DIVISION

OF

MATRIMONIAL PROPERTY

Possible Solutions to Problems Within the Present Law

Second Mini-Working Paper

LAW REFORM COMMISSION OF SASKATCHEWAN

SASKATOON, SASKATCHEWAN

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The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

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INTRODUCTION

In June of this year the Saskatchewan Law Reform Commission issued its First Mini-Working Paper dealing with matrimonial property laws. That paper explored the background and the present law in Saskatchewan relating to the division of matrimonial property. It was seen that each of the spouses now has the right to own and control his or her own property. Property purchased with the wife's money belongs to her and property purchased with the husband's money belongs to him. As well, they may own property jointly. It was pointed out that in the view of many people this concept of separate property has often resulted in great injustice. Some of the problems created by the law were examined. Hypothetical examples and actual facts of cases which have been before the courts were cited to point out how the law is working in practice.

The present law is unfair, because it does not allow recognition of a wife's role in the earning of money or the acquisition of property through her work as a homemaker and mother. The law is even more unfair where the wife, in addition to her regular duties, assumes an active role in her husband's business or farming operations. If the marriage should break down, unless title is in her name alone or jointly, she is likely to receive no share of the property acquired by the joint effort of her husband and herself.

As well as being unfair, the present law is complex and, in many cases, uncertain in its application. It often concentrates upon factors which the parties do not regard as significant. Under our present system, accurate records must be kept of all intra-family transactions. In the absence of

such records, unless property is held jointly, it is very difficult to establish that a wife has a right to any of the property. Most husbands and wives simply do not bother to keep such records and accounts.

It would seem also that the present situation does not reflect the desires or expectations of most people. There are increasing pressures to update the law so that it reflects today's conditions and concepts rather than those of mid-Victorian England.

In conclusion, the first mini-working paper issued by the Commission stated that an examination of alternative approaches to the concept of property ownership as between husband and wife appears justified. It promised a further paper which would explore several alternate solutions to the problems presently being experienced.

This second paper, therefore, sets out a number of approaches, some of which have been adopted in other provinces or outside Canada and others which have been suggested as possible solutions by certain law reform bodies in Canada and abroad.

SOME BASIC QUESTIONS

During a happy marriage the inadequacies of the separate property approach are not obvious and the system would appear to work fairly well. However, when a marriage ends either by breakdown or death, these inadequacies become not only real but painfully apparent. It has been suggested by the British Columbia Working Group on Matrimonial Property that even in a happy marriage the concept of separation of property is no longer acceptable since it does not reflect the concept of marriage as an equal partnership. This concept, which is implicit in the recommendation

of the Royal Commission on the Status of Women would seem to be generally endorsed by the public.

Before one can consider the desirability of any particular approach to the distribution of matrimonial property, there are several basic questions which must be considered.

Is the concept of partnership in marriage endorsed by the mere fact of marriage or is it endorsed because the husband and wife truly become partners who work for the common good of the partnership? Is it fair to say that you are a partner simply because you have signed a document and have spoken a few words if you do not in fact go forward and build a real economic partnership beyond the marriage formalities? What if the marriage should last only a matter of weeks or months? Are these examples of true partnerships upon which we can base an approach to ownership of the property of the parties?

In business partnerships if an equal partner does not contribute money or effort in some form after the legal formalities, he does not remain an equal partner for long. Marriages, however, may continue to exist legally for one reason or another long after one party has ceased to contribute and indeed has become a real hindrance to the progress of the other. Must a contribution of some type be made before a person can be considered an equal partner, whether in business or in marriage?

Should conduct of the parties be allowed to have a bearing on the sharing or division? Is moral conduct a factor which should be considered? Should economic conduct be considered?

Most Saskatchewan residents would probably like to see the law provide

for some sharing of property between husband and wife regardless of who paid for it or who holds title. Are we prepared to say, however, that in every marriage the sharing should be equal?

Accepting for the moment that each spouse should receive some share of the property, which property should be subject to sharing?

(a) All property owned by either, regardless of when or how obtained?

(b) All property acquired during the marriage?

(c) All property acquired during the marriage with the exclusion of certain assets, i.e. gifts from third parties, inheritances?

(d) Windfall property, such as sweepstakes winnings, bingo prizes, etc.?

(e) Assets acquired after the parties have separated?

(f) Should business assets be included, or only family assets?

(g) Only the home and its contents?

(h) Should the home and its contents owned before the marriage be shared with the other spouse?

(i) Assuming that property acquired prior to the marriage is excluded from the sharing, should interest or capital gain on that property (earned during the marriage) be shared?

Assuming that there should be sharing of some property, when should the sharing take place?

(a) Upon legal termination of the marriage - divorce?

(b) Upon marriage breakdown - separation?

(c) Upon squandering of assets, gross mismanagement, or bankruptcy of one party?

(d) Upon insanity?

(e) Or do they share even during the marriage?

(f) If the sharing takes place at the time of divorce, should it be dealt with by the court during the divorce action?

(g) Or should a separate action be necessary as it is now?

If a new approach is adopted, when and how should it take effect? Should it apply

(a) retroactively to all property and all existing and future marriages?

(b) to all existing and future marriages but only to property acquired after the legislation is passed?

(c) to all marriages and all property unless the spouses agree in writing, within a certain time after legislation is passed, that it shall not apply to their marriage?

(d) to all marriages and all property unless, within a certain time after the legislation is passed, one of the spouses rejects the scheme in writing?

(e) to all future marriages, and to those existing marriages where the spouses agree in writing that the legislation shall apply?

(f) only to future marriages? (This offers nothing to presently married women.)

(g) or should certain approaches apply to future marriages and future

property in existing marriages while the courts would exercise judicial discretion with regard to property acquired before the legislation was passed?

Legislation may allow opting-out of any scheme by agreement or may disallow such agreements. A provision for opting-out could allow spouses to tailor the law to their own needs, and could dispel disadvantages caused by the rigidity of a compulsory system. It would seem desirable to provide for opting-out by those people who do not wish a new scheme to apply to them. Some might prefer separate property or a private agreement. Perhaps opting-out should be permitted in order to preserve the freedom of the individual. If it is allowed, procedures for doing so must be provided.

(a) Should it be allowed both before and after marriage?

(b) Should safeguards such as independent legal advice in making the agreement be required in order to ensure that both spouses understand the effect of their agreement?

(c) Should opting-out be by written agreement only?

(d) Is there a need for registration of agreements to protect creditors?

No scheme can possibly provide complete justice for the variety of circumstances and personal preferences found in society today. It seems that all that can be hoped for is a fair, simple, known and certain scheme which will apply to all couples who have not entered into legally permitted private agreements of their own.

Should there be an attempt to safeguard the economic interests of children? If so, how can this best be done?

ALTERNATE APPROACHES

If a sharing of at least some of the property at some time is accepted, what are the possible approaches or actual methods by which such a sharing can be accomplished? The various approaches can each be included in one of the four following general types:

A. *discretionary approaches*

B. *fixed approaches*

C. *composite approaches*

D. *patch-up approaches*

Discretionary approaches involve giving power to the courts to divide property between the spouses as the judge sees fit. Canadian courts have never been given express authority to exercise such power in regard to property disputes between spouses. They have not had power to disregard actual title to the property and to order division of all or part of the property between the spouses solely on the basis of what the court believes is just. Any legislation which may in the future give such power might set out detailed circumstances which the court must consider in each case or it might give only very general guidelines to be followed in exercising this discretion. Under discretionary schemes, there is great flexibility to meet the circumstances of the individual case but there is less certainty of the result. This uncertainty flows from the varying circumstances of the cases and the different opinions of individual judges.

Legislation based on fixed approaches would divide the property between the spouses according to stated proportions regardless of the circumstances of any given case. These approaches provide automatic division which produces certainty. The results cannot be varied because of unusual circumstances. Community of property regimes, deferred participation schemes, such as that proposed by the Ontario Law Reform Commission's Report on Family Law, and co-ownership of the matrimonial home fall under this general heading.

Composite approaches involve attempts to combine features of the fixed property approach with features of the discretionary approach. There is a blending of some certainty with some flexibility.

When faced with the problems of a fundamental change, some people tend to throw up their hands and to say, "Well, let's try to patch up what we have and make it work." Because of this, we consider some less fundamental changes which may remedy defects within the present law without changing its basic structure. There are serious problems involved in taking this less drastic approach. Those problems will be considered in the last part of this paper.

A. Discretionary Approaches

Adoption of a discretionary approach would appear to be the simplest solution to the problem of the distribution of matrimonial property. It would not require a radical change in our legal system and would be the least disruptive to related legislation. This was the route chosen by both New Zealand and England. British Columbia and the Northwest Territories have also passed discretionary legislation. The Saskatchewan Legislature, in its last session, tabled an amendment which would give the courts a wide discretion in dealing with marital property litigation.

(a) New Zealand

In 1963 New Zealand passed its *Matrimonial Property Act* which provides that in any question between husband and wife as to the title, possession or disposition of property, the husband or wife, or in certain cases a third party, may apply to the court at any time. The court is given complete discretion to make such order as it thinks fit with respect to the property in dispute. It is specifically empowered to make orders that affect title to the property. The court is given relatively few guidelines to follow in exercising its wide discretion.

When the dispute relates to the matrimonial home the court must (and in other cases may) have regard to the respective contributions of the spouses to the property in dispute whether that contribution is in the form of money, service, good management or otherwise. The contribution need not be unusual or in the form of money in order for the spouse to receive a share. Conduct of the spouses which is unrelated to the acquisition of the property is not to be considered.

A second *Act*, the *Matrimonial Proceedings Act 1963*, runs parallel to the *Act* just mentioned. This *Act* provides for maintenance (support) by payments in the usual manner, for a lump sum payment or a property settlement upon divorce. It allows the court to order a settlement of the property of the spouses for the children. Special provisions apply to the matrimonial home. The court has a wide discretion in making orders for possession or sale of it. The court may give possession or ownership of the furniture to either party in conjunction with an order for possession of the home.

Until 1971 the reported court decisions appeared to follow the spirit of the legislation and wives who had devoted themselves to their homes and

families were no longer suddenly finding themselves facing economic frustration when their marriages ended. It led one judge to say, "the discretion now given to the Court seems to be a very wide one and should enable fair, just, and commonsense resolutions of the property difficulties of husbands and wives." In 1971 things changed when the Court of Appeal of New Zealand dealt a severe blow to the spirit of the law and gave a very restrictive interpretation to the legislation which seems to have set the situation back almost to its original position.

The share allotted to the wife under the legislation has varied from nothing to 1/2 of the assets with the majority receiving 1/4. Often maintenance payments are awarded as well to bring the wife's share to about 1/2 overall.

The legislation has not completely remedied the problems of wives in matrimonial property disputes. The reason appears to be that the legislation is based on the concept of contribution of the spouse to specific property rather than contribution to the marriage generally. A wife and mother's contribution is most often to the family and marriage as a whole and, therefore, only indirectly to property. The legislature appears to have intended these contributions to be recognized, but because it has provided so few guidelines for the courts, the application has varied widely. The results have not been entirely as intended.

(b) England

Until 1970 the law relating to the division of matrimonial property in England was very similar to that of Saskatchewan. Legislation was then passed allowing the court to order maintenance, transfer of property or settlement

of property for the benefit of either spouse or of the children upon termination of the marriage or at anytime thereafter. The court is required to exercise its discretion in order to place the parties, so far as it can do so justly having regard to their conduct, in the financial position in which they would have been had the marriage not broken down. Additional and very specific guidelines are set out for the court to follow in coming to its decision. On the whole, the English approach allows the court to deal with the economic readjustment problems of a broken marriage without drawing distinctions between maintenance and division of property.

The courts appear to be awarding between 1/3 and 1/2 of the value of the family assets (as opposed to business assets) to the spouse applying, depending on the circumstances of each case. Where the wife receives less than 1/2 of these assets, the order will usually be supplemented by a maintenance order which will give her at least 1/2 overall. However, the courts have been reluctant to give the wife a share of the husband's business assets where she did not actually assist in the business.

The courts have said that where a wife has cared for the home and family for many years, she should not be deprived of benefits merely because she contributed to the marriage breakdown unless her conduct is both "obvious and gross". English legislation provides specifically that substantial contribution by a spouse in money or money's worth to the improvement of property owned by either or both will give rise to a share (or enlarged share) of the property for that spouse. Also, money or property derived from a housekeeping allowance will be shared equally in the absence of an agreement to the contrary.

Whatever may be said in favour of England's legislation must be tempered by the fact that England's Law Commission has come out in favour of super-imposing co-ownership of the matrimonial home upon the present system. This concept will be discussed below. It would confer on each spouse a right in the matrimonial home that would not be dependent upon the discretion of the court. Clearly, then, the legislation providing for a wide judicial discretion has not been entirely satisfactory to date.

Advantages and Disadvantages

The most obvious advantage of a discretionary scheme is its flexibility which would allow the particular circumstances of each case to be taken into consideration. This approach can blend property division and maintenance more easily in order to arrive at a fair overall distribution. The needs of children of the marriage can easily be taken into account. It also has the advantage of simplicity in implementation and operation.

There are certain disadvantages also. There is less certainty or predictability of results and, therefore, increased litigation might result. Individual judges may have different opinions under such legislation thus increasing the uncertainty of results. Another major and fundamental objection is that it does not create a present right to any property for the spouse who does not have legal title. He or she must go to the courts and ask for what might be said to already rightfully belong to him or her. This can be an expensive procedure and may bring little return.

B. Fixed Approaches

(a) Community Property

This system is an old traditional one which grew largely out of

European custom. It still exists in many countries, notably Spain and France, as well as in eight of the United States.

Historically, under a community property scheme both spouses owned all their property in common, that is to say, equally. Originally, the husband had control and management of all the property. In theory, at least, the wife owned an equal share and she may have been content to have the husband control and manage the whole. Marital breakdown was relatively rare. Practically speaking, therefore, the scheme worked fairly well since the wife rarely asked for her half to be turned over to her.

As dissatisfaction with the basic scheme developed, many variations and refinements grew up. Under full community all property brought to the marriage by each spouse was included in the common property together with all property acquired after the marriage. Under most modern schemes of community property provision is made for some type of separate property. Detailed rules are spelled out in order to identify and maintain the identity of the separate property. One variation excludes the real property (land and generally whatever is built or growing on land) owned at the time of marriage, so that the community consists only of personal property (all property other than real property) owned prior to marriage and all property acquired after the marriage. This was the scheme in Quebec prior to 1970. A further variation excludes <u>all</u> property owned prior to marriage. In disputes between spouses as to whether specific property is classified as separate property or as community property there is a presumption that all of their property is community property. The spouse who claims property to be separate has the burden of establishing that fact.

Usually gifts or inheritances do not form part of the community property. Income from, or increase in value of, separate property during the marriage may or may not form part of the community property. More often it remains separate property and this gives rise to complex problems of tracing and accounting since in practice it often becomes mixed with the community property. Debts of the spouses, whether incurred before or after marriage, provide special problems. Many detailed rules must be provided to protect creditors. Spouses must also be protected from the effect of each other's debts on the community property. Most countries have provision for opting-out of the scheme at least prior to, and sometimes after, marriage. Varying rules govern the termination of the community of property on divorce or death but generally there is no discretion to vary the amounts to be received by each spouse.

Many of the modern codes provide for joint management and control of the community property while maintaining separate control of the separate property. This generally means that either spouse may manage the community property but certain important transactions involving real estate or large assets require joint action.

Advantages and Disadvantages

If one accepts the concept of marriage as a partnership, in theory the system of community property seems most acceptable since it reflects complete and equal partnership in marriage. Equal partners own the property in equal shares and they manage and control it jointly. The rights of both spouses are certain, present and defined. They each have an immediate interest which does not depend on termination of the marriage or judicial discretion for its

existence. The financial dependence of one spouse upon the other is at least partly removed. It has been said that another advantage of the system is the simplicity of its concept.

The advantages would seem to be overshadowed by disadvantages. The most cogent argument against community property is that it has not been acceptable to the people in many jurisdictions where it has been tried. Sweden, Denmark, Norway, Germany and the Province of Quebec have all moved from traditional community to forms of deferred participation which will be discussed below. A number of the United States had adopted community property because it offered a tax advantage. When the tax laws were changed to remove that advantage, significantly, these states promptly dropped the system.

Basically this system is very rigid and, therefore, can often result in unfairness and injustice. There is no way to take into account any special circumstances of the individual case. The lazy, do-nothing, spendthrift spouse gets half of what the hardworking, industrious, thrifty spouse has managed to accumulate in spite of his or her partner. Management and control of the common property by the husband would probably be unacceptable to Saskatchewan women. Would common management and control be any more acceptable in Saskatchewan? Joint control might prove extremely inconvenient, and inefficient. It might seem to unduly restrict everyday living and business transactions for people accustomed to separate property and sole control.

Community of property is a concept derived from the European civil law systems. Saskatchewan's law is based on the English common law. Introduction of a civil law concept into our present system would leave our courts and lawyers

with no background to draw upon in dealing with the problems which inevitably arise under any new legislation. Our legal concepts are inadequate to deal with civil law simply because they are so different. For this reason as well, adoption of a community property scheme would result in more fundamental changes in other parts of the law than would adoption of any other scheme. In spite of the apparent simplicity of the concept, the actual implementation and regulations required are extremely complex. The adoption of such a system could very well create more problems than it would solve.

(b) Co-Ownership of the Matrimonial Home

Many people take the view that co-ownership of the home is all that is needed to reform the present law. This approach would merely apply the community property concept just discussed to the matrimonial home, whenever acquired, while leaving all other property owned individually by the spouses separate. Under this approach, both spouses would have equal shares in the home and both would have equal management and control. An equal right to occupy the home would flow from such ownership. The home could only be sold, mortgaged or otherwise dealt with by mutual consent or upon order of a court. The effect would be similar to that where spouses own their home as joint tenants under our present law.

There are several ways in which co-ownership of the matrimonial home could be established within our legal system. New Zealand has specific legislation providing for voluntary registration of the home as a joint family home. Such legislation does nothing which cannot be done under our law by simply placing title in joint tenancy. Another way would have legislation give the courts a wide discretionary power to decide ownership rights in the home. The court would consider all the contributions by

both spouses and decide how the family home should be shared under the circumstances. The disadvantages of the discretionary approach to property distribution generally apply here as well. Co-ownership of the home could also be achieved by applying a legal presumption that the matrimonial home belongs to both of the spouses in case of any dispute. The court would start from the position that the home is to be shared equally unless there is very clear evidence of a contrary intention or unless special circumstances make that extremely unfair. Co-ownership can also be achieved by operation of law. Legislation would simply state that the matrimonial home automatically belongs to both spouses. Each spouse would have a present and equal interest without inquiry into contributions, intentions, conduct or injustice under the circumstances. The rigidity of this method could give rise to unfairness in certain circumstances as discussed earlier with regard to community property generally.

Regardless of the method of implementation, certain problems could arise and would necessitate specific rules to govern. There would be disputes involving identification of which of a number of properties constituted the matrimonial home. Problems in relation to creditors could arise. Provision for registration of title would be necessary. Should the parties own as joint tenants or as tenants in common (the difference being that upon death joint tenancy automatically passes title to the survivor)? Title could be held by one spouse if legislation provided for co-ownership by judicial discretion, presumption or operation of law.

Advantages and Disadvantages

Like other possible reforms, this one has both advantages and disadvantages.

If one regards marriage as a partnership where the main property is often the home, a strong argument can be made for introducing this system. It would allow at least some measure of security and certainty for the spouses upon termination of the marriage. As well, it would help to avoid litigation over the main family asset. While this reform could operate alone, it has the advantage of being easily combined with other alternatives. Once one accepts this view of marriage, however, it is difficult to justify sharing only one specific asset, the home. Such a system would do nothing to solve the problems of the present law for those people who do not own a home. Those who do not wish to share with their spouses could easily circumvent sharing by not acquiring a home. Some of the serious problems of implementation discussed in connection with the introduction of a community property scheme into our legal system would be faced upon introduction of this concept as well.

(c) Deferred Participation

Deferred participation is a blending of the true community property regimes and the separate property system. Under this scheme there is a sharing or community of property, but it only materializes at the end of the marriage or upon other special circumstances arising -- thus, the title "deferred participation". During the existence of the marriage, each spouse is free to own and control his or her own separate property, subject to certain controls to protect the other spouse and children of the marriage. When the scheme ends, certain property of each spouse is brought into community and there is an equal division of that property between the spouses.

Such a division is not necessarily a physical division of the property. Rather, an equalizing claim is calculated and it becomes a debt from the spouse who acquires more property to the spouse who acquires less. It can be paid in cash, by transfer of property, or by instalments. In the latter case the debt could be secured by a mortgage of the property to the spouse receiving the payments. Where the parties cannot agree how the debt should be paid, the court could be empowered to decide for them. Of necessity, there must be some flexibility. This is especially true if there are children. The spouse with custody, for instance, might require that the matrimonial home be protected from a forced sale to pay off a claim by the other spouse.

A sharing of the property takes place at the end of the marriage, whether by divorce or death. By agreement of the spouses, it could also take place upon joint application to the court. Under certain circumstances one party alone might apply to the court. This could happen after separation for a specified period. It also might take place where one party is giving away, squandering or otherwise disposing of the property, thus depriving the other of a fair share of the total matrimonial assets.

Generally speaking, in such a scheme property brought into the marriage by a spouse is not shared. Certain other designated non-sharable property, such as gifts from third parties, inheritances, certain insurance benefits, and windfalls also are not included in the property to be shared. Often, however, income or the increase in value of all such property is subject to sharing.

This type of scheme has been carefully considered by the Law Reform Commission of Canada and has been proposed by the Ontario Law Reform Commission.

Each of these bodies has set out several detailed working examples to show how such a scheme works. We shall borrow the simplest of these.

Let us suppose that at the time of the marriage Spouse A had property valued at $5,000. Spouse B had $2,000. worth of property. Neither had any debts. During the marriage, A inherited $5,000. from an uncle. At the end of the marriage, A has $45,000. worth of property and owes $15,000. in debts. B has $10,000. worth of property and no debts. The calculation of the division of their property would be done as follows:

Spouse A	Spouse B	
$45,000.	$10,000.	value of property at end of marriage
- 15,000.		less debts at end of marriage
30,000.	10,000.	net worth at end of marriage
- 5,000.	- 2,000.	less net worth at date of marriage
25,000.	8,000.	individual gain (or loss) during the marriage before deduction of non-sharables
- 5,000.		less non-sharable property (gifts, inheritances received during the marriage)
20,000.	8,000.	individual gain (or loss) during the marriage
$20,000.		
+ 8,000.		
$28,000.		total sharable gain of the marriage

The total sharable gain of the marriage, $28,000., is divided equally and each spouse should receive $14,000. at the end of the marriage. Now

subtract B's gain during the marriage, $8,000., from $14,000. and the resulting $6,000. is the amount that A must transfer to B in order that each spouse has an equal share.

The equalizing claim is a means of sharing not only gains, but also, in some situations, sharing debts. A debt will be shared in each case where it is not offset by property owned by the spouse responsible for payment of the debt. This follows because the amount left for sharing is reduced by the amount of the debt. However, where the debts of one spouse are greater than the value of his or her property at the time of division, the result is a negative net worth for that spouse.

If all debts are deducted and a negative net worth is allowed in calculating the equalization claim, the spouse who has gained during the marriage may have to use all of his or her property in order to pay off the claim. To prevent this, the Ontario Report has suggested that business, speculative and other debts should be taken into the calculation of the equalization claim only to the extent that they reduce the net worth of the debtor spouse to zero. They are, therefore, only partly shared. Because it is felt that support of children and the spouses should be a mutual obligation, it is recommended that there be complete sharing of debts incurred for these purposes.

It has been suggested that there should be a presumption that all property of both spouses is sharable. The spouse who wishes not to share an asset would have to establish that it was owned before marriage or that it was a type of non-sharable property. Each spouse would be required to submit a sworn inventory of assets at the time of the termination of this scheme.

There are many special types of property giving rise to unusual problems which must be given specific consideration if such a scheme were to be implemented. Damages recovered for personal injuries to a spouse are one example. Under Quebec's present scheme, they are not shared, but the Ontario Report recommends their sharing. Insurance policies and pension benefits give rise to specialized problems which are too complex to be treated here. Intangibles such as patents, or copyrights and company shares require special and complex valuation procedures.

In order to mutually protect the spouses, prohibition of gifts to other persons, other than those of the usual and customary type, is necessary. If one spouse were to make unusual gifts, the court might be asked to end the scheme and possibly order that the value of such gifts be included as part of the assets of the spouse making them. Sale of property to friends or relatives at nominal prices without the consent of both spouses, as well as secret transfers or trusts, must be disallowed. Obvious wasting of property through riotous living or inordinate indulgence in luxuries might be regulated. This is a very difficult area since circumstances and tastes vary so widely. However, in cases of dispute, the spouses should be able to call on the courts to decide these issues.

Under a deferred participation scheme, termination of a marriage by death should produce results similar to those where the marriage has broken down during the lives of the spouses. The widow or widower should receive at least the same protection and benefits as the divorcee. However, some special rules appear to be necessary. The Ontario Commission recommended that the equalizing claim should be calculated on the net estate of each spouse at the time of death without deductions in either estate. Equalizing

claims should be payable only to the surviving spouse and not to the estate, since the survivor would usually obtain a large portion of the estate in any event. This would also protect children left in the care of the survivor. Introduction of such a scheme would require review and amendment of existing legislation which touches distribution of property and taxation upon death.

Advantages and Disadvantages

There are very cogent arguments in favour of deferred participation. Under the scheme, rights of spouses to an equal share of the matrimonial property are established. They do not depend on the discretion of a judge. The weaker partner does not have to go begging for what should be his or hers by right. Separation of property until the end of the marriage preserves separate control and management by each of the spouses and prevents an impasse in case of disagreement. This scheme incorporates the best aspects of true community of property while avoidng the weakness of joint control. As well, this scheme would fit into Saskatchewan's legal system and social concepts more readily than a true community system.

There have been criticisms levelled at the deferred participation scheme. At the most fundamental level it is said that such a scheme does not really give recognition to the concept of equal partnership in marriage. During the existence of the marriage the spouses still own their property separately and conceivably one of the spouses may own most or all of the property throughout the marriage. In most instances the wife would remain in an economically inferior position until the marriage ends. In the absence of divorce such a scheme would effect few changes from the present situation until the death of one of the parties.

Another very serious defect in the scheme is that it lacks flexibility. Upon the end of a marriage it would invariably divide the property equally between the spouses. This does not leave any room for individual differences and may lead to injustice where one spouse has been lazy, extravagant or a plain hindrance to the general and financial welfare of the couple. Contribution in some form is surely a prerequisite for equality of partnership. Deferred participation does not consider contribution a prerequisite for receiving an equal share of the economic proceeds of the marriage.

Any scheme adopted should be as simple as possible while still providing practical solutions to the problems inherent in the separate property system. The deferred participation scheme is not simple. The accounting procedures are complex. Problems of identifying sharable and non-sharable property will arise. It must be pointed out, however, that the problems of the distribution of marital property is itself extremely complex and defies a simple solution. We must be on guard against adoption of a simplistic but inadequate solution only because the best solution may appear difficult.

It is to be hoped that this brief outline of the basic principles of a deferred participation scheme will provoke much thought and discussion amongst the people of Saskatchewan. Since it has much in common with Quebec's legislation and Ontario's recommendations, it is important that it be given careful consideration. We invite comments and suggestions.

(d) Quebec's New Legislation

Legislation of the Province of Quebec since 1866 provided for traditional community of property. In 1970 a deferred participation scheme called "The Legal Regime of Partnership of Acquests" was adopted. The introduction to the

legislation states in part,

> It has been known for a long time that our regime of community of moveables and of acquests has fallen into complete disfavour. A recent survey even revealed that in the last five years more than 70% of married persons in Quebec preferred to marry under a different regime. Whatever may be the value and the legitimacy of the reasons of this popular reaction, the blunt fact remains and it must be taken into account.

A couple may choose an alternate regime to govern their property by formally signing documents before their marriage. Community of property or separate property are seen as the alternatives and the Quebec Civil Code prescribes the formulas for each. In the absence of an alternate choice, the new regime is applied. It has been said that the new regime joins the advantages of separate property to those of community property and minimizes the disadvantages of both.

The legislation provides very detailed rules for determining what is private property and what constitutes "acquests" -- that is, property subject to division on termination of the marriage. Basically the property is grouped into four sections -- the wife's separate property, the husband's separate property and the acquests of each. All property is presumed to be acquests (sharable) until the contrary is shown.

All of the property of each spouse, both private and acquests, is liable for any debts that he or she incurs. Before the division, the creditor may sue the spouse primarily liable for the debt. After the division of property a creditor may recover from the debtor and also from the other spouse if that spouse has received part of the acquests of the debtor. That spouse may then recover from the debtor spouse 1/2 of the amount which he or she was called upon to pay. Each spouse continues to

manage all of his or her property but within limitations set out by the legislation in order to protect the other spouse. Finally the spouses must contribute to the expenses of the household in proportion to their respective means.

The regime can be ended upon death, termination of the marriage or under certain other specified circumstances. At that time a spouse has an option to accept or renounce the benefits of the partition. The equalization of acquests upon termination is much more simple than it was under the traditional community scheme. An inventory of the property of each spouse is drawn and then is divided into private property or acquests. Then the amount that is owed by the husband's private property to the husband's acquests, or inversely, is computed. The same computation is done for the wife's property. Once these calculations are done the two resulting masses of property are divided in half between the spouses. The division can be a division of actual property or payment in money from one to the other.

Basically, the scheme is very similar to that proposed for Ontario, differing only in matters of detail and computation.

C. Composite Approaches

There are several ways that the schemes above described could be combined in order to take advantage of the positive elements of a scheme while using another scheme to overcome its negative aspects. Three such combinations will be considered.

(a) Deferred Participation with an Overriding Judicial Discretion

Under this approach, upon termination of the marriage each spouse would

ordinarily receive 1/2 of the property (or its value) acquired during the marriage. However, by adding an overriding provision for judicial discretion as to all of the property the court could take into account any special or unusual circumstances of the individual case. The court could thus adjust the division where the 50/50 split would be unconscionable or unfair. It is suggested that very specific guidelines for the court's departure from the usual rule should be set out in the legislation. This approach combines the advantage of a degree of certainty while still allowing some flexibility for extreme cases.

A variation of this theme would simply add co-ownership of the matrimonial home and contents except where unconscionable. The remaining property acquired during the marriage would still be held under deferred participation subject to an overriding judicial discretion. This would insure that both spouses share equally in the home and contents while allowing for greater flexibility in the division of the remaining property.

(b) Division of Certain Assets, Plus Judicial Discretion

Under this combination, certain assets only (e.g. the matrimonial home and its contents) acquired during the marriage, or their value, would be equally divided between the spouses with no exceptions. In essence this would constitute adoption of the co-ownership of the matrimonial home concept. Added to this would be judicial discretion (with or without guidelines) as to the remaining property. This would produce a fixed right for each spouse in part of the property while allowing flexibility to reward the extraordinary work or efforts of one of the spouses. If the home and contents were the main asset of the spouses, it would assure equal division

of most of their property. If the couple did not own a home, such a scheme would leave the whole of their property to be divided according to judicial discretion. It follows that this approach would incorporate the advantages and disadvantages of each of the parent schemes.

(c) Division of Certain Assets Except Where Unconscionable, Plus Judicial Discretion

This combination is the same as the one just considered except that the automatic operation of the equal split of certain assets, or their value, would be avoided where it would be unconscionable in the opinion of the court. Such a situation may arise where one spouse has completely neglected his or her duties and may finally have left the other without making any contribution at all to the marriage or property. In such a case, the judge would decide whether the delinquent spouse would receive nothing or merely a reduced share of the assets acquired during the marriage. For those who desire a fixed approach this may be too close to the discretionary approaches. It does have the advantage of allowing the court to correct what would be an obvious injustice if the fixed approach alone were adopted.

D. Minor Changes in Present Law

As suggested earlier, there may be many who feel that effecting a fundamental change in our law is too difficult or unnecessary and that we should attempt to work for reform within the present framework with only minor changes in existing legislation. Problems arising out of the separate property system were set out in the First Mini-Working Paper issued by the Commission. It seems convenient to follow that outline in

considering changes to correct these problems.

Legislation might be passed which would declare that the housekeeping allowance, savings from it, or any property purchased with such savings, belong to the spouses in equal shares unless there is a specific agreement to the contrary.

Further change could be effected by providing for recognition of the wife's housekeeping-mothering roles as a direct contribution to the marriage and, therefore, to the accumulation of property. Such a provision could further provide for a compulsory share of property for the wife. The proportion of property which would be attributed to this contribution could vary or could be set at an invariable 1/2.

This provision could go further and provide that a spouse's work on a family farm or business should be acknowledged as a direct contribution. If such work is in addition to housekeeping and mothering, it should raise the proportion to be received by the contributing spouse.

Further legislation could provide that money spent either in the purchase of property, or in its renovations, repairs or general improvement, would be recognized as a direct contribution giving rise to a share in the property. This provision could also recognize money spent for household and family expenses as being a contribution giving rise to an actual interest in marital property.

Provision could be made for a declaration that household goods and furnishings are owned equally by the spouses. The standing of joint bank accounts could be clarified.

For those who desire a fundamental change, such a "patch-up" approach will likely be completely unacceptable. It is impossible to anticipate all the various circumstances which might be said to give rise to a property interest. There would still remain an uncertainty as to the actual share each spouse would receive. The concept of partnership in marriage would not be recognized. Rather than making the law simpler to apply such a multiplicity of legislative provisions might complicate it more than would a complete and fundamental change.

CONCLUSION

The Saskatchewan Law Reform Commission has published this summary of some of the approaches which might be followed in order to improve our present law as it relates to the distribution of matrimonial property. We repeat that any changes must be generally acceptable to the people of Saskatchewan. They must also be capable of general application.

We are asking for comments and opinions from interested groups and individuals. Written memoranda or briefs should be submitted to the Commission offices at Suite 403, 402 - 21st Street East, Saskatoon, Saskatchewan, S7K 0C3.

The Commission will be holding public meetings in various Saskatchewan communities throughout the fall in order to give interested persons an opportunity to voice their views. A third and last paper on the division of matrimonial property will be issued in October. It will present the Commission's tentative proposals for reform and will consider other areas of the law which will be affected by the proposed changes. We request and welcome any comment or criticism.