other approach would amount to creation of a new exemption. Second, focusing on the legal form of the gift or bequest would, in the social context of contemporary Saskatchewan,

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systematically discriminate against women and deny the social facts that explain the motives underlying a decision to make a gift or bequest. As a matter of policy, it should be presumed that a gift or inheritance was intended to benefit the family unit unless the contrary can be shown.

Amendment of *The Matrimonial Property Act* to expressly incorporate the principle in *Lea v. Lea* must be carefully formulated. It should not interfere with the intention of a testator or donor any more than is necessary to achieve the legitimate policy goals set out above. The need for some qualification of the principle in *Lea v. Lea* can be appreciated by considering the facts of a recent matrimonial property case that did not go to trial. A woman inherited valuable land outside the province from a distant relative. She received the inheritance shortly after separating from her husband, who initiated a matrimonial property application on the basis of the bequest. *Burant v. Burant* would suggest that the date of separation is a relevant consideration. Here, however, the focus will be on other aspects of the case.

Even though neither she nor her husband had received income from the land or made any contribution to its improvement or maintenance, mechanical application of the principle in *Lea v. Lea* would have made it difficult to displace the presumption of equal sharing. Neither the will nor any available extrinsic evidence revealed any wish on the part of the testator to exclude the beneficiary's spouse from the benefit of the bequest. In fact, the testator knew neither of the parties and likely had no opinion about their relationship. Not surprisingly, the woman was advised to agree to a settlement that gave her more than half the property in question, but less than the whole bequest. This advice was sound, given the state of the law, but can hardly be reconciled with the policy considerations that motivated *Lea v. Lea*.

From a policy point of view, the principle in *Lea v. Lea* is strongest when the gift or inheritance is made within the immediate family of the testator and when it has become a source of income for the spouses that one or both manage, maintain or improve. The latter factors will be discussed in more detail below. It is submitted, however, that identifying the relationship between the testator or donor and the recipient of the gift or inheritance as an independent factor to be considered would be a useful corrective to the over-inclusiveness of the *Lea* principle.

Another issue raised by *Lea v. Lea* also deserves further consideration. On the facts in the case, the evidence that the beneficiary's spouse was not intended to benefit from the bequest was extrinsic to the will: Testimony that the testator disliked the spouse and did not wish title to any of

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the land in question to fall into her hands. Extrinsic evidence is appropriately received in cases like this. The issue is not the legal or equitable title to the property (which can be determined from the will), but the motives and expectations of the testator. Presumably, the will itself might also contain language that is useful to assess motives and expectations. In particular, a clause might be inserted in the will for the purpose of overriding *The Matrimonial Property Act's* presumption of equal sharing of gifts and inheritances. If extrinsic evidence is acceptable as a basis for departing from equal sharing, such a clause ought also be acceptable. There is, however, an essentially technical difficulty.

Consider a clause of this form:

I give, devise and bequeath the property known as Blackacre to A in fee simple. It is my intention that the benefit of this gift be for A alone, and that the gift shall not be subject to division under *The Matrimonial Property Act*.

Note first that the will gives an absolute interest to the beneficiary. The testator retains no right to control the future use or disposition of the property after granting the fee simple. As a matter of construction, all the words following the grant of the fee simple amount to a "precatory trust", a mere expression of a wish without legal effect⁴⁰. In addition, the clause purports to override the provisions of *The Matrimonial Property Act*. Under the Act, all property acquired by the spouses is *prima facie* divisible, regardless of source. The parties themselves can contract out of the Act. A declaration by the testator that the Act does not apply to the bequest is clearly not effective *as such*.

Neither of the problems outlined above ought to prevent the court from considering the clause as evidence of the testator's purpose in making the bequest. Though it is contained in a will, it should be treated in the same manner as extrinsic evidence of purpose. The clause may be ineffective as a term of the bequest, but it is at least as good an indicator of what was in the testator's

⁴⁰Had the interest been equitable, the construction would be no different. A determinable fee or trust might conceivably be used to divest an interest upon divorce or application under *The Matrimonial Property Act*. However, such devices will usually be impractical. In particular, they would provide protection from a matrimonial property application only if the property reverted back to the testator's estate or went to some other beneficiary in the event of an application under the Act.

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mind as the extrinsic evidence received by the Court in *Lea v. Lea*. Nevertheless, without clear authority on the status of clauses such as this, it is possible that a court might treat the clause as

· simply a failed attempt to create a legally-effective fetter on the property, and ignore it as a nullity. *The Matrimonial Property 'A' Act* should give express recognition to clauses in wills and deeds of gift that give evidence of the testator's or donor's purpose. The Act should make it clear that such clauses can be considered even if they are merely precatory.

(d) The way the spouses have dealt with property

In *Pepper v. Pepper*, the Court of Queen's Bench exempted an inheritance of farm land from division even though it had been received in the first year of a 26 year marriage, and had provided the foundation for a family farming operation throughout the marriage. This aspect of the decision attracted as much criticism as the construction placed on the Act by the Court. It can be argued that the most serious policy deficit in the decision is its failure to give consideration to the way in which the property was used by the spouses and the way they regarded it during the course of the marriage.

The Court in *Pepper v. Pepper* gave preference to the intention of the testator as expressed in the will. *Lea v. Lea*, which provided the foundation for the discussion of policy in the last section of this paper, suggests that the testator's intention in the narrow legal sense is not enough to oust equal division. Nevertheless, *Lea v. Lea* does identify the testator's intention in the broader sense of purpose as a cardinal consideration. The fact of 25 years of joint contribution following the bequest is not directly relevant on the approach adopted in *Lea v. Lea*. If the testator in *Pepper v. Pepper* had expressly stated that the bequest was for the benefit of the named beneficiary only, nothing in the logic of *Lea v. Lea* would have dictated any different decision than the one the Court made.

The way in which the spouses deal with the property during marriage is an independent policy consideration. In *Burant v. Burant*, the Court of Queen's Bench considered the fact that the property owning spouse had treated an inheritance as if it were a joint asset of the spouses. This amounts to at least partial recognition of the importance of the way the property has been dealt with. It is also likely that the length of the marriage and joint use of the property were among the circumstances that dictated equal division in *Seaberly v. Seaberly*. However, there has been no clear or comprehensive discussion of the way in which the property has been dealt with as a factor to be considered in applying section 21 (2)(e).

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The partnership model of marriage that *The Matrimonial Property Act* implements assumes that assets acquired by either spouse amount to part of the joint contribution of the spouses, and that the efforts of both contribute to the preservation of the property and its use to generate income that adds to the matrimonial assets. This policy orientation probably reflects community expectations. In particular, it recognises what may be identified as a reliance interest. If the property is used, for example, as the foundation for a farming operation, both spouses plan on the assumption that the property will be available for their joint purposes. The spouse of the inheritor may decide to remain on the farm rather than pursue another career' because both spouses are needed on the farm. The inherited property is relied upon as a continuing source of income by both spouses. A farm wife may agree with her spouse that they should "stick it out" through bad times in expectation that sacrifices made now will be rewarded in the future. The property may be regarded as an asset that can be sold to provide security for both spouses in retirement.

In circumstances such as those outlined above, the spouses impliedly treat the property as a joint asset despite the state of legal title. If the spouse with legal title has expressly stated (as in *Burant*) that the property is "ours" rather than "mine", the case for equal division is obviously stronger. *Burant v. Burant* is reminiscent in this respect of pre-matrimonial property reform cases in which matrimonial homes were divided because the spouse with title has treated the home as a family asset. However, it is submitted that the policy focus should be on mutual reliance on the property and the joint contribution entailed by it rather than on evidence that the spouse with title regards the property as a *defacto* joint asset. The structure of *The Matrimonial Property Act* dictates that mutual reliance must be presumed as an incident of the partnership model. In cases in which there is some evidence that the property was not relied on by the non-property-owning spouse, evidence that it was none the less treated as a joint asset would be relevant, but neither this nor any other class of evidence should be regarded as the *sine qua non* that determines the proper decision.

There are clearly circumstances in which fairness and equity make it reasonable to set aside the presumption of reliance. A clear example is perhaps provided by the unreported case outlined above in which out of province property was inherited by a spouse after separation. The decision in *Cyr v. Ross* can also likely be reconciled with the policy recommended here, even though the marriage in that case had merely "deteriorated" without actual separation of the spouses at the time of the inheritance. Obviously, however, other factors might also be relevant in both cases. If, for example, the inheritance had been expected and both spouses had relied on eventual receipt of it when planning for the future, the presumption of mutual reliance would not be rebutted by the

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circumstances at the time the inheritance was actually received.

It could be argued that there is no need to include any reference to the time at which a gift or inheritance is received in *The Matrimonial Property Act*. A proper analysis of the reliance interest would include consideration of the circumstances of the marriage at the time the inheritance is received. In addition, the Act makes the date of separation of the parties an independent equitable consideration (section 21 (2)(j)), and the court has some latitude to exclude property acquired between date of application and date of division from distribution.⁴¹ Nevertheless, cases such as *Cyr v. Ross* suggest that the circumstances of the marriage at the time the inheritance was received is a factor that will be significant in many disputed cases. Moreover, public opinion seems to incline strongly in favour of the policy expressed in *Cyr v. Ross*. For these reasons, it is probably desirable to make express reference to the time at which the inheritance or gift was received in the Act.

(e) Heirlooms

In its consultations with the public, the Commission found that there is particular concern about the fate on matrimonial property division of gifts that can be colloquially described as heirlooms. An antique that has been passed down in a family from generation to generation, or an item of property (with or without much market value) that has sentimental value to the recipient of the gift, falls into this category. Most lay people consulted by the Commission felt strongly that heirlooms should not ordinarily be divisible.

In most cases, division of an heirloom could be avoided by taking into account the wishes of the donor and the way in which the spouses have dealt with the property. Creating a blanket exemption for heirlooms would not be appropriate. A family farm may have great sentimental value, but if it has been the economic foundation of the marriage partnership, it must be treated as a divisible asset rather than an "heirloom" as the term was defined above. Nevertheless, the Commission believes that it would be appropriate to make reference to heirlooms and property with sentimental value in the Act. Heirloom status should be included as a factor to consider in determining whether to depart from equal division of a gift or inheritance

See the Commission's background paper *Date of Valuation Under The Matrimonial Property Act*.

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(f) Tracing gifts and inheritances

Because gifts and inheritances are not exempt from division, the tracing provisions in the Act applicable to property that is exempt because it was 'brought into marriage' do not apply to them, even if it is concluded that the gift or inheritance should not be divided. Nevertheless, a kind of tracing does seem to be appropriate in some cases.

Tracing of exempt property has not been handled in an entirely consistent manner by the courts. Usually, however, the value of property 'brought into marriage' has been exempted if the evidence suggests that it has been expended to acquire other property, or has been used to maintain other property.⁴² A gift or inheritance that is found to be non-sharable might appropriately be dealt with in the same way.

In *Billo v. Billo*, the Unified Family Court declined to credit the spouse who had received small money gifts during the marriage with the value of the gifts because the money no longer existed as an asset. The Court did not consider the appropriate course of action in a case in which the gift, while no longer existing *in specie*, could be 'traced' into other property. The decision in *Billo v. Billo* rests on the 'assumption that section 21(2)(e) is concerned with the division of existing assets, and thus differs from the provisions of the Act dealing with the exempt value of property brought into marriage. This construction of the Act was, of course, confirmed in *Seaberly*. However, the broad discretion given to the courts under section 21 (2)(e) does not preclude *deIacto* tracing of the value of a non-sharable gift or inheritance. If the value can be traced, the division formula can be adjusted to take into account the contribution made by the non-sharable property to the maintenance or acquisition of other property.

Tracing of non-sharable gifts and inheritance could be expressly provided for in *The Matrimonial Property Act*. However, doing it so is probably neither necessary nor desirable. The tracing provisions applying to property brought into marriage have proved to be a source of confusion. Recreating the problems produced by the tracing provisions already in the Act should be

⁴²see Herauf, Wilson, and Kovatch, "Saskatchewan" in J.G. McLoed, *Matrimonial Property Law in Canada*, S-62 ff.

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avoided. More important, the number of cases in which tracing of a gift or inheritance would be appropriate is almost certainly very small. Tracing might be justified when the gift or inheritance is non-sharable and has been expended on other property. If, for example, a spouse inherited an heirloom such as a valuable ring, sold it and purchased another ring, treating the inheritance as nonsharable might be appropriate and trace it into the substitute. In the vast majority of cases, however, it would be difficult to rebut the presumption of reliance (and thus establish a non-sharable status) if the gift has been used to acquire other property. In *Billo v. Billo*, for example, it is likely that the court would have found that the gifts received had been used for family purposes if they had been traceable.

4. Recommendations

The recommendations set out here implement the policy considerations discussed above within the context of the existing structure of *The Matrimonial Property Act*. This goal can more easily be achieved by replacing section 21 (2)(e) in the Act with a new provision that clearly indicates the policy that should be applied when division of a gift or inheritance is in issue. In conformity with the structure of the Act and the partnership model of the marital relationship it adopts, gifts and inheritance received during marriage remain *prima facie* divisible property. The proposed new section 21 (2)(e) set out below lists the factors that should be considered in determining whether equal division should be departed from.

Gifts and inheritances are not expressly mentioned in section 21 (2)(e) as it presently stands. In stead, the provision refers to "contribution, whether financial or in another form, made directly or indirectly by a third party". As noted above, the intended scope of the provision is not entirely clear. It should be noted, however, that the Act expressly provides elsewhere for claims made by third parties to matrimonial property. This covers cases in which, for example, a third party can claim an interest in matrimonial property by way of resulting or constructive trust.⁴³ In the result, section 21(2)(e) can be confined in its application to situations in which the third party contribution amounts to a gift or inheritance. The proposed new provision does so.

⁴³See *Ibid.*, S-70ff

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It is recommended that clause(e) of subsection (2) of section 21 of *The Matrimonial Property Act* be replaced with the following:

tIn determining whether to depart from equal division of matrimonial property, the Court may consider:]

(e) A gift, whether by bequest, inheritance, or otherwise, received by a spouse during marriage, and having regard to the terms of the will or gift and any other relevant evidence, the court may consider for this purpose:

(i) whether the gift was for the purpose of benefiting the spouse who received it to the exclusion of the other spouse;

(ii) whether the gift was an heirloom or other personal property given to the spouse who received it for reasons other than or in addition to ,its monetary value;

(iii). whether the gift was applied to the acquisition, disposition, operation, management, or use of the matrimonial property;

(iv) whether the gift was regarded by the spouses as matrimonial property or otherwise relied upon by both of the spouses as an asset of the marriage;

(v) the time at which the gift was received.