

LAW REFORM
COMMISSION
OF
NOVA SCOTIA



Division of Family Property

Final Report - September 2017

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Law Reform Commission of Nova Scotia
September 2017

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The Law Reform Commission receives funding from the Law Foundation of Nova Scotia and support from the Government of Nova Scotia. The Commission gratefully acknowledges their support.

ACKNOWLEDGMENTS

We acknowledge with thanks the many contributions of the members of our advisory groups for this project (indicated positions are as of each individual's participation on the advisory group):

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We also gratefully acknowledge the assistance and advice of Janice Beaton Q.C., Vaughan Black, Paula Boyd, Krista Brookes, Patrick Burke Q.C., Scott Campbell, Brian Casey Q.C., Donna Davis, Kate Drolet, Justice Theresa M. Forgeron, Debora Garson, David Hirtle, Victoria Kongats, Piotr Luczak, Justice Mona Lynch, Robert MacGillivray, Justice Lee Anne MacLeod-Archer, Jennifer Parker, Paul Thomas, Angela Anne Walker, Daniel Walker, and Women's Centers Connect. We also express our thanks to those members of the public and the legal profession who responded to our on-line surveys and attended our in-person consultations.

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1. SUMMARY

Nova Scotia's *Matrimonial Property Act*¹ governs the division of married spouses' and registered domestic partners' property at the end of the relationship. Under the *Act*, a couple's matrimonial assets are presumptively divided 50-50. The presumption of equal division applies to matrimonial assets which are in both names, or in the name of one of the spouses or partners only. Matrimonial assets may be unequally divided if the parties agree or if a court is persuaded that an equal division would be unfair or unconscionable.

The *Act* does not define matrimonial assets. All property is presumptively included in a division, subject to specific exclusions. The presumptive exclusions include business assets, reasonable personal effects, legal damages, insurance settlements, property which the spouses have agreed to exclude from division, and property acquired by a spouse after separation. Gifts, inheritances and trusts are also presumptively excluded, except to the extent that they are used for the benefit of the family. These non-matrimonial assets are only presumptively excluded from an equal division - they may still be divided, if a court orders their division because it would be unfair or unconscionable not to do so.

The *Matrimonial Property Act* has not been amended since its introduction in 1980. It is now significantly out-of-date in comparison with family property regimes in other jurisdictions in Canada.

Calls for reform of the *Matrimonial Property Act* have emphasised a number of issues, including family property rights for common law couples, the presumptive exclusion of business assets from an equal division, the presumptive equal division of pre-matrimonial assets, and the *Act*'s treatment of pensions.² Nova Scotia is one of the only provinces to exempt business assets from a presumption of equal division – an exemption that is hard to rationalize in light of the purposes of matrimonial property legislation. Pensions are considered matrimonial assets, but there is some inconsistency between the *Matrimonial Property Act* and Nova Scotia pension legislation in terms of how pension assets should be divided. Finally, Nova Scotia is one of only a handful of jurisdictions in Canada that continues to include pre-matrimonial assets in a presumptive equal division.

Other areas of concern include division of debts, treatment of other non-matrimonial assets (*e.g.*, gifts and inheritances, personal injury settlements, and accident and disability insurance

¹ RSNS 1989, c 275.

² See, *e.g.*, DA Rollie Thompson, *Never Trust a Statute Over 30?* (Halifax: *Matrimonial Property Act* @ 30 Conference, Canadian Bar Association, 15 October 2010).

benefits), enforceability of marriage contracts, the interaction of matrimonial property legislation with estate plans and succession rights, and rights in connection with bankruptcy proceedings.

A number of societal changes have altered the face of separation and divorce in Nova Scotia. While couples with children are still a popular family form in Nova Scotia, at 22.2% of census families in 2016, couples without children were a more popular family form in Nova Scotia at 29.8%.³ Married couples in general are not as prominent as they once were in Nova Scotia. Married couples made up 83.7% of census families in Nova Scotia in 1981, but only 67% of census families in 2016.⁴ By contrast, the incidence of common law families, including common law families raising children, has been steadily growing in Nova Scotia since 1981, from 4.2% to 15.7% of census families in 2016.⁵

Changes are also occurring within the married family. The age at which couples are entering marriage is also increasing and assumptions about the amount of property and debt that each partner may bring into a marriage may no longer be as relevant.⁶ Gender roles are changing as well. There has been a significant change in women's social and economic positions in Canadian society since 1980, when the *Matrimonial Property Act* was introduced. On the other hand, while these social and economic shifts in gender roles within marriage are significant, women remain more likely than men to end up in poverty, particularly after divorce. Women still do not have pay equity with men and they continue to have lower attachment rates to the labour market.⁷ They continue to undertake more work inside the home than men.⁸

³ Statistics Canada, "Focus on Geography Series, 2016 Census" – Nova Scotia, online: <<http://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-pr-eng.cfm?Lang=Eng&GK=PR&GC=12&TOPIC=4>>.

⁴ Statistics Canada, "Census Profile, 2016 Census" – Nova Scotia, online: <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=PR&Code1=12&Geo2=PR&Code2=12&Data=Count&SearchText=Nova%20Scotia&SearchType=Begins&SearchPR=01&B1=Families,%20households%20and%20marital%20status&TABID=1>.

⁵ *Ibid.*

⁶ Anne Milan, "Marital Status: Overview, 2011" *Report on the Demographic Situation in Canada* at 10, online: Statistics Canada <<http://www.statcan.gc.ca/pub/91-209-x/2013001/article/11788-eng.pdf>>.

⁷ Data from the 2016 census reveals that women in Canada working full-time earn 87 cents for every dollar that men working full time make. Statistics Canada, "Women and Paid Work", *Women in Canada: A Gender-based Statistical Report*, online: <<http://www.statcan.gc.ca/pub/89-503-x/2015001/article/14694-eng.htm>>.

⁸ Colin Lindsay, "Are women spending more time on unpaid domestic work than men in Canada?" in *Matter*

Legally-recognized same-sex marriage and greater acceptance of same-sex couples are increasing the prevalence of same-sex married families in Nova Scotia. In 2016, there were 1760 same-sex married spouses in Nova Scotia.⁹ Representing 0.5% of all census married spouses in Nova Scotia in 2016, this is slightly higher than the Canadian average of 0.4%.¹⁰ The prevalence of same-sex marriage is steadily growing in Canada and in Nova Scotia as well.¹¹

Family property reform must be attendant to the economic and personal realities of partners and their children upon relationship breakdown. Family law litigation is time consuming and expensive, and it takes an emotional toll on the families involved. A report by the Action Committee on Access to Justice in Civil and Family Matters recommended that family law statutes should encourage consensual dispute resolution processes and agreements as the norm in family law, and that their language should reflect that orientation.¹² Among the Committee's recommendations were calls for simplifying laws and procedures, and less discretion for courts, especially with regard to smaller amounts of money.¹³

Besides stronger promotion of settlement, access to justice may also require more public legal education for family law disputants. The incidence of self-represented litigants is increasing.¹⁴ It

of Fact (Ottawa: Statistics Canada, 2008) online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-630-x/2008001/article/10705-eng.pdf>>.

⁹ Statistics Canada, "Families, Households and Marital Status Highlight Tables" (2016), online: <<http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/fam/Table.cfm?Lang=E&T=11&Geo=00&SP=1&view=1&sex=1&presence=1>>.

¹⁰ *Ibid.*

¹¹ Statistics Canada, "Same-Sex couples in Canada in 2016", online: <<http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016007/98-200-x2016007-eng.cfm>> and "Families, Households and Marital Status Highlight Tables" (2011), online: <<http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/fam/Table.cfm?Lang=E&T=11&Geo=00&SP=1&view=6&sex=1&presence=1>>.

¹² Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words*, Final Report of the Family Justice Working Group (April 2013) at 56-57, online: <<http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>>.

¹³ *Ibid* at 58-59.

¹⁴ See Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report* (May 2013), online: <<http://www.lsuc.on.ca/>>

is important to promote easily-understandable and accessible public legal and financial education in order that participants in the family justice system understand their rights and responsibilities. Reform of Nova Scotia's matrimonial property regime would be incomplete without attention to the various ways in which the law, and the administration of justice may be limiting access to effective justice.

The Commission decided to review the *Matrimonial Property Act* in December 2012. After extensive preparatory research and consultation, we convened a 7-member advisory group which included one of Canada's foremost academic experts on family law, Nova Scotia family law practitioners, a judge of the Nova Scotia Supreme Court (Family Division), and a chartered accountant who specializes in family property division. The group met through the winter and spring of 2014. We convened a second advisory group to deal with issues that arise when family property is divided after a spouse has died. That group met through the winter of 2015.

The Commission distributed a Discussion Paper on Division of Family Property as well as an online survey during the summer of 2016. We also held 5 in-person consultation sessions around the Province. The Commission received 78 responses to the online survey and approximately 55 people attended our in-person consultations.

In this report we recommend substantial reform of the *Matrimonial Property Act*. Among other things we recommend that:

1. Common law partners should be entitled to make a claim for division of family property on substantially the same basis as married spouses. Common law partners should be eligible to make a claim after two years continuous cohabitation.
2. The net value of assets acquired prior to cohabitation should be presumptively excluded from division;
3. Business assets should not be presumptively excluded from division;
4. Trusts set up by a third party for the benefit of one spouse or partner should be presumptively excluded from division regardless of whether the trust has been used for a family purpose;
5. Debt which is incurred in the name of both spouses or partners, or by one spouse or partner for a family purpose, should be presumptively subject to equal division;

[uploadedFiles/For the Public/About the Law Society/Convocation Decisions/2014/Self-represented project.pdf](#)>.

6. Where one spouse or partner has died, and the surviving spouse or partner makes an application for division, property received by the surviving spouse or partner from the estate of the deceased spouse or partner should count towards the spouse or partner's family property entitlement.

1.1. List of Recommendations

Our recommendations are as follows:

Information and access

1. The Government of Nova Scotia should develop and disseminate public legal education materials and programs about the rights and responsibilities of spouses and partners in the new family property regime.
2. New family property legislation should require legal counsel acting for a spouse or partner who is party to an application pursuant to the legislation, where appropriate, to:
 - (a) discuss with the spouse the advisability of using alternative methods to resolve the matters that are the subject of the application; and
 - (b) inform the spouse of the collaborative law services and mediation services known to him or her that might be able to assist the spouses in resolving those matters.
3. The Government of Nova Scotia should provide funding and support for greater access to justice for Nova Scotians, including greater access to legal advice and free or subsidized consensual dispute resolution of family property matters where appropriate, for persons who do not currently qualify for legal aid and cannot otherwise afford these services.

General Reforms

4. New family property legislation should continue to provide for a division of property model, and not an equalization regime.
5. Family property legislation should recognize the following principles and goals in its preamble:
 - (a) Childcare, household management and financial support are the joint responsibilities of spouses, registered domestic partners and common law partners; spouses and partners are presumed to have made an equal contribution to the relationship, financial and otherwise, that presumptively entitles each equally to the family assets;

- (b) The orderly and equitable settlement of the affairs of the spouses and partners upon the termination of a relationship is an important objective of the law;
 - (c) The settlement of the affairs of the spouses and partners upon the termination of a relationship should be on a consensual basis wherever possible;
 - (d) Spouses and partners have mutual obligations in family relationships including the responsibility of parents for their children.
6. The term “spouse” in family property legislation should no longer refer to “either of a man and woman” but should be defined as “either of two persons who are married to each other”.
 7. The provisions of the new legislation should reflect the inclusion of registered domestic partners in the family property regime.

Disclosure

8. New family property legislation should require that every party to a family property dispute has a duty to provide to the other party full and complete financial disclosure for the purposes of resolving the dispute.
9. Matters regarding the timing, scope and enforcement of disclosure obligations should be left to rules of court.
10. Family property legislation should refer to the rules of court.
11. Rules of court should permit a party to waive disclosure from another party.
12. Rules of court should provide that a material change in the information previously disclosed (e.g., the value of an asset) must be disclosed.
13. Rules of court should provide for a variety of enforcement powers of the court when a party fails to make full disclosure, including drawing an adverse inference against that party, requiring the party to post security, and requiring payment of the other party’s solicitor-client costs and expenses.
14. Parties who fail to make full disclosure should be subject to a fine or payment not exceeding \$5000.
15. The court should be able to make any other order it considers appropriate.
16. Public legal information should explain disclosure obligations in the context of family property proceedings. This should include disclosure required when negotiating marriage contracts, cohabitation contracts, and separation agreements. Public legal information should also explain the consequences of a party waiving disclosure.

Common Law Couples

17. Common law couples should be included in Nova Scotia's matrimonial property regime.
18. The *Matrimonial Property Act* should be retitled the *Family Property Act*.
19. Common law partners and registered domestic partners should not be included in the definition of "spouse" under the *Act*.
20. The *Family Property Act* should incorporate the definition of "domestic partner" from Nova Scotia's *Vital Statistics Act*.
21. Public legal education should:
 - define the three types of relationships included in the *Act*: common law partnerships, registered domestic partnerships and married relationships;
 - advise common law partners of their rights to an equal division under the *Act*, set out what constitutes non-family assets and when these may be divided by way of an unequal division;
 - advise common law partners that after two years of cohabitation they will have possessory rights in the family home even if they are not on title;
 - advise common law partners of their ability to make a domestic contract and the importance of getting independent legal advice and seeking and providing full financial disclosure in making these agreements;
 - set out when a couple can be said to be in a common law relationship, when this relationship becomes an eligible relationship under the *Act* (ie., at two years cohabitation) and when the relationship can be said to be at an end;
 - explain the concept of cohabitation and set out the factors that the courts have used to establish cohabitation; and
 - set out the importance of keeping documentation to establish the value of property at the date of cohabitation.
22. Family property legislation should apply to common law couples in the same way as to married couples and registered domestic partners.
23. A "common law partner" should be defined for the purposes of family property legislation as a person who is cohabiting or has cohabited with another person in a conjugal relationship continuously for a period of not less than two years.
24. The legislation should provide that a common law partnership ceases when the partners live separate and apart with the intention to separate permanently. Partners may be

separated despite continuing to live in the same residence. The court may consider as evidence of separation communication or action by one partner that demonstrates an intention to separate permanently.

25. Family property legislation should require a common law partner, registered domestic partner or former domestic partner to bring an application for division no later than 24 months following the date of separation, unless a court order or domestic contract provides otherwise.
26. The limitation period should not operate where the delay in bringing a claim is due to circumstances beyond the claimant's control.
27. Public education materials should ensure that common law partners and registered domestic partners are aware of the operation of the limitation period.

Property to be divided

28. Cohabitation date net values of family assets owned by a spouse, registered domestic partner, or common law partner prior to cohabitation should be presumptively excluded from an equal division of assets.
29. Only the increase in value of pre-cohabitation family assets will be presumptively shared. Where a pre-cohabitation family asset has depreciated in value such that the owning spouse or partner's equity in the property has decreased, the valuation date value or the value of the asset at the date of disposition should be presumptively excluded from an equal division of family assets subject to an application for unequal division.
30. Public legal education materials should raise awareness of documentation that spouses and partners may need to prove cohabitation date values. These include: bank statements including retirement savings account statements, investment account statements and loan statements including mortgages, lines of credit, and credit card statements, assessment statements for real property, and statements from pension plans. Spouses and partners should be advised to keep these documents themselves as banks may not retain records older than seven years.
31. Family property legislation should define the exclusion of cohabitation date values according to the earlier of the date when the spouses, common law partners or registered domestic partners began to live together in a conjugal relationship, or their marriage.
32. The cohabitation date value of a family home owned before cohabitation should not be subject to a presumptive equal division of assets.
33. Family property legislation should not exclude business assets from a presumptive equal division of family assets.

34. The legislation should provide that the court should be permitted to order, or the parties to agree, that a spouse, common law partner or registered domestic partner may be paid the value of the spouse or partner's portion of a business asset, in lieu of a divided portion of the asset itself.
35. The legislation should provide that an order to effect the division of a business asset shall not be made so as to require or result in the sale of an operating business or so as to seriously impair the operation of the business unless there is no reasonable alternative of satisfying the award.
36. In addition to the remedies currently available to the court under section 15 of the *Matrimonial Property Act*, where the court determines that an order to effect the division of a business asset would impair the viability of the asset as a source of income for the spouse or partner the court should be able to defer distribution of the asset. The legislation should provide that the court may also do any of the following:
 - Order a spouse or partner to make payments in instalments;
 - Place a charge property in order to secure the order of the payee spouse or partner;
 - Vest the property in both spouses and make an order of possession to one spouse.
37. The legislation should provide that the term for deferring a payment should not exceed 10 years. The court may order the payor spouse or partner to pay interest on this amount. The court should not order a deferred payment if to do so would cause undue hardship on the payee spouse or partner.
38. Family property legislation should not include a provision that where a corporation holds an asset that would otherwise be a family asset, shares in the corporation owned by one spouse or partner with equal value to the asset are family assets.
39. Family property legislation should presumptively exclude from an equal division gifts and inheritances received by one spouse, common law partner or registered domestic partner from a person other than the other spouse or partner.
40. Gifts and inheritances received by one spouse or partner from a third party should be included as family assets to the extent they are used for the benefit of both spouses or partners, or their children.
41. Family property legislation should expressly include in a presumptive equal division a beneficial interest in property, whether vested or contingent.
42. Family property legislation should presumptively exclude from an equal division:

- (a) property which would be excluded as a non-family asset (e.g., a gift or inheritance) which is held in trust for the benefit of a spouse or partner;
 - (b) a spouse or partner's beneficial interest in a trust to which the spouse or partner has not contributed and which is settled by a person who is not the spouse or partner.
43. A spouse or partner's interest in a third party trust should not be included as a family asset regardless of whether the trust has been used for the benefit of both spouses or partners or their children.
44. The increase in value of a spouse or partner's interest in a third party trust during the parties' cohabitation should not be included in a presumptive equal division.
45. Family property legislation should expressly include as a family asset property, other than property which is otherwise excluded from the definition of family assets, which has been contributed by a spouse, registered domestic partner, or common law partner, to a trust in which:
- (a) the spouse or partner has a beneficial interest, contingent or vested;
 - (b) the spouse or partner has a power to transfer to himself or herself that part of the trust property, or
 - (c) the spouse or partner has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.
46. Family property legislation should provide that a trust interest shall be valued according to its fair value, taking into account (as appropriate depending on the nature of the interest) the prior use of the trust, the number of beneficiaries and their expected lifespans, expected performance of the assets, expected or potential payout date and value, and other factors and evidence that may be relevant.
47. The legislation should exclude from a presumptive equal division awards and settlements of damages for personal injury or loss, and insurance payments.
48. The exclusion should not extend to an award, settlement or payment that represents compensation for loss to both spouses or partners, a family asset, or lost income or pecuniary loss during the couple's cohabitation.
49. The exclusion should not extend to assets acquired for the benefit of both spouses or partners or their children from the conversion of an award or settlement for personal injury or loss or insurance payment.
50. Lump sum payments from disability benefit programs for lost income during cohabitation should not be excluded from a presumptive equal division of assets.

51. Family property legislation should exclude from a presumptive equal division of family assets reasonable personal effects of one spouse or partner, including clothing, footwear and outerwear, and personal care items, including medication and personal assistive devices.
52. Family property legislation should exclude from a presumptive equal division property and debt acquired post-separation, except to the extent they are derived from family assets or debt or from the disposition of family assets or debt.
53. Family property legislation should provide that, subject to the court's order or the agreement of the parties, family assets and family debts shall be valued as of the date of division, except that:
 - (a) Post-separation changes in value that derive from consumption through usage of a depreciating asset by one spouse or partner only should not be shared;
 - (b) Separation date assets and debts that no longer exist at trial and have not been replaced, substituted for or liquidated for the mutual benefit of the spouses or partners, should be valued as of the date of separation.
54. Family property legislation should provide an exception to these valuation rules where one spouse or partner has unreasonably impoverished a family asset or family debt after separation.
55. Public legal education materials should clarify for self-represented persons that the value of property may include notional disposition costs.
56. Public legal education materials should clarify for self-represented persons under what situations these costs are likely to be incurred and what sort of costs may be included.

The Family Home

57. Family property legislation should not deem a spouse or partner to have a property interest in the family home upon marriage, registration of a domestic partnership or the beginning of an eligible common law relationship.
58. The provisions of the *Matrimonial Property Act* extending equal possessory rights, as well as rights against unilateral disposition or encumbrance, and rights of redemption and notice, during the marriage should be included in new family property legislation.

59. Family property legislation should provide that the equal possession rights of a common law partner, registered domestic partner or former domestic partner who does not have an interest in the family home or homes should expire two years after the parties separate.
60. Family property legislation should provide that an affidavit of status which deems a property not to be a family home may be made by a spouse's or partner's substitute decision maker for property, to the best of their knowledge and belief.
61. Family property legislation should expressly confirm that liens and judgments are encumbrances subject to the court's remedial power to set them aside, in whole or in part, in appropriate cases.
62. Family property legislation should provide for the court's authority to set aside any disposition or encumbrance and revest it upon "such terms and subject to such conditions as the court considers appropriate."
63. Family property legislation should expressly confirm the court's authority to impose less sweeping remedies, including a determination of the extent of one or both spouses' or partners' interest in the home which the charge may encumber, and priority as between the charge and a spouse or partner's interest.
64. Family property legislation should provide that where the parties cannot agree a judge may make an order for exclusive possession in favour of one spouse, registered domestic partner, or common law partner where:
 - (a) it is in the best interests of the children affected; or
 - (b) cohabitation between the spouses or partners has become intolerable.
65. The legislation should provide that in making an order for exclusive possession the court shall consider:
 - (a) any existing support orders or orders for division;
 - (b) the financial position of both spouses or partners;
 - (c) any agreement between the parties;
 - (d) the availability other suitable and affordable accommodation;
 - (e) any violence committed by a spouse or partner against the other spouse or partner or the children; or
 - (f) any other relevant fact or circumstance.

66. Family property legislation should provide that where one spouse or partner has occupied or will occupy the family home to the exclusion of the other spouse or partner, the court may order the occupying spouse or partner to pay to the other such periodic or other payments as the court shall decide.
67. Provision for occupation rent should not depend on whether an order for exclusive possession has been made.
68. The legislation should confirm that the common law remedy of occupation rent does not apply in respect of a family home.
69. The legislation should provide that in deciding an application for occupation rent, the judge may consider the following:
- (a) the timing of notice of a claim for occupation rent;
 - (b) the duration of the spouse, registered domestic partner, or common law partner's occupancy of the home;
 - (c) inability of the non-resident spouse or partner to realize on the equity in the property during the exclusive possession of the other spouse or partner;
 - (d) any reasonable credits to be set off against the occupation rent;
 - (e) any other competing claims in the litigation; and,
 - (f) any other relevant fact or circumstance.
70. Family property legislation should not exclude a leasehold interest from the definition of a family home.
71. The legislation should provide that if a family home is leased by one or both of the spouses, registered domestic partners, or common law partners under an oral or written lease and the court makes an order giving possession of the family home to one spouse, registered domestic partner, or common law partner, that spouse or partner is deemed to be the tenant for the purposes of the lease.

Family Debt

72. Family property legislation should provide that family debt means debt which:
- (a) exists at the date of separation, was incurred during the couple's cohabitation, and was:
 - (i) incurred in the names of both spouses, registered domestic partners or common law partners; or,

- (ii) incurred in the name of one spouse or partner for a family purpose; or,
 - (b) was incurred after the date of separation for the purpose of preserving or maintaining family assets.
- 73. The legislation should provide that the party claiming that a debt incurred during cohabitation is a non-family debt bears the burden of showing that the debt was not a family debt.
- 74. Family property legislation should provide that family debt is to be divided on a presumptively equal basis.
- 75. The legislation should provide that the court may order an unequal division of family debt, or the division of non-family debt, where it would be unfair or unconscionable to divide family debt in equal shares.
- 76. The legislation should provide that where the parties cannot agree the court may make an interim order dividing responsibility for servicing family debt after separation.
- 77. The legislation should provide that the court may give credit to a spouse or partner for unequal amounts spent in the service of debt after separation, if it is shown that the spouse or partner has serviced a greater part of the debt than the other spouse or partner, and that this is not reflected in a spousal support order or agreement.
- 78. Family property legislation should provide that where family debt exceeds family assets, the court may make an order for unequal division of debt, considering each party's respective ability to pay for the debt.
- 79. Family property legislation should provide that family debt may include a liability contingent on the happening of a future event.
- 80. The legislation should provide that the court may order a contingent liability to be divided on an "if and when" basis.
- 81. The legislation should permit the court to order an unequal division of a contingent liability, considering each party's current and prospective ability to pay.

Unequal Division

- 82. Family property legislation should provide that a court may order a division of family assets and family debts that is not equal, or a division of property that is not a family asset, or debt that is not a family debt, where the court is satisfied that the division of family assets and family debts in equal shares would be unfair or unconscionable.

83. Family property legislation should provide that in deciding whether an equal division of family assets and family debts is unfair or unconscionable, the court shall take into account the following factors:
- (a) the unreasonable impoverishment by either spouse or partner of the family assets;
 - (b) the value of family debts and the circumstances in which they were incurred, particularly in circumstances where family debts exceed family assets;
 - (c) a domestic contract between the spouses or partners;
 - (d) the length of time that the spouses or partners have cohabited with each other, including where the parties have cohabited for a long period of time;
 - (e) the date and manner of acquisition of assets;
 - (f) the contribution by one spouse or partner to the education or career potential of the other;
 - (g) the needs of a dependent child including a dependent adult child;
 - (h) the contribution made by each spouse or partner to the relationship and to the care and welfare of the family;
 - (i) all taxation consequences of the division of family assets.

Domestic Contracts

84. Family property legislation should refer generally to domestic contracts, including marriage contracts, cohabitation agreements, and separation agreements.
85. Marriage contracts, cohabitation agreements and separation agreements should be defined separately in the legislation.
86. Family property legislation should provide that the court may vary a domestic contract where any term of the contract is unconscionable, unduly harsh on one party or fraudulent.
87. Family property legislation should not require independent legal advice as a condition for a valid domestic contract.

Pensions

88. Provincial pension legislation should be amended to permit a non-member spouse or partner to receive greater than fifty per cent of the member's pension earned during the relationship where the court makes an order for an unequal division of the pension.

Family Property on Reserve

89. New family property legislation should confirm that it does not apply to real property on reserve in Nova Scotia.
90. Public legal education materials should raise awareness about the differences between the *Family Homes on Reserves and Matrimonial Interests or Rights Act* and the family property regime off reserve.

Bankruptcy

91. Public legal education materials should advise that payments to effect a division of property are liable to discharge through bankruptcy.

Death of a Spouse or Partner

92. Family property legislation should provide that the estate of a deceased spouse, registered domestic partner, or common law partner may not initiate an application for division of family property where there were no grounds for an application (e.g., separation, petition for divorce, death of the other spouse) prior to the spouse or partner's death.
93. The legislation should permit the estate of a deceased spouse or partner to continue an application made by the deceased spouse or partner before their death.
94. The legislation should permit the estate of a deceased spouse or partner to bring an application for a division where there were grounds for an application while the spouse or partner was still alive.
95. Family property legislation should provide that, subject to any express direction in a will, on the death of a spouse, registered domestic partner, or common law partner the surviving spouse or partner should be entitled to either a division of family property or entitlements under the deceased spouse or partner's will, but not both.
96. Family property legislation should provide that on the death of a spouse or registered domestic partner, the surviving spouse or partner should be entitled to either a division of family property or entitlements pursuant to the *Intestate Succession Act*, but not both.
97. The *Intestate Succession Act* should be reviewed, to ensure that it is fulfilling the purpose of financially providing for the surviving spouse upon the death of the intestate.

98. Family property legislation should expressly provide for the division of family property upon the death of one spouse or partner, rather than leaving family property claims to be decided under the *Testators' Family Maintenance Act*.
99. Family property legislation should provide that upon the death of a spouse, registered domestic partner, or common law partner, the surviving spouse or partner must elect between:
- (a) their entitlements under the deceased spouse or partner's will or by intestacy, or
 - (b) a division of family property.
100. The legislation should provide that where the surviving spouse or partner elects to make a claim for division, subject to any direction in the deceased spouse or partner's will, the spouse or partner will receive their entitlements under the will or by intestacy (for spouses and registered domestic partners), plus whatever property is needed to ensure an equal division of family assets.
101. The legislation should provide that the surviving spouse or partner may receive their entitlement to an equal division of family assets, as well as the gifts made to him or her in the deceased spouse or partner's will, if the will expressly provides for that result.
102. The legislation should provide that a spouse, registered domestic partner, or common law partner who elects a family property division should not be permitted to act as the personal representative of the deceased spouse or partner's estate in matters relating to the family property claim.
103. The legislation should provide that where a spouse, registered domestic partner, or common law partner elects a family property division on the death of a spouse or partner, the *Act's* provisions for an unequal division do not apply.
104. Public legal education materials should highlight the options available to a surviving spouse or partner and their consequences in different factual scenarios. They should explain the option for a testator to provide in the will that the surviving spouse or partner may have their entitlement under the will, in addition to a family property claim.
105. Family property legislation should provide that the presumption of resulting trust should apply in questions of ownership between spouses and partners where property is not held by them as joint tenants, but the presumption of advancement should be maintained for property held in the name of spouses and partners as joint tenants, including money on deposit in the name of both spouses or partners.

106. Family property legislation should provide that, where one spouse or partner has died, the full value of life insurance proceeds, less any contingent tax liabilities, paid or payable to the surviving spouse or partner as a result of the death of the other spouse or partner, will be included as a family asset.
107. Family property legislation should provide that, where one spouse or partner has died, the portion of the cash surrender value of a life insurance policy on the life of the deceased spouse or partner, paid or payable to a third party, corresponding to the cohabitation of the parties, will be included as a family asset.
108. The legislation should presumptively exclude from an equal division life insurance proceeds paid or payable to any person on the death of the deceased spouse, if the purpose of the policy is to satisfy a child or spousal support claim, or any other debt, liability or obligation the deceased had during their lifetime, or to compensate for the loss of the deceased in respect of a business undertaking.
109. Public legal education materials should explain the treatment of life insurance under the new legislation.
110. The legislation should expressly permit a spouse or partner to indicate in writing that upon their death the surviving spouse or partner shall receive life insurance proceeds as well as a division of family property.
111. Family property legislation should provide that, where one spouse or partner has died, any benefit, payment or other property, less any contingent tax liability, which the surviving spouse or partner has received or will receive by right of survivorship or otherwise as a result of the death of the other spouse or partner will be included as a family asset.
112. The legislation should expressly permit a spouse or partner to indicate in writing that upon their death the surviving spouse or partner shall receive property passing outside their estate, as well as a division of family property.
113. Family property legislation should provide that, where one spouse or partner has died, the value of any benefit, payment or other property, less any contingent tax liability, which a third party has received or will receive by right of survivorship or otherwise as a result of the death of the spouse or partner will be included as a family asset for purposes of calculating the parties' respective entitlements.
114. Family law disclosure rules and probate rules should require disclosure by the estate of a deceased spouse or partner, and third parties, of any property, including policies and plans held by the deceased spouse or partner immediately prior to death.

115. An award or agreement for a family property division in favour of a surviving spouse or registered domestic partner should take priority over an award made under dependants' relief legislation.

Conflict of Laws

116. Family property legislation should reproduce the provisions from the *Court Jurisdiction and Proceedings Transfer Act* for the territorial jurisdiction of superior courts, including the factors to consider in declining jurisdiction.
117. Family property legislation should provide that a real and substantial connection to the proceeding shall be presumed where:
- (a) property that is the subject of the proceeding is located in Nova Scotia;
 - (b) the last common habitual residence of the plaintiff and the defendant was in Nova Scotia;
 - (c) the habitual residences of both the plaintiff and the defendant when the proceedings are commenced are in Nova Scotia; or,
 - (d) a petition with respect to the marriage of the plaintiff and defendant has been validly issued under the *Divorce Act* (Canada) in Nova Scotia.
118. The legislation should permit the court to decline jurisdiction on the basis of "any other circumstances the court considers relevant".
119. Family property legislation should provide that where a court has territorial competence to entertain a proceeding relating to family property, some of which is located outside of Nova Scotia, the court may:
- (a) reapportion entitlement to family property within Nova Scotia to compensate for rights in family property located outside Nova Scotia,
 - (b) order the party who has legal title to family property located outside Nova Scotia to pay compensation to the other party in lieu of division,
 - (c) make an order in connection with family property located outside of Nova Scotia that is enforceable against the party that owns the family property, including an order preserving the property, respecting possession of the property or requiring the owner to convey or charge all or part of the owner's interest in it to the other party, or
 - (d) if the internal law of the territory in which the family property is located allows for the recognition and enforcement of an order for non-monetary relief made by a court of another territory, make an order for non-monetary relief.

120. Family property legislation should provide that:

(a) Where the spouses, registered domestic partners or common law partners have made a domestic contract setting out a choice of law rule, the terms of the contract will govern which territory's laws apply to the division of family property.

(b) Where the spouses or partners have not made a domestic contract as provided in (a), the substantive rights of the spouses or partners in a family property proceeding will be determined by:

(i) the internal law of the territory where the parties had their last common habitual residence;

(ii) if the parties' last common habitual residence is located outside Canada and is not the territory most closely associated with the marriage or common law relationship, or registered domestic partnership, the internal law of the territory that is most closely associated with the marriage, common law relationship or registered domestic partnership; or,

(iii) if there is no place where the parties had a common habitual residence, the internal law of the territory where the plaintiff last habitually resided.

121. The legislation should provide that subject to the terms of a domestic contract setting out a choice of law rule, if the internal law of the territory in which the plaintiff and defendant first had a common habitual residence during their marriage provides that some or all of their family property is held in a regime of community of property, then regardless of a change of residence, their rights in the family property that is subject to the regime of community of property shall be determined by the law of that territory.

122. Family property legislation should provide that if spouses, registered domestic partners or common law partners make a domestic contract respecting the division of family property or debt, the substantive rights of the spouses or common law partners regarding the division of property and debt will be determined by the agreement.

123. The legislation should provide that the enforcement of a domestic contract is subject to any restriction that the proper law of the relationship places on the ability of spouses or partners to determine the division of family property or debt by agreement.

124. The definition of “spouse” should include reference to a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

Transition

125. Family property legislation should provide that unless spouses or registered domestic partners agree otherwise, a proceeding respecting property division started under the *Matrimonial Property Act* must be continued under the *Matrimonial Property Act* as if the *Matrimonial Property Act* had not been repealed.
126. The new law should apply to common law partners or former common law partners regardless of whether the relationship reached the qualifying conditions (e.g., two years continuous cohabitation) or the parties separated prior to the new law coming into effect.
127. The legislation should expressly confirm that a common law partner may make an application under the new law, provided that the application is brought within the applicable limitation period (24 months) following separation.
128. The legislation should permit a common law partner to convert an application in respect of family property brought under the common law (e.g., for unjust enrichment) to an application for a statutory division of property under the new legislation.
129. The legislation should not require that a proceeding concerning the enforcement of a marriage contract or cohabitation agreement made prior to the new law coming into effect must be started or continued under the former law.
130. The legislation should require that a proceeding concerning the enforcement of a separation agreement made before the coming into force of the new legislation must be started or continued under the former law.

1.2. Definitions

In this report we use the following terms:

Affidavit - A written statement given as evidence of the truthfulness of the statements made.

Beneficiary - A person or organization who benefits or profits from certain legal transactions or transfers - for example from a will, an insurance policy, a trust, etc.

Cohabit – To live together in a conjugal or “marriage-like” relationship.

Common law - Rules of law created and developed by judges through their decisions.

Common law relationship - A spousal relationship between persons who cohabit but have not gone through a legally recognized form of marriage.

Community of property regime – A legal system of matrimonial property ownership which deems all assets of the couple to be held jointly on marriage, except for assets such as gifts and inheritances to one of them from a third party.

Conjugal relationship - A relationship which is ‘marriage-like’, having regard to the extent of cohabitation, sexual and personal conduct, sharing of household responsibilities, social activities, economic support and integration, and other factors.

Deferred sharing regime – A legal system of family property ownership that requires property held by the either of the spouses or partners to be shared 50-50 only at the end of the relationship.

Estate - All of the assets and liabilities belonging to a person - commonly used in reference to the property of a person who is deceased or legally incapacitated.

Family assets - All property owned by either or both spouses or partners, which will be presumptively included in a division of property under new family property legislation recommended in this report. Under the *Matrimonial Property Act* these are referred to as matrimonial assets, but in that context the term is not applicable to the property of common law partners.

Family property – All property owned by either or both spouses or partners, whether presumptively included or presumptively excluded from a division of property under new family property legislation recommended in this report. Under the *Matrimonial Property Act* this is referred to as matrimonial property, but in that context the term is not applicable to the property of common law partners.

Former domestic partner – A person who was party to a registered domestic partnership (see below), where the partnership has been terminated pursuant to the *Vital Statistics Act*.

Immovable property – Property that cannot be moved, such as land or a house.

Matrimonial assets – All property owned by either or both spouses or partners, which is presumptively included in an equal division of property under the *Matrimonial Property Act*.

Matrimonial property – All property owned by either or both spouses or partners, whether presumptively included or presumptively excluded from a division of property under the *Matrimonial Property Act*.

Non-matrimonial assets – Property presumptively excluded from an equal division of property under the *Matrimonial Property Act*. Excluded classes of assets are listed at section 4(1) of the *Matrimonial Property Act*, including gifts, inheritances, trusts, an award or settlement of damages in favour of one spouse, reasonable personal effects of one spouse, business assets, property exempted under a contract or real or personal property acquired by one spouse after separation.

Partner – A person who is either a common law partner or a registered domestic partner.

Presumption of advancement – A presumption of law that a transfer of property absent consideration is meant to be a gift. Where the presumption applies, a court is permitted to assume that a transfer of property from one spouse to another spouse, without anything in return, is intended to be a gift. The presumption may be rebutted by evidence that the transferor intended the transfer to be a loan, or to have created a trust.

Presumption of resulting trust – A presumption of law that a transfer of property absent consideration is meant to create a trust for the benefit of the transferor. Where the presumption applies, a court is permitted to assume that a transfer of property from one spouse to another spouse, without anything in return, is intended to put the receiving spouse in the position of a trustee with regard to the property, to hold it for the benefit of the transferring spouse.

Registered domestic partnership – A conjugal relationship between two people, regardless of their sex, who are not married, and who have made a declaration which is registered in a provincial registry. Registering a domestic partnership declaration provides many of the same rights and obligations that apply to married partners.

Separate property regime – A legal system of property ownership in which married spouses hold property separately from one another.

Unjust enrichment – A legal rule that provides a remedy where one person has benefited another by some effort or contribution and it would be unjust to allow the person to keep the benefit without compensation. Now frequently employed in Canada to ground a claim by one common law partner for compensation from the other because of uncompensated effort and contribution during the relationship.

2. INTRODUCTION

2.1. History of Matrimonial Property Law in Nova Scotia

Pursuant to the common law doctrine of coverture, when a woman married a man her legal personality was subsumed to that of her husband. The doctrine of marital unity holds that at law, a husband and wife are one person. As explained by Sir William Blackstone in his *Commentaries on the Laws of England*: “the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything.”¹⁵

The consequences of coverture were far reaching for married women: a woman could not hold, acquire or dispose of personal property in her own name. While a married woman could hold real property, she lost the ability to manage that property and to keep rents therefrom.¹⁶ She could not keep her own wages, acquire or satisfy debts, or enter into contracts on her own unless these contracts were for goods and services for the household.¹⁷ This meant that a woman was not able to work for wages outside the home without her husband’s consent, nor was she able to conduct business in her own name. Married women were not able to bring legal proceedings in their own names and conversely were not able to be sued in contract or tort in their own names, but had to be joined with their husbands.¹⁸ Women were not able to have a domicile that was different from their husbands’. Therefore, if a man left the province and his wife refused to leave with him, her refusal to leave would constitute legal desertion.¹⁹

¹⁵ William Blackstone, *Commentaries on the Laws of England*, 4 vols (Oxford 1765-1769), book 1, chapter 15, at 442.

¹⁶ Constance Backhouse, “Married Women’s Property Law in Nineteenth-Century Canada” (1988) 6 L & History R 211 at 213.

¹⁷ Lilius M Toward, QC, *Development of Matrimonial Property Law in England and Nova Scotia: An Historic Perspective* (Halifax: Nova Scotia Law Reform Advisory Commission, 1975) at 3.

¹⁸ *Ibid.*

¹⁹ Philip Girard & Rebecca Veinott, “Married Women’s Property Law in Nova Scotia, 1850-1910” in Janet Vey Guildford & Suzanne Morton, eds, *Separate spheres : women's worlds in the 19th-century Maritimes* (Fredericton, NB: Acadiensis Press, 1994) 67 at 72.

Women were not able to make wills in their own name without the consent of their husbands.²⁰ If a wife died before her husband, his right of curtesy at common law provided that he would gain a life interest in all real property that she owned at the time of her death. Upon the husband's death, the wife's property then passed to her heirs. The husband's right was conditional upon a child of the marriage being born alive and living while the mother was still alive – even if only for a few brief moments. The requirement for an heir to the wife has been explained as follows:

There are those who maintain that the original purpose of curtesy was based on something more than the desire of the surviving father to exclude the lord from wardship of his minor child. It is possible that the custom grew out of the common sense view that it was against the child's and the family's moral interest that the child should be brought up to despise his father, the head of the family, knowing that on his mother's death the child, as heir of his mother, could turn his father out.²¹

The common law also provided succession rights to women with respect to their husband's real property, called dower. A wife was entitled to a life interest in one-third of the real property her husband owned during their marriage. Further, she was entitled to live in the matrimonial home for forty days after her husband's death (called "quarantine" – being approximately the amount of time it would take for her portion of real property to be assigned to her).²² Unlike curtesy, it was not necessary that a child of the marriage was born in order for a wife to be entitled to her dower.²³

The existence of the common law doctrine of coverture in Canada meant that women left by their husbands without means of support were placed in an extremely vulnerable situation, as the law provided them no ability to conduct business in their own name or to dispose of property to support themselves. In the most egregious cases, even where a woman was able to support herself and her children, the doctrine of coverture dictated that a deserting husband could return and take the property that the wife had earned in his absence.²⁴

²⁰ *Development of Matrimonial Property Law in England and Nova Scotia*, *supra* note 18 at 3.

²¹ Lilius M Toward, *Dower and Curtesy: A Study Paper* (Halifax: Nova Scotia Law Reform Advisory Commission, 1973) at 41.

²² *Ibid* at 2.

²³ *Ibid*.

²⁴ Backhouse, *supra* note 16 at 213.

The right of dower as a right to real property was therefore extremely important for widows and is an example of early welfare legislation. In the rural agrarian economy of 19th century Nova Scotia, men would often leave their land to their sons – not wives. Without a woman’s right to dower she could potentially be left destitute.²⁵

Toward the end of the 19th century there was greater recognition of the need for legislation to allow women to provide for their families and to prevent them from having to rely on poor relief. This was not just in the case of the husband’s death, but also in cases of marital breakdown, typically by desertion.²⁶ The problem of desertion became more acute in Nova Scotia after 1850 with the increase in out-migration from the province.²⁷

In 1884, Nova Scotia’s Legislative Assembly introduced the *Married Women’s Property Act, 1884*.²⁸ The new *Act* expanded upon the separate property rights provided to married women 18 years earlier.²⁹ It was modeled upon similar legislation in Ontario and provided for a married woman to be able, as of right, to hold and enjoy her property “as if she continued sole and unmarried” regardless of whether or not she had been deserted by her husband.³⁰ A woman’s property would be hers to hold and dispose of, free from her husband and any obligations that he might have to creditors.³¹ The *Act* provided that a woman could insure her life, or with his consent,

²⁵ *Dower and Curtesy*, *supra* note 21 at 34.

²⁶ Girard & Veinott, *supra* note 19 at 74.

²⁷ *Ibid* at 71.

²⁸ SNS 1884, c 94.

²⁹ *An Act for the Protection of Married Women in Certain Cases*, SNS 1866, c 33, s 1-5: The 1866 Act provided that where a married woman was deserted by her husband “without reasonable cause” and she was supporting herself, she could make an application to Supreme Court for an order providing for the protection of the property and earnings she acquired to support herself after her husband’s desertion. An order of protection had to be entered with the Registrar of Deeds. A woman’s property would thereafter be protected from both her husband and his creditors and if her husband or his creditors wrongfully detained her property she could apply to court for restoration of the property plus a penalty worth double its value. Furthermore, the Act provided that after the granting of an order of protection the wife would be deemed during her desertion to be in the same position with regard to “property and contracts and suing and being sued” as if she had been granted a divorce. The Act provided that a husband or his creditors could apply for a discharge of an order of protection for cause.

³⁰ Girard & Veinott, *supra* note 19 at 80

³¹ Sections 3-5.

the life of her husband, that she could keep a separate bank account, and that she had the right to make a will.³²

However, a husband was still entitled to the earnings of his wife and children unless he had registered his consent or the wife had obtained an order of protection disentitling him.³³ A woman could not carry on business on her own without an order or the registered consent of her husband,³⁴ nor could she be involved in a legal proceeding without being joined with her husband, unless he was absent from the province.³⁵ Therefore, while the 1884 *Act* provided for greater separation as to property, it did not do away with all aspects of the common law doctrines of coverture and marital unity especially as they applied to a woman's ability to engage in paid work and conduct business without the consent of her husband. The *Act* further provided that a woman would be wholly disentitled to the rights contained in the *Act* if it was found that she had committed adultery.³⁶

The common law doctrines of coverture and marital unity were finally overridden by legislation in Nova Scotia with the *Married Women's Property Act* of 1898.³⁷ The 1898 *Act* provided that women could sue or be sued in contract or tort in their own name and that they could enter into contracts with respect to their own property. Furthermore, a woman was entitled to keep her wages and was no longer required to gain the consent of her husband. She did, however, require the consent of her husband to carry out her own business.

These late-19th century matrimonial property reforms were revolutionary in the sense that they provided women with more fully separate legal personhood notwithstanding marriage; however, they gave no rights to property in the husband's name, and so did not address the socio-economic disadvantage generally experienced by women upon divorce. A woman now had full legal personhood to contract, to keep her wages, to hold and dispose of her personal and real property, and to carry on business in her own name (with her husband's consent). But only what she brought into the marriage in her name and only what she acquired during the marriage in her name would leave with her upon relationship breakdown. While women were expected to

³² Sections 11, 13 and 33, respectively.

³³ Section 52; Girard & Veinott, *supra* note 19 at 79.

³⁴ *Ibid.*

³⁵ Section 10.

³⁶ Section 94.

³⁷ SNS 1898-99, c 22.

undertake the bulk of the work in the home, upon divorce they were not given credit for that work as having contributed to the overall economic welfare of the family. Even when women gained greater access to the labour market they earned less than men on average and were less likely to have amassed property and savings during the marriage.

Agitation by women's rights advocates in the early-to-mid 20th century across Canada resulted in the enactment of legislation to ensure that women and children could apply to the court for relief where the husband had not adequately provided for them upon his death.³⁸ Dependents' relief legislation was passed to address situations in which women were disinherited by their husbands in the will, and modern intestate succession legislation was passed to ensure the surviving spouses and dependents of intestates were provided for, as well.

In 1956, the Nova Scotia legislature introduced the *Testators' Family Maintenance Act*,³⁹ to ensure the financial well-being of spouses and other dependents, and to ensure they did not become a charge on the state. The *Testators' Family Maintenance Act* provided, as it does today, for the "proper maintenance and support of the dependant" where the testator has failed to do so.⁴⁰

A decade later, the legislature passed the *Intestate Succession Act* - the first "modern" intestate legislation in Nova Scotia. The introduction of the *Intestate Succession Act* in 1966 and its repeal⁴¹ of the *Descent of Property Act*⁴² established a "preferential share" of \$25,000 for the surviving spouse.⁴³ If the estate was worth \$25,000 or less, the spouse of the intestate was entitled to the whole estate; however, if the estate was worth more, then the spouse would be entitled to a charge on the estate for \$25,000 plus accrued interest from the date of death of the intestate.⁴⁴ The creation of a preferential share for the surviving spouse was a significant advancement for the rights of widows of intestates. Before this, intestate succession legislation largely favoured the children of the intestate. The preferential share indicated a growing recognition of needs of the surviving, untitled spouse – usually, the wife.

³⁸ See discussion in *Tataryn v Tataryn Estate*, [1994] 2 SCR 807 at para 10.

³⁹ RSNS 1967, c 303.

⁴⁰ RSNS 1967, c 303, s 5.

⁴¹ Section 2(2).

⁴² SNS 1954, c 69.

⁴³ Section 3.

⁴⁴ Sections 3(1) and (2).

Besides these statutory protections for spouses and dependants, after the Second World War superior courts in Canada became more willing to use a resulting trust analysis “to mitigate the harshness of the separate property regime”.⁴⁵ A non-titled spouse could be found to have an interest in property to which she had contributed directly. The remedial effect of the use of resulting trust was limited, since many women were not in a position to have contributed directly to property. Slowly courts began to recognize indirect contributions to property such as the payment of household expenses or through work done to improve the property.⁴⁶

However, judicial recognition of indirect contributions sufficient to ground a claim in a resulting trust was not sufficient to do justice for women. As Berend Hovius explains, “contributions through household management and child-raising were not treated as relevant contributions giving rise to a presumption of resulting trust. The contribution to family life by a homemaker was left wholly out of account.”⁴⁷ Furthermore, courts in Canada were increasingly interpreting the resulting trust doctrine as requiring a common intention to share in the property⁴⁸ – thereby giving an advantage to the titled spouse to argue that he never had any such intention.

With the passage of the *Divorce Act* in 1968 divorce became a more common phenomenon⁴⁹ and the provincial legislatures across Canada began to recognize the need to provide women not just with maintenance, but a more equal sharing of matrimonial property upon relationship breakdown. One case in particular brought home the injustice of the separate property regime and the need for legislative intervention: *Murdoch v. Murdoch*⁵⁰.

Murdoch v. Murdoch involved a husband and wife living on a ranch in Alberta who had been married for 25 years. The wife had contributed both financially and through her work in the home to the acquisition and maintenance of the ranching business, which was held solely in the name of her husband. The absence of matrimonial property legislation and prevailing regime of separate property meant Mrs. Murdoch was not entitled by legislation to any interest in her husband's

⁴⁵ Berend Hovius & Timothy G Youdan, *The Law of Family Property* (Scarborough: Thomson Professional Publishing Canada, 1991) at 195.

⁴⁶ *Ibid.*

⁴⁷ *Ibid* at 196.

⁴⁸ *Ibid.*

⁴⁹ *Walsh v Bona*, 2002 SCC 83, 221 DLR (4th) 1 at para 107 (per L’Heureux-Dubé J).

⁵⁰ [1975] 1 SCR 423.

properties. Upon the breakdown of the marriage, she brought an equitable claim by way of resulting or constructive trust to a one-half interest in the property in his name, based on her financial and non-financial contributions to the property.

At trial, the judge found that Mrs. Murdoch had not contributed financially to the business nor was there a common intention on behalf of the parties to act as a partnership. The Supreme Court of Canada upheld the decision of the trial judge, and endorsed his view that, “what the appellant had done, while living with the respondent, was the work done by any ranch wife.”⁵¹ The implication was clear – a woman’s contribution to the marriage in terms of domestic work and childrearing were not sufficient to provide her with a claim to share in property in the husband’s name.

Since the 1960s, women’s rights groups had been calling for a regime of equal sharing of property based on the recognition of the marriage as an economic partnership. A Royal Commission Report on the Status of Women recommended such reform in 1970.⁵² The release of the *Murdoch* decision in 1975 spurred the provincial legislatures to introduce regimes of equal sharing upon marriage breakdown in the provinces and territories. In the late 1970s and the 1980s family law reform swept the Canadian provinces. By the end of the 1980s all the provinces and territories in Canada had matrimonial property legislation.

Nova Scotia’s *Matrimonial Property Act* came into effect on October 1, 1980. It institutes a regime of deferred sharing and division of matrimonial property upon marriage breakdown, in recognition of the joint contributions of both spouses to the economic well-being of the family. The preamble to the *Act* states that it is meant to recognize the:

[C]ontribution made by each spouse to the relationship and to the family, such contribution taking on the form of childcare, household management, and financial support. ... In recognition of this joint responsibility and its discharge, the legislation presumes an equal entitlement to the matrimonial assets.⁵³

In contrast to the forward-looking regimes of child and spousal support, the remedial purpose of the *Matrimonial Property Act* is to look backward across the relationship and to presume an

⁵¹ [1975] 1 SCR 423 at 436.

⁵² Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Royal Commission on the Status of Women, 1970) at 246.

⁵³ *Walsh v Bona*, 2002 SCC 83, 221 DLR (4th) 1 at para 112 (per L’Heureux-Dubé J).

equal contribution and entitlement to the assets brought into and acquired during the relationship. The Act finally abolished the common law doctrines of dower and curtesy.⁵⁴

The *Matrimonial Property Act* applies to married couples only; common law couples are not included. In 2000, the Nova Scotia Court of Appeal ruled that the exclusion was discriminatory under section 15(1) of the *Charter*, and gave the provincial government 12 months to amend the definition of spouse in the Act.⁵⁵ In response, the *Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, or the *Law Reform (2000) Act*⁵⁶ was introduced on November 6, 2000. It was passed three weeks later, on November 30, 2000. The Act made changes to both the *Maintenance and Custody Act*⁵⁷ as well as the *Pension Benefits Act*,⁵⁸ in order to include common law opposite and same-sex partners. Common law couples were not included for purposes of the *Matrimonial Property Act*, however, unless they registered as a “domestic partnership” under the *Vital Statistics Act*.⁵⁹

It was not until the recognition of same sex marriage,⁶⁰ then, that same sex married partners were included in the definition of spouse and entitled to matrimonial property rights provided under the *Matrimonial Property Act*.

Following the enactment of the *Law Reform (2000) Act*, the Supreme Court of Canada overturned the Court of Appeal’s decision in *Nova Scotia (Attorney General) v. Walsh (Walsh v. Bona)*,⁶¹ holding that the *Matrimonial Property Act*’s exclusion of common law couples was not

⁵⁴ Section 33(1). Except where the husband died before the coming into force of the Act: s 33(2). It is also noteworthy that in 2012, SNS 2012, c 10, entitled “An Act to Repeal Out-dated Statutes” repealed the *Married Women’s Deeds Act*, the *Married Women’s Property Act* as well as outdated laws relating to the Court of Divorce and Matrimonial Causes.

⁵⁵ *Walsh v Bona*, 2000 NSCA 53, 221 DLR (4th) 1.

⁵⁶ SNS 2000, c 29 [*Law Reform (2000) Act*].

⁵⁷ RSNS 1989, c 160. Now *Parenting and Support Act*.

⁵⁸ RSNS 1989, c 340.

⁵⁹ *Vital Statistics Act*, RSNS 1989, c 494.

⁶⁰ *Boutilier v Nova Scotia (Attorney General)*, [2004] SH No 227691, NSJ No 357; *Civil Marriage Act*, SC 2005, c 33; See also, *Reference re Same-Sex Marriage* 2004 SCC 79.

⁶¹ 2000 NSCA 73, 185 NSR (2d) 190 [hereinafter *Walsh v Bona*].

discriminatory under the *Charter*.⁶² More recently a majority of the Supreme Court held that the exclusion was discriminatory, but a separate majority considered the discrimination was justified under section 1 of the *Charter*.⁶³

Common law couples therefore remain subject to a regime of separate property, limited only by their ability to bring equitable claims.

The Supreme Court of Canada considered claims for unjust enrichment and resulting trust in the context of common law relationships in the case of *Kerr v. Baranow*.⁶⁴ The court addressed the concept of common intention resulting trust; a concept that had developed since *Murdoch* and required that in order for a trust to arise in the context of a relationship, both parties must have had the intention to share the property. The court in *Kerr* held that the concept of common intention resulting trust had no place in the family law context and that an action for unjust enrichment – one that did not require proof of intention on behalf of the parties – was more appropriate to deal with these cases.

The majority reasons by Cromwell J. accepted that “it is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption of married partners engaged in a joint family venture.”⁶⁵ But Cromwell J. insisted that where a common law relationship has functioned to give rise to a “joint family venture” and a partner can show a link between their contribution and family property, they will share in this property in the appropriate proportion. There is no presumption of equal sharing.⁶⁶

Kerr prioritizes a case-specific, functional understanding of the partnership and each party’s contributions to it, as opposed to a presumption of equal sharing. A number of commentators have suggested that as a consequence, we can expect more complex and uncertain litigation regarding the parties’ actual contributions to wealth accumulated during the relationship, and

⁶² *Walsh v Bona*, 2002 SCC 83, 221 DLR (4th) 1.

⁶³ *Quebec (Attorney General) v A*, 2013 SCC 5, 1 SCR 61 at para 338.

⁶⁴ 2011 SCC 10, 1 SCR 269.

⁶⁵ *Ibid* at para 84.

⁶⁶ See *Kerr* at para 62: “Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.”

indeed, this appears to have been the case.⁶⁷ The decision also opens greater possibility for disputes between married couples where one spouse makes a claim to property that is not subject to a presumptive equal division under family property legislation.⁶⁸

A number of other provinces and territories – Saskatchewan, Manitoba, the Northwest Territories, Nunavut and most recently, British Columbia – have amended their matrimonial property legislation to include common law couples.

2.2. The Project: Reform of Matrimonial Property Law

Nova Scotia's *Matrimonial Property Act* has not been amended since its introduction in 1980. It has been the subject of calls for reform, however. In 1997 this Commission released its Final Report, *Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (the "1997 Report").⁶⁹ The 1997 Report recommended the creation of new legislation entitled the *Domestic Property Division Act* to replace the *Matrimonial Property Act*.⁷⁰ The Commission recommended the inclusion of common law couples in the scheme of family property division, express provision for dividing family debts, ending the exempt status of business assets, and provision for the division of pensions.⁷¹ The Commission noted that, by the time of its report, "most of the changes recommended in this Final Report have occurred, or have been recommended, in other provinces in Canada."⁷² None of the recommendations for reform of the *Matrimonial Property Act* in the 1997 Report have been implemented.

Calls for review of Nova Scotia's *Matrimonial Property Act* have been growing in recent years, with particular emphasis on the status of common law couples, the presumptive exclusion of

⁶⁷ See, Berend Hovius, "Chapter 4: Disputes Between Separating Common-Law/De Facto Partners" in Johanne Elizabeth O'Hanlon ed, *Gender, Sex and the Law in Canada* (Toronto: Carswell, 2015); DA Rollie Thompson, "Annotation: Droit de la famille – 091768" (2013) 21 RFL-ART 325.

⁶⁸ See, for example, Philip M Epstein, QC, "Houston, We Have a Problem": Constructive Trust and Unjust Enrichment (A Discussion of *Rawluk*, *Kerr*, *Vanasse* and *McNamee*) (Paper delivered at the "Kissing Cousins: Joint Issues in Family Law and Trusts and Estates Law" Conference, Ontario Bar Association Continuing Legal Education, Toronto, 1 May 2012).

⁶⁹ Law Reform Commission of Nova Scotia, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Halifax: Law Reform Commission of Nova Scotia, 1997).

⁷⁰ *Ibid* at 1.

⁷¹ *Ibid* at 59-62.

⁷² *Ibid* at 13.

business assets as non-matrimonial assets, and the *Matrimonial Property Act*'s treatment of pension income.⁷³ As mentioned, other provinces have moved to include common law relationships in their family property regime. Nova Scotia is one of the only provinces to specifically exclude business assets from a presumptive equal division – an exemption that is hard to rationalize in light of the overall purposes and intent of the regime. While pensions are considered matrimonial assets, the *Matrimonial Property Act* provides no guidance as to how they ought to be divided and is to some extent inconsistent with the relevant pension legislation.

Other areas of concern include division of debts, treatment of other property presumptively excluded from equal division (*e.g.*, gifts and inheritances; personal injury settlements; and accident and disability insurance benefits), the enforceability of domestic contracts, the treatment of pre-marital assets and finally, the interaction with succession rights. These issues are addressed in detail in the following sections.

It should be noted that the Commission received feedback on our Discussion Paper that some aspects of succession law may cause financial hardship on spouses, such as probate taxes on property inherited by one spouse from the other. While the Commission recognizes that the financial cost of probate on spouses after death is an important topic that requires consideration and potentially review, we are of the view that the issue of probate taxes is outside of the scope of this project.

There have been a number of important jurisprudential developments since the introduction of the *Matrimonial Property Act*. They include cases considering the definition of spouse: *Walsh v. Bona* and *M v. H*;⁷⁴ the definition of business assets: *Clarke v. Clarke*;⁷⁵ the inclusion of pension benefits earned before marriage as matrimonial assets: *Morash v. Morash*;⁷⁶ and debt acquired during the marriage: *Grant v. Grant*⁷⁷ and *Larue v. Larue*.⁷⁸ The *Act* should take account of the development of the law, where appropriate.

⁷³ *Never Trust a Statute Over 30?*, *supra* note 2.

⁷⁴ [1999] 2 SCR 3.

⁷⁵ [1990] 2 SCR 795, 73 DLR (4th) 1.

⁷⁶ 2004 NSCA 20, 221 NSR (2d) 115.

⁷⁷ 2001 NSSF 13, 192 NSR (2d) 302.

⁷⁸ 2001 NSSF 23, 195 NSR (2d) 336.

In February 2013, the Commission published two online surveys: one for the public and one for practitioners. In these anonymous surveys, the Commission asked respondents to indicate what issues they thought were most in need of reform with respect to Nova Scotia's matrimonial property regime and why. The Commission received 33 responses from the public and 22 responses from practitioners.

Among members of the public, issues of debt and division of pre-matrimonial assets emerged as the top two areas of concern. Some respondents were also concerned that their partners would be entitled to share in pre-matrimonial pension benefits. Respondents raised issues with respect to access to justice, including concerns over the cost and quality of their legal representation, frustration with the length of time and obstacles to reaching settlement, and the need for better public legal education.

Respondents to the public survey were largely in favour of including common law couples in Nova Scotia's matrimonial property regime. Only 12% were opposed. 36.4% felt that inclusion of these couples should be automatic, while the remaining 42.4% felt eligibility should be based on the presence of particular criteria including the presence of children, level of financial interdependence and duration of the relationship.

Legal practitioners responding to the Commission's online survey indicated that the most significant issues for reform were the exclusion of business assets from the definition of matrimonial assets, the inclusion of pre-matrimonial assets in a presumptively equal division of matrimonial assets, the division of debt and contingent liabilities and the inclusion of common law couples in a regime of equal sharing. Bankruptcy, pension division and unequal division of matrimonial assets were also identified as important issues – in that order. Legal practitioners were less likely than the public to be in favour of including common law couples in a regime of equal sharing.

The Commission convened an advisory group of experts in family property division. The group met through the winter and spring of 2014 to work through the various issues identified as reform priorities. The Commission convened a second advisory group of estate planning practitioners and members of the faculty of the Schulich School of Law, Dalhousie University, to consider issues that arise when matrimonial property is divided after the death of a spouse. The estate planning and succession group met during the early winter of 2015.

The Commission distributed a Discussion Paper on Division of Family Property as well as an online survey during the summer of 2016. The Commission also held 5 in-person consultation sessions around the Province. The Commission received 78 responses to the online survey and approximately 55 people attended our in-person consultations.

2.3. Family Property Reform Efforts Outside of Nova Scotia

Nova Scotia's *Matrimonial Property Act* is now significantly out-of-date by comparison with efforts in other jurisdictions to amend and modernize family property laws. In recent years the provinces of Alberta,⁷⁹ British Columbia and Ontario have conducted broad law reform projects which have included reform of family property laws. In 2004, Manitoba made significant amendments to its *Matrimonial Property Act*, now the *Family Property Act*⁸⁰ and in 1997, Saskatchewan updated its family property legislation.⁸¹

The new British Columbia *Family Law Act*⁸² came into force on March 18th, 2013. The *Act* introduced sweeping changes to British Columbia's family law regime, based on recommendations in the Attorney General's *White Paper on Family Relations Act Reform*.⁸³ Among other goals, such as placing the best interests of children first in regard to the adjudication of family law disputes, and addressing family violence, the *Family Law Act* modernizes and clarifies how property is divided upon relationship breakdown. The *Act* extends statutory division of family property rights to common law couples⁸⁴ and provides extensive guidance on pension division.⁸⁵

British Columbia's previous matrimonial property legislation – the *Family Relations Act* – was similar to Nova Scotia's *Matrimonial Property Act*. The White Paper and *Family Law Act* provide important resources for a review of the *Matrimonial Property Act*.

⁷⁹ In 2014, the Alberta Law Reform Institute published its Discussion Paper on valuation dates under the *Matrimonial Property Act*. See Alberta Law Reform Institute, *The Matrimonial Property Act: Valuation Date, Report for Discussion* (Edmonton, Alberta Law Reform Institute, November 2014).

⁸⁰ CCSM c F25.

⁸¹ *Family Property Act*, SS 1997, c F-6.3. Furthermore, in 2001, with SS 2001, c 51, common law couples were included within the definition of spouse and in 2012, the Act was amended to include provisions promoting collaborative law in the context of family property disputes (see SS 2012, c 24).

⁸² SBC 2011, c 25.

⁸³ British Columbia, Ministry of the Attorney General, Justice Services Branch, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (July 2010), online: <www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf> (the "White Paper").

⁸⁴ *Family Law Act*, 3(1)(b).

⁸⁵ *Family Law Act*, Part 6.

Family law reforms extending beyond review of matrimonial property legislation has also been undertaken in New Brunswick,⁸⁶ and Ontario.⁸⁷ In particular, these reforms are focusing on reforming family court processes in order to increase the efficiency and accessibility of family courts while at the same time developing a more collaborative practice of assisting families through relationship breakdown.

The reform projects in Ontario, British Columbia, and New Brunswick highlight the need to focus on early intervention and alternative dispute resolution in order to direct families in crisis, where appropriate, away from adversarial litigation.

The American Law Institute (the “ALI”) has made sweeping recommendations for family law reform in the United States in its 2002 report, “Principles of the Law of Family Dissolution”.⁸⁸ The ALI recommendations cover not only the division of property at relationship breakdown, but compensatory spousal payments, custody and child support, and common law (domestic) partners.

A number of law reform agencies outside of North America have examined the inclusion of common law couples in family law legislation. In 2007, the Law Commission for England and Wales made recommendations to provide rights for common law partners upon the breakdown of common law relationships.⁸⁹ In 2006, the Law Reform Commission of Ireland released its recommendations pertaining to the rights and duties of cohabitants.⁹⁰ And in 1992 the Scottish Law Commission recommended that cohabiting couples should have the right to make certain claims to each other’s property.⁹¹

⁸⁶ Hon Raymond J Gurette *et al*, *Report of the Access to Family Justice Task Force* (Fredericton: 23 January 2009) online: <<http://www.gnb.ca/0062/FamilyJustice/FinalReport-e.pdf>>.

⁸⁷ See Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity: Final Report* (Toronto: Law Commission of Ontario, 2013) online: <<http://lco-cdo.org/en/family-law-reform-final-report>>.

⁸⁸ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Philadelphia: American Law Institute, 2002).

⁸⁹ The Law Commission, *Cohabitation: the financial consequences of relationship breakdown* (London: The Law Commission, 2007), online: <http://lawcommission.justice.gov.uk/docs/lc307_Cohabitation.pdf>.

⁹⁰ The Law Reform Commission, *Report: Rights and Duties of Cohabitants* (Dublin: Law Reform Commission, 2006), online: <<http://www.lawreform.ie/fileupload/Reports/R822006cohabitants.pdf>>.

⁹¹ Scottish Law Commission, *Report on Family Law* (No 135) (Edinburgh: HMSO, 1992).

In 2006, Scotland introduced the *Family Law (Scotland) Act 2006*,⁹² which substantially adopted the recommendations of the Scottish Law Commission. The Act gives judges discretion to correct economic advantages and disadvantages between the parties by ordering a sum of money to be paid from the more advantaged to the less advantaged spouse, or to divide household goods acquired during cohabitation equally.⁹³

In 2009, the Australian *Family Law Act 1975* was amended in order to extend to *de facto* partners – that is, unmarried cohabitants – rights to the resolution of property and financial matters upon relationship breakdown equal to those provided to married spouses.⁹⁴

Australia has also seen law reform in its states and territories over the past several decades extending rights to non-conjugal relationships to apply for property and financial orders. The Australian Capital Territory and New South Wales extend rights to persons in some non-conjugal domestic relationships⁹⁵ and “close personal relationships”⁹⁶ upon relationship breakdown. In Tasmania and Victoria persons in non-conjugal relationships are entitled to register their relationships in order to bring themselves within the property sharing regime enjoyed by married couples - including rights relating to matrimonial property.⁹⁷

In this regard, relatively recent foreign legislative reform has taken a functional view of interdependence within relationships and unseated the conjugal relationship as the paradigmatic family form worthy of recognition in law.

On June 10th, 2013, the federal government passed the *Family Homes on Reserves and Matrimonial Interests or Rights Act*⁹⁸ in order to fill the legislative gap between the *Indian Act*⁹⁹ and provincial matrimonial property legislation. Pursuant to section 88 of the *Indian Act*

⁹² *Family Law (Scotland) Act 2006*, 2006, asp 2.

⁹³ *Ibid*, s 28.

⁹⁴ *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

⁹⁵ *Domestic Relationships Act 1994* (ACT).

⁹⁶ *Property (Relationships) Act 1984* (NSW).

⁹⁷ *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic).

⁹⁸ SC 2013, c 20.

⁹⁹ RSC 1985, c I-5.

provincial laws of general application apply on reserve except to the extent that they are inconsistent with the *Indian Act*. Real property on reserve is specifically governed by the *Indian Act*, and provincial legislation - including the *Matrimonial Property Act* - therefore does not apply. The *Indian Act*, however, does not provide a scheme of family property. Personal property on reserve such as bank accounts, cars, etc., is subject to provincial and territorial legislation of general application, subject to certain limitations in the *Indian Act*.¹⁰⁰

The provisional federal rules under the *Family Homes on Reserves and Matrimonial Interests or Rights Act* – applicable on reserves that have not developed their own matrimonial property law¹⁰¹ – came into force on December 16, 2014. The rules provide for the occupation and possession of the family home. As well, the *Act* provides for the valuation and division of interests in the family home and other matrimonial interests and rights on reserves both upon relationship breakdown and on death of one of the spouses or common law partners. Common law partners are included on the same terms as married spouses in the scheme of the *Act*. The *Act* allows the court to make emergency protection orders in cases of family violence,¹⁰² and exclusive possession orders where appropriate, based on a list of factors including best interests of the child and lack of suitable alternative housing on reserve.¹⁰³

We address the *Act* in greater detail in a later section. Federal and First Nations laws are not within our jurisdiction, but we consider the differences between the provisional rules and the *Matrimonial Property Act*.

2.4. Social and Economic Context of Family Property Reform

2.4.1. Families in Canada and Nova Scotia Since 1980

A number of societal changes have altered the face of separation and divorce in Nova Scotia. The *Matrimonial Property Act* was based on certain assumptions about the “normal” Nova Scotian

¹⁰⁰ *E.g., ibid*, s 89, exempting real and personal property on reserve from seizure, attachment, etc.

¹⁰¹ These include Pictou Landing (16 December 2014), Millbrook (1 December 2014), Bear River (16 December 2014), Paqtnkek Mi’Kmaq Nation (18 December 2014), and Sipekne’katik First Nation (25 September 2015). On April 30, 2016, Membertou Chief and Council passed the *Membertou Family Homes Law, 2016*, online: Maupeltu Ta’n Telsutekek, Membertou Governance <<http://maupeltutantsutekek.webs.com/Family%20Law/MembertouFamilyHomesLaw.pdf>>

¹⁰² Section 16.

¹⁰³ Section 20.

family. These include that the family is composed of an opposite-sex couple,¹⁰⁴ that the couple married earlier in life with few assets, that most assets would be acquired by the couple during the marriage, that this would be the first marriage for both spouses,¹⁰⁵ that children would be born of the marriage, and that the husband and wife would take on traditional gender roles, with the woman undertaking more work within the home and the man undertaking more work outside of the home.¹⁰⁶

But the picture of the “normal” family in Nova Scotia is changing. Overall in Nova Scotia, couples (both married and common law) without children rose from 46.3% of all census families in 2001 to 57.2% of all census families in 2016.¹⁰⁷ This is consistent with the trend across Canada that families with children have been on the decline since 2001.¹⁰⁸ Statistics Canada reports:

In 2001, there were more couples with children (43.6% of all census families) than couples without children (40.3%). In 2006, for the first time, there were slightly more couples without children than couples with children (42.7% and 41.4% of all census families, respectively). In 2011, this pattern was sustained, with the gap between couples with children (39.2% of census families) and couples without children (44.5%) growing larger.¹⁰⁹

¹⁰⁴ The Act defines spouse at s 2(g) as either of a man and woman who are married to each other.

¹⁰⁵ The inclusion of pre-matrimonial assets, for example, is based in part upon the assumption that neither member of the couple will have acquired much in the way of assets before coming into the marriage, as well as the assumption that neither spouse has previously divided property pursuant to a prior divorce or separation. See, for example, the comment of Legere Sers J at para 167 in *Verdun v Dorrance*, 2006 NSSC 305: “The *Matrimonial Property Act* has not specifically addressed the complexities of pensions...and the complexity of today's environment where second and third marriages are far more common and the issue whether previously acquired assets such as a portion of a pension ought to be included.”

¹⁰⁶ The Preamble to the Act recognizes that: “it is desirable to recognize that childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets.” Indeed, the primary reason for family property legislation is to recognize the gendered division of labour in society, whereby women are asked to take on more work within the home, disadvantaging them when it comes to acquiring property.

¹⁰⁷ Census Profile, 2016, *supra* note 4.

¹⁰⁸ Statistics Canada, *Portrait of Families and Living Arrangements in Canada: Families, households and marital status* (Ottawa: Ministry of Industry, 2012) at 9, online: <<http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.pdf>>.

¹⁰⁹ *Ibid.*

Married couples in general are not as prominent as they once were in Nova Scotia. Married couples made up 83.7% of census families in Nova Scotia in 1981, but only 67% of census families in 2016.¹¹⁰ Common law couples only accounted for 4.2% of census families in 1981, but represented 15.7% of census families in Nova Scotia in 2016.¹¹¹ The incidence of common law families, including common law families raising children, has been steadily growing in Nova Scotia since 1981.¹¹² Finally, while lone parent families made up 12.1% of all census families in Nova Scotia in 1981, the figure in 2016 is now 17.3%.¹¹³ In fact, the 2016 census figures indicate that Nova Scotia has the highest incidence of lone parent families of all the provinces in Canada.¹¹⁴

Legislative provision for registered domestic partnerships is having an effect – however slight – on the family form in Nova Scotia. Couples that would otherwise be considered “common law partners” are registering their unions and opting into the matrimonial property regime in Nova Scotia. In 2014, for example, 74 couples registered their domestic partnership with the Vital Statistics office.¹¹⁵ The most common age ranges for domestic partners were those between the ages of 25-29 and those between the ages of 45-55. For 32 of the 44 couples who registered their domestic partnerships in 2008, neither spouse had been married previous to registering their partnerships. In the other twelve couples, at least one spouse had been married previously and was either widowed or divorced. Registered partners were more likely to be opposite-sex couples, at 63.6%. Same-sex female relationships were the second most common form of registered domestic partnership at 25% and same-sex male couples were the least common at 11.4%.¹¹⁶

¹¹⁰ Census Profile, 2016, *supra* note 4.

¹¹¹ *Ibid.*

¹¹² Nova Scotia Community Counts, Demographics, Family Structure, Nova Scotia, online: <http://www.gov.ns.ca/finance/communitycounts/dataview.asp?gnum=pro9012&gnum2=pro9012&chartid=&whichacct=&year2=&mapid=&ptype=>ype=&range=1991%20to%202001&acctype=0&gname=&dcol=&group=&group1=&group2=&group3=&gview=3&table=table_d5&glevel=pro>.

¹¹³ Census Profiles, 2016, *supra* note 4.

¹¹⁴ The territories of Yukon, Northwest Territories and Nunavut have higher rates of lone parenthood. *Portrait of Families and Living Arrangements in Canada*, *supra* note 108 at 7, online: <<http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.pdf>>.

¹¹⁵ Correspondence from Sarah Galloway, Research and Statistical Officer Nova Scotia Vital Statistics (5 May 2015) [on file with author].

¹¹⁶ *Ibid.*

Changes are also occurring inside the married family. The age at which couples are entering marriage is increasing, meaning earlier assumptions about the amount of property and debt that couples bring into a marriage may no longer be as relevant. In 1980, the average age for a woman to marry was approximately 23 years old. For men the figure was approximately 25 years old.¹¹⁷ By 2008, it was 29.6 years old for women and 31 years old for men.¹¹⁸

Statistics show a significant number of blended or step-families as people are entering into second and third marriages or common law relationships. In 2001, 11% of marriages were not first time marriages; 10% were second marriages and 1% were third marriages.¹¹⁹ Results from the 2011 census show that in 2011, 12.6% of all census families in Canada were step-families.¹²⁰ As second and third marriages will in many cases be preceded by divorce, many of those spouses are entering marriage with pre-existing support obligations and previously-divided assets and debts. In 2008, the average age of divorced women at remarriage was 44.8 years and 48.4 years for men.¹²¹

Legally recognized same-sex marriage and greater acceptance of same-sex couples are increasing the prevalence of same-sex married families in Nova Scotia. The incidence of same-sex marriages has increased from 0.1% of the Canadian census couples in the 2006 census¹²² to 0.3% of census couples in 2016.¹²³ In 2016, there were 1760 same-sex married spouses in Nova Scotia,¹²⁴ representing 0.5% of all census married spouses in Nova Scotia in 2016.¹²⁵ The prevalence of

¹¹⁷ “Marital Status: Overview, 2011”, *supra* note 6 at 10.

¹¹⁸ *Ibid.*

¹¹⁹ Warren Clark and Susan Crompton, “Till death do us part? The risk of first and second marriage dissolution”, Canadian Social Trends, no 81, Statistics Canada, online: <<http://www.statcan.gc.ca/pub/11-008-x/2006001/pdf/9198-eng.pdf>>.

¹²⁰ *Portrait of Families and Living Arrangements in Canada*, *supra* note 108 at 11, online: <<http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.pdf>>.

¹²¹ “Marital Status: Overview, 2011”, *supra* note 6 at 10.

¹²² Same-sex marriage became legal between 2003 and 2005 across Canada.

¹²³ Families, Households and Marital Status Highlight Tables (2016), *supra* note 9.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

same-sex marriage is steadily growing in Canada in general,¹²⁶ and it is reasonable to assume that same-sex marriages will steadily increase in Nova Scotia, as well.¹²⁷ These changes indicate that the heteronormative language and assumptions of the *Matrimonial Property Act* are no longer appropriate.

Besides the growing prevalence of same-sex marriages, socio-economic changes are bringing into question some of the traditional gender roles that were more prominent in Nova Scotia in 1980, when the *Matrimonial Property Act* was introduced. There has been a significant change in women's social and economic position in Canadian society at large that is changing the shape of families in Nova Scotia. The total fertility rate in Canada has been declining steadily - from 3.36 children per woman in 1926 to 1.68 children per woman in 2008.¹²⁸ Women are also generally older before they have their first child. In the mid-1960s, the average age of a woman at the birth of her first child was 23.5 years old – by 2008 this number rose to 28.1 years old.¹²⁹ Having fewer children at older ages has both facilitated and been facilitated by women's increasing participation in the labour market. More women are working today than in previous years and they are holding more senior positions. One figure estimates that in 29% of opposite-sex couples in Canada in 2011, women made more than their male counterparts.¹³⁰

While these social and economic shifts in gender roles are significant, women remain more likely than men to end up in poverty, particularly after divorce. As LeBel J. highlighted in *Miglin v. Miglin*:

Though marriage relationships are, in general, becoming more egalitarian, there continues to be a disjunction between the principle of equality and the lived economic and personal reality of many married women, and the law needs to be able to recognize and to accommodate the situations where this disjunction exists.¹³¹

¹²⁶ *Portrait of Families and Living Arrangements in Canada*, supra note 108 at 7-8.

¹²⁷ *Ibid* at 8.

¹²⁸ Anne Milan, Leslie-Anne Keown & Covadonga Robles Urquijo, *Families, Living Arrangements and Unpaid Work* (Ottawa: Minister of Industry, 2011) at 13, online: <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11546-eng.pdf>>.

¹²⁹ *Ibid* at 14.

¹³⁰ Meg Luxton, *Changing Families, New Understandings* (Toronto: Vanier Institute of the Family, 2011) at 3, online: <http://vanierinstitute.ca/wp-content/uploads/2015/12/CFT_2011-06-00_EN.pdf>.

¹³¹ 2003 SCC 24, 1 SCR 303 at para 214.

Women still do not have pay equity with men and they continue to have a lower attachment to the labour market.¹³² They continue to undertake more work inside the home than men. In 2010, women in Canada spent on average 50.1 hours per week on child care while men reported only spending 24.4 hours per week on childcare.¹³³ Women also reported doing more household domestic work than men in 2010 – 13.8 hours a week versus 8.3 hours per week for men.¹³⁴ The participation of women in the labour market has increased over the past thirty years, but national statistics indicate that the average number of hours women spend per day on childcare, shopping and housework has remained fairly constant.¹³⁵ Law reform must be attendant to the lived economic and personal realities of married persons in the province.

2.4.2. Characteristics of Relationships at Separation and Divorce

Rates of both marriage and divorce have been declining in recent years in Canada. The marriage rate in Canada in 2008 was 4.4 marriages per 1,000 people - the lowest rate in a century.¹³⁶ Divorce rates peaked in Canada in the 1980s, and have been slowly declining since 1990.¹³⁷ The divorce rate is now 41% of all marriages, from a high of 42% in 2006.¹³⁸

¹³² Data from the 2016 census reveals that women in Canada working full-time earn 87 cents for every dollar that men working full time make. “Women and Paid Work”, *supra* note 7.

¹³³ Milan, Keown & Robles Urquijo, *supra* note 128 at 20.

¹³⁴ *Ibid* at 21.

¹³⁵ In 1986, women spent 2.0 hours per day on childcare and shopping, and 2.8 hours per day on housework. In the same year, men spent 1.1 hours per day on childcare and shopping, and 1.0 hour per day on housework. In 2005, women spent on average 1.9 hours per day on childcare and shopping and 2.4 hours per day on housework. In the same year, men spent 1.1 hours per day on childcare and shopping, and 1.4 hours per day on housework. See Lindsay, *supra* note 8.

¹³⁶ “Marital Status: Overview, 2011”, *supra* note 6 at 8. What is also noteworthy is that rates of marriage have also been shown to differ for visible minority Canadians. In the 2006 census more visible minority women (51%) were married than non-visible minority women (46%) and fewer lived common law (3.6% versus 12%) see Milan, Keown & Robles Urquijo, *supra* note 128 at 18-19. Living in a married union was also more common for recent immigrant women: see *ibid* at 19.

¹³⁷ Anne-Marie Ambert, *Divorce: Facts, Causes & Consequences* (Toronto: Vanier Institute of the Family, 2009) at 7.

¹³⁸ Mary Bess Kelly, *Divorce Cases in Civil Court, 2010/2011*, Juristat, (Ottawa: Minister of Industry, 2012), online: <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.pdf>>.

While marriages are more common than common law relationships, common law relationships are growing at a faster rate than both marriages and lone parent families. Between 2006 and 2011, the prevalence of common law couples in Canada increased 13.9% while married couples increased only 3.1% and lone parent families increased by 8%.¹³⁹

In Nova Scotia, the divorce rate has remained relatively steady since 1998 when it was 28.2%. In 2004 the divorce rate was 30.2%, and in 2008, 31.1%.¹⁴⁰ On average, this is slightly less than the overall divorce rate for Canada, of 37.9% in 2004 and 40.7% in 2008.¹⁴¹ These figures do not include separation of non-married cohabitants, or separation (but not divorce) of married couples.

The average length of a marriage in Canada at divorce in 2005 was 14.5 years - an increase of 1.7 years from a decade ago.¹⁴² The most common length of a marriage that ends in divorce in Canada in 2004 was 3 and 4 years - at a rate of 26.1 and 25.8 per 1000 marriages, respectively.¹⁴³ By 2008 these numbers rose slightly, with 30 divorces per 1000 marriages of three years' duration.¹⁴⁴ In 2008, 59% of divorce cases in Canada were of couples married for less than 15 years.¹⁴⁵ In 2005, the average age of a Canadian man at divorce was 44 years old, the average age for women was slightly lower, at 41.4 years of age.

Data from 2009 indicate that children are predominantly in the custody of their mothers, with less than 10% of divorce custody orders granting joint physical custody. This is in contrast to joint

¹³⁹ *Portrait of Families and Living Arrangements in Canada*, *supra* note 108.

¹⁴⁰ Ambert, *supra* note 137 at 4.

¹⁴¹ Kelly, *supra* note 138 at 8.

¹⁴² Ambert, *supra* note 137 at 9. In 2008 the divorce rate peaked at 3 years of marriage in 30 out of 1000 marriages in Canada: see Kelly, *ibid* at 8. For the year 2005, the average duration of a marriages at divorce in Nova Scotia was slightly higher than the Canadian average at 15.9 years: See Statistics Canada, Divorces, by mean and median duration of marriage, Canada, provinces and territories, online: <<http://www5.statcan.gc.ca/cansim/a05?lang=eng&id=1016520>>.

¹⁴³ Statistics Canada, *ibid*.

¹⁴⁴ Kelly, *ibid* at 8.

¹⁴⁵ *Ibid*.

legal custody which is becoming more common and accounts for 46.5% of all divorce custody orders.¹⁴⁶

Fewer new divorce cases are entering Nova Scotia courts. From 2009 to 2011 there was a 22% drop in the number of new divorce cases entering the system.¹⁴⁷ Kelly has speculated that new regulations for family proceedings that came into effect in July 2010 may have been the cause.¹⁴⁸ However, a decrease in divorce cases – while not so drastic as 22% - has been reported in five other jurisdictions in Canada as well.¹⁴⁹

Nova Scotia had a contested divorce rate of 19% in 2010/2011.¹⁵⁰ This is fairly average for those provinces and territories studied, with a high in British Columbia of 23% of all divorce cases filed and low of 10% of all divorce cases filed in Nunavut.¹⁵¹ Ontario and Alberta also had a contested divorce rate of 19% for the year 2010/2011.¹⁵² British Columbia's most recent round of family law reforms was to some extent aimed at reducing high rates of litigation. The *Family Law Act* focuses heavily on promoting settlement and alternative dispute resolution.

Only 2% of contested divorce cases reach the trial stage in Canada.¹⁵³ Contested cases in Nova Scotia take longer than the Canadian average to be resolved, however. In 2010/2011, 1355 of 5354 (25%) of total active divorce cases had been ongoing for more than 4 years.¹⁵⁴ The equivalent rate is 4% in Ontario; 15% in British Columbia; 21% in Yukon; 8% in the Northwest Territories; and 9% in Nunavut. Only Alberta had a comparable rate, at 26%.¹⁵⁵ These figures do not distinguish between maintenance, custody and matrimonial property disputes, but it is significant that a

¹⁴⁶ Ambert, *supra* note 137 at 11.

¹⁴⁷ Kelly, *supra* note 138 at 9.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* at 13.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid* at 13.

¹⁵⁴ *Ibid* at 21.

¹⁵⁵ *Ibid.*

disproportionate number of divorce cases are taking a long period of time to resolve in Nova Scotia, with attendant costs to divorcing spouses, families, and the justice system.

2.4.3. Emotional and Financial Consequences of Separation and Divorce

Besides the cost, time and potential emotional upset of litigation, divorce and separation can have important social, economic and personal consequences on families and society. Divorce and separation have been tied to increased rates of depression,¹⁵⁶ poverty,¹⁵⁷ and negative outcomes for children.¹⁵⁸

One of the most widely documented consequences of divorce and separation are the economic impacts on families. Data has consistently shown that persons who have experienced separation or divorce are more likely to declare bankruptcy than other Canadians. In 2007, the Office of the Superintendent of Bankruptcy reported that a greater proportion of bankrupt debtors had been separated or divorced relative to the general population:

Generally speaking, more separated/divorced people file bankruptcies (27.4%) than proposals (19.5%), while the proportion of common-law/married people is higher in the case of proposals (52.3%) than bankruptcies (38.8%). Compared with the Canadian population, divorced/separated people are overrepresented in the population of bankrupts and proposal filers. This observation could suggest a link between divorce and the financial difficulties that may result from it and that may lead to insolvency.¹⁵⁹

More recent statistics compiled by one firm of bankruptcy trustees in Ontario indicate that 28% of insolvent debtors were divorced or separated at the time of filing.¹⁶⁰ Eighteen percent of those

¹⁵⁶ Statistics Canada, “Study: Marital Breakdown and Subsequent Depression”, *The Daily* (22 May 2007), online: <<http://www.statcan.gc.ca/daily-quotidien/070522/dq070522a-eng.htm>>.

¹⁵⁷ Ambert, *supra* note 137 at 17.

¹⁵⁸ *Ibid* at 22.

¹⁵⁹ Office of the Superintendent of Bankruptcy, *An Overview of Canadian Insolvency Statistics to 2006*, at 5, online: <http://publications.gc.ca/collections/collection_2008/ic/Iu73-1-2006E.pdf>.

¹⁶⁰ J Douglas Hoyes and Ted Michalos, *Joe Debtor: Who Is He? Who Is at Risk?* (May 2013) at 3, online: <<http://hoyes.com/blog/wp-content/uploads/2013/05/Joe-Debtor-2013-Whos-At-Risk.pdf>>.

debtors cited relationship breakdown as the cause of their financial problems.¹⁶¹ In both cases this was an increase from previous years. The firm explained the impact of divorce on the debt cycle:

Faced with debt, couples begin to argue about money. When that stress leads to separation or divorce, the debt-cycle continues. Now separated, ex-spouses are faced with managing on one income rather than two. ...While adjusting to their new situation, recently separated people often rely on credit to pay their bills. Combine this with the potential legal costs associated with a marital breakdown and debts grow even larger. It is unfortunate, but divorce and bankruptcy often go hand in hand as a result of this debt-divorce-debt cycle.¹⁶²

In this context, it is important to keep in mind that bankruptcy and insolvency rates are higher in Nova Scotia than the Canadian average.¹⁶³

Gender, age and family status also have a role to play in the financial wellbeing of separated and divorced persons. Women are more likely than men to suffer adverse financial effects of divorce and separation due to lower labour market attachment, lower overall earnings and earning potential and a greater likelihood of being the primary caregiver of children.¹⁶⁴

In Canada, statistics from 2011 indicate that 70% of children of divorce lived with their mothers as their primary residence while 15% of children were with their fathers.¹⁶⁵ In 2006, Statistics

¹⁶¹ *Ibid* at 12.

¹⁶² *Ibid*.

¹⁶³ Office of the Superintendent of Bankruptcy, *Annual Consumer Insolvency Rates by Province and Economic Region, 2010-2014*, online: <<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html>>. Statistics for 2014 reveal that Canadian bankruptcy rates were 2.3/per 1000 of the population. In Nova Scotia in 2014 the bankruptcy rate was 5/per 1000 of the population.

¹⁶⁴ Sebastien LaRochelle-Côté, John Myles, and Garnet Picot, *Income Replacement Rates Among Canadian Seniors: The Effect of Widowhood and Divorce* (Ottawa: Minister of Industry, 2012) at 7, online: <<http://www.statcan.gc.ca/pub/11f0019m/11f0019m2012343-eng.pdf><http://www.statcan.gc.ca/pub/11f0019m/11f0019m2012343-eng.htm>>.

¹⁶⁵ Statistics Canada, "Distribution of separated or divorced parents, by primary residence of their children, Canada 2011", 2011 General Social Survey: Overview of Families in Canada – Selected Tables on Families in Canada, Catalogue No 89-650-X (Ottawa: Ministry of Industry, 2012), online: <<http://www.statcan.gc.ca/pub/89-650-x/89-650-x2012001-eng.pdf>>.

Canada reported that 50% of female lone parents were divorced or separated.¹⁶⁶ Lone mother households are among the most common family forms to be living on a low income in Canada.¹⁶⁷

Age plays an important part in the financial well-being of women leaving relationships. One study found that after divorce or separation during their retirement years, women were less likely to replace the income they had during their pre-retirement years in the marriage. Women in the top income quintile who divorced or separated in their later years saw a reduction in their income of 20%.¹⁶⁸ Men, on the other hand, had little to no negative impact on their income replacement rate.¹⁶⁹ The reason was that women in the top quintile had less access to investments, capital gains, and private pensions than their male counterparts.¹⁷⁰ Differences between men and women in lower income quintiles were off-set by the provision of public pension income such as Old Age Security, Guaranteed Income Supplement and Canada Pension Plan.¹⁷¹

Financial hardships suffered by spouses upon divorce and separation have a detrimental effect on children's well-being. This is particularly so as women are often primary caregivers and they are often hardest hit by divorce. One study conducted by Statistics Canada in 1999 showed that for a two-parent family near the low income cut off,¹⁷² separation increased the likelihood of the child

¹⁶⁶ Milan, Keown & Robles Urquijo, *supra* note 128 at 12. Statistics from 2016 indicate that 81.3% of children aged 0 to 14 in lone parent families were living with their mother and 18.7% where living with their father. See Statistics Canada, "Portrait of Children's Family Life in Canada in 2016", online: <<http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016006/98-200-x2016006-eng.cfm>>.

¹⁶⁷ The only other families that are more likely to be living on a low income are couple families with children with no earner and couples with no earner. See Nathan Battams, Nora Spinks and Roger Sauvé, *Current State of Canadian Family Finances: 2013-2014 Report* (Ottawa: Vanier Institute of the Family, 2014), Appendix B at 30, online: Vanier Institute for the Family <http://vanierinstitute.ca/wp-content/uploads/2015/11/FFIN_2014-06-09_Report-2013-2014.pdf>.

¹⁶⁸ LaRochelle-Côté, Myles & Picot, *supra* note 164 at 7.

¹⁶⁹ *Ibid* at 6.

¹⁷⁰ *Ibid* at 14.

¹⁷¹ *Ibid* at 32.

¹⁷² The Low Income Cut Off is otherwise known as the "unofficial poverty line" calculated from data compiled by Statistics Canada and indexed to the Consumer Price Index.

entering low income eleven-fold.¹⁷³ It has been well documented that poverty can have a negative effect on child health, well-being and development.¹⁷⁴

Reform of matrimonial property law must be sensitive to the financial and gendered realities of separating spouses, such as the possibility that spouses may not be equally able to finance settlements. Division of debt and contingent liabilities such as future income tax should be carefully considered when making recommendations for reform.¹⁷⁵ The legislation's treatment of major assets such as pensions and business assets must be designed with financial realities in mind, so as to fairly provide for the economic wellbeing of both partners. Unequal access to legal counsel is relevant with regard to the processes required to reach settlements or obtain a court order. Whether and how the legislation promotes alternative dispute resolution is also relevant, since ADR or consensual decision making is important not just for its ability to mitigate the costs of separation and divorce, but also emotional strain and interpersonal conflict.¹⁷⁶

2.5. Access to Justice and Family Property Reform

In September 2008, the Chief Justice of Canada, Beverley McLachlin, convened the first meeting of the Action Committee on Access to Justice in Civil and Family Matters, composed of members of the judiciary, bar, government and other justice leaders, to address the issue of access to justice in Canada.

Access to justice has been described by Supreme Court of Canada Justice Thomas Cromwell, Chair of the Action Committee, in the following terms:

¹⁷³ G Picot, M Zybblock and W Pyper, "Why Do Children Move Into and Out of Low Income: Changing Labour Market Conditions or Marriage and Divorce?" (Statistics Canada, April 1999) at 20, online: <<http://www.statcan.gc.ca/pub/11f0019m/11f0019m1999132-eng.pdf>>.

¹⁷⁴ See for example, Dennis Raphael, "The Health of Canada's Children. Part III: Public Policy and the Social Determinants of Children's Health" (2010) 15.3 Paediatr Child Health 143; Stefania Maggi et al, "The Social Determinants of Early Child Development: An Overview" (2010) 46 J of Ped and Child Health 627.

¹⁷⁵ Contingent liabilities are obligations that will come due at a future point, whose values may not be known at trial or negotiation. Assigning this debt to be divided between the spouses on an "if and when" basis, in cases where values are not available at trial, raises some serious issues for concern. Such an order undermines the principle of finality in making matrimonial property awards and may hinder settlement. It also fails to provide for each party a clear picture of what their financial obligations may be going forward.

¹⁷⁶ *Meaningful Change for Family Justice*, *supra* note 12.

I think we can agree that, in general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters. I emphasize that I do not have a “court-centric” view of what this knowledge and these resources and services include. They include a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services, including those available through the courts. I do not view Access to Justice, and I suggest we should not view it, as simply access to litigation or even simply as access to lawyers, judges and courts, although these are, of course, aspects of what Access to Justice requires.¹⁷⁷

In April 2013 the Family Justice Working Group of the Action Committee released a Final Report on access to justice in the family law system entitled, *Meaningful Change for Family Justice: Beyond Wise Words*.¹⁷⁸ Among its recommendations were the promotion of and greater access to consensual dispute resolution (CDR) processes, providing greater public legal education and greater funding for legal aid as well as all family justice programs and services.¹⁷⁹

In June 2014 the Nova Scotia Department of Justice announced the creation of the Nova Scotia Access to Justice Co-ordinating Committee. The 6-member Committee, headed by the Chief Justice of Nova Scotia and the Minister of Justice, will take action towards making the justice system more efficient, less costly and easier for persons to navigate.¹⁸⁰

Lack of access to justice - and in particular, access to legal services for Nova Scotians who don't meet legal aid eligibility criteria - has been noted as a particular challenge for the legal system. In 2009 a Nova Scotia study reported that,

¹⁷⁷ Thomas A Cromwell, “Access to Justice: Towards a Collaborative and Strategic Approach” (2012) 63 UNBLJ 38 at 39.

¹⁷⁸ *Meaningful Change for Family Justice*, *supra* note 12.

¹⁷⁹ *Ibid.*

¹⁸⁰ Department of Justice, “Access Committee to Improve Justice System” (12 June 2014), online: Department of Justice <<http://novascotia.ca/news/release/?id=20140612005>>.

At the time of writing the Committee comprised the Chief Justice of Nova Scotia, the Nova Scotia Minister of Justice, President of the Nova Scotia Barristers' Society, the President of the Canadian Bar Association - Nova Scotia Branch; Dean of the Schulich School of Law at Dalhousie University, the Executive Director of the Nova Scotia Legal Aid Commission, and a Public Representative. See Nova Scotia Barristers' Society, News Release, “Access Committee to improve justice system”, online: NSBS <<http://nsbs.org/news/2014/06/access-committee-improve-justice-system>>.

Many community workers who attended our round-tables had clients who either qualified for legal aid or barely missed the income cut-offs. The working poor and even the middle class are unable to pay for legal fees, but do not qualify for legal aid: they represent the access to justice challenge in Nova Scotia today.¹⁸¹

Lack of access to affordable legal services has also contributed to a rise in self-represented litigants in the justice system. Research has noted the growing prevalence of self-represented litigants as a result in large part of the rising costs of legal services and dissatisfaction with the quality of representation by legal counsel. Lack of access to legal counsel and the unwillingness of legal counsel to settle as opposed to litigating their case were two areas of reported dissatisfaction.¹⁸²

A lack of access to legal services can mean that some litigants are unable to effectively navigate the legal system. Self-represented litigants who cannot afford legal services may also find that they are not able to take advantage of consensual or alternative dispute resolution services.

For the Action Committee on Access to Justice in Civil and Family Matters, alternative dispute resolution figures centrally in addressing the access to justice challenge in Canada:

Historically, access to justice has been a concept that centered on the formal justice system (courts, tribunals, lawyers and judges) and its procedures. The formal system is, of course, important. But a more expansive, user centered vision of an accessible civil and family justice system is required. We need a system that provides the necessary institutions, knowledge, resources and services to avoid, manage and resolve civil and family legal problems and disputes. That system must be able to do so in ways that are as timely, efficient, effective, proportional and just as possible:

- by preventing disputes and by early management of legal issues;
- through negotiation and informal dispute resolution services; and
- where necessary, through formal dispute resolution by tribunals and courts.¹⁸³

¹⁸¹ Emma Halpern, Hilary Kennan, Nasha Nijhawan, *Pro Bono in Nova Scotia: Current Practices and Future Opportunities* (Halifax: Law Foundation of Nova Scotia, 2009) at 20, online: Nova Scotia Barristers Society <<https://nsbs.org/sites/default/files/ftp/NovaScotiaProBonoStudy.pdf>>.

¹⁸² See Macfarlane, *supra* note 14 at 38-46.

¹⁸³ Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 2, online: Canadian Forum on Civil Justice <http://www.cfcj-fcj.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.

Consensual or alternative dispute resolution (ADR) services can be understood as encompassing a range of processes for resolving disputes out of court - including most prominently collaborative lawyering, mediation, arbitration, and med/arb. ADR is hailed by many as a way to avoid the time, cost and emotional strain of litigation.

However, mediation is generally considered inappropriate in situations where pre-existing power differences may give rise to coercion and intimidation. Despite the emphasis on alternative dispute resolution processes in the context of family disputes, over the past several decades awareness has emerged as to the dangers of mediation in the context of family violence.¹⁸⁴ As noted by the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, “mandatory CDR could put vulnerable spouses at risk, and that that goal of encouraging out-of-court resolution by agreement cannot be implemented at the expense of the goals of ensuring safety, security and well-being and reaching fair agreements.”¹⁸⁵

Some have argued for the benefits of mediation in some situations even where domestic violence is present, but they insist that these cases must be carefully screened. Only in those cases where it is determined that a safe and fair mediation process could proceed should mediation be attempted.¹⁸⁶ While the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters recommended a requirement that all parties to a contested family matter participate in one session of consensual decision making, the working group recommended that appropriate safeguards should be in place for cases involving family violence, including ongoing screening for violence and the ability of dispute resolution professionals to exempt a family from mediation without having to disclose why.¹⁸⁷

A similar focus on promoting ADR was recommended by the Canadian Bar Association, in its summary report, *Reaching Equal Justice*. The Association recommended that courts should be “re-centered” to provide triage and ADR services:

¹⁸⁴ Trina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 Yale LJ 1545; Pam Rubin, “A community of one's own? When women speak to power about restorative justice” in ed James Ptacek, *Restorative Justice and Violence Against Women*, (New York: Oxford University Press, 2010).

¹⁸⁵ *Meaningful Change for Family Justice*, *supra* note 12 at 34-35.

¹⁸⁶ Lene Madsen, “A Fine Balance: Domestic Violence, Screening and Family Mediation” (2012) 30 CFLQ 343.

¹⁸⁷ *Meaningful Change for Family Justice*, *supra* note 12 at 34-35.

Re-centred courts will provide tailored public dispute resolution services with effective internal and external triage and referral processes and will employ a wide range of quasi-judicial officers to assist litigants to achieve just and timely outcomes. ...

Judges must be ready to integrate new functions and approaches, potentially including active case management, judicial dispute resolution, specialization, court simplification and active adjudication models. Many Canadian courts have already taken steps in these directions and should be supported in these important reform efforts.¹⁸⁸

Broad-based recommendations focusing on increased use of ADR in family law matters have been made in New Brunswick¹⁸⁹ and Ontario.¹⁹⁰ In Ontario, the Ministry of the Attorney General introduced four pillars of reform of the family justice system, including access to ADR:

- providing more information to families up front about the steps they need to take and the impact on children when relationships break down
- through an intake and triage approach, identifying cases which are appropriate for mediation and other means of alternative dispute resolution, as well as cases which require immediate judicial attention so that those cases receive expedited access to the courts
- improving access to legal advice as well as less adversarial means of resolving issues
- streamlining and simplifying the steps involved for those cases that must go to court.¹⁹¹

¹⁸⁸ Canadian Bar Association, Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (Summary Report) (Ottawa: CBA, 2013) online: <http://www.cba.org/CBA/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> at 22-23.

¹⁸⁹ See Hon Raymond J Gurette *et al*, *Report of the Access to Family Justice Task Force* (Fredericton: 23 January 2009) online: <<http://leg-horizon.gnb.ca/e-repository/monographs/30000000046807/30000000046807.pdf>>.

¹⁹⁰ See Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity: Final Report* (Toronto: Law Commission of Ontario, 2013) online: <<http://lco-cdo.org/en/family-law-reform-final-report>>.

¹⁹¹ Ontario, Ministry of the Attorney General, Court Services Division, *Annual Report: 2010-2011*, at 42, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_10/Court_Services_Annual_Report_FULL_EN.pdf>.

The Law Commission of Ontario (the “LCO”) has addressed a number of concerns regarding access to ADR in the context of family law disputes. In particular, the LCO pointed out that low income family disputants and self-represented litigants may have less access to effective alternative dispute resolution processes.¹⁹² Private mediation, arbitration and med/arb processes may be faster, more predictable and more confidential than court-provided ADR services, but they can be very costly. The LCO’s Report concludes that there must be greater education around ADR and more resources provided for these services to make them accessible. As well, there must be proper screening for domestic violence cases, and measures to ensure that in general, participants do not feel coerced into mediating.¹⁹³

In 1999, the Nova Scotia and federal governments partially unified family courts by creating a Supreme Court (Family Division) in Halifax Regional Municipality and Cape Breton. Outside these two areas, two levels of courts deal with family law matters: the Supreme Court for divorce and property, and the Family Court for custody, access, child and spousal support for non-divorcing spouses, common law partners and unmarried parents (as well as all child protection matters). As a unified court, the Family Division can hear every kind of family law matter. Family Division also provides ADR services for maintenance and custody disputes that are not available at Supreme Court (outside the unified areas) or provincial Family Court.¹⁹⁴

The lack of ADR services in areas outside the Halifax Regional Municipality and Cape Breton has created a two-tier system in Nova Scotia - with more services and more expedient resolution of cases at Family Division.¹⁹⁵ Conciliation, sliding scale mediation, supervised access and/or exchange programs, duty counsel, as well as on-site Family Law Information Centres are not available in the districts.¹⁹⁶ The disparity may be easing: in September 2014, the Department of Justice announced that family court officers would provide group information sessions, assistance with completing applications and forms and determining the appropriate services, conflict assessment and help in the settlement process.¹⁹⁷

¹⁹² *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, *supra* note 190 at 32.

¹⁹³ *Ibid* at 32-33.

¹⁹⁴ NS Reg 140/2014. The October 2014 amendments to the *Family Court Rules* provide for court based ADR (ie., conciliation by a court officer), conflict assessment and settlement conferencing in Family Court.

¹⁹⁵ See for example, Tammy Mackenzie, “Partial Unified Family Court Rollout Creates Two-Tier System” *The Lawyer’s Weekly* (18 February 2011) at 11.

¹⁹⁶ *Ibid*.

¹⁹⁷ Department of Justice, News Release, “Family Court Services Expanded for All Nova Scotians” (23

Neither the Family Division nor the Supreme Court outside the unified areas provide access to ADR services, other than judicial settlement conferences, for resolving matrimonial property disputes where the litigants do not meet legal aid eligibility criteria.

Both represented and self-represented parties need to be aware of ADR services, especially conciliation and arbitration, in order to take advantage of them. Plain language legal information must be provided to parties - especially self-represented parties - to give them the tools and information to resolve disputes out of court and to decide when to use the services of the court. The Government of Nova Scotia provides a great deal of information through the Family Law Nova Scotia website and the work of the Family Law Information Centers. Information is also available through the Legal Information Society Nova Scotia, and others working to promote public legal education in Nova Scotia. In this report we make a number of recommendations intended to improve public legal education in the context of family property disputes in particular.

Recommendation:

The Government of Nova Scotia should develop and disseminate public legal education materials and programs about the rights and responsibilities of spouses and partners in the new family property regime.

Legislation has a role to play as well. Collaboration and settlement can be promoted by the language of legislation, and laws may be structured to reduce the need for litigation to resolve uncertainty. In its report, the Family Justice Working Group recommended that “substantive family laws be simpler and offer more guidance by way of rules and presumptions, where appropriate.”¹⁹⁸ On this account, greater certainty and simplicity promotes settlement, and helps to prevent costly court hearings. The Working Group also highlighted the importance of language and values contained in family law legislation:

Our family law statutes also have to pay more attention to language and values consistent with the approaches to family dispute resolution described above. Statutes should not presume that disputes will end up in courts in front of judges to be decided in hearings and trials. Our family law statutes should emphasize agreements and methods of reaching agreements. Statutes should encourage consensual dispute resolution. Court hearings and

September 2014), online: Department of Justice <<http://novascotia.ca/news/release/?id=20140923006>>.

¹⁹⁸ *Meaningful Change for Family Justice*, *supra* note 12 at 59.

trials should be downplayed and treated as the residual “last resort” methods of dispute resolution that they are. The concepts and language of substantive family law provisions should reflect a less adversarial, more consensual approach.¹⁹⁹

In this report we make a number of recommendations to simplify the law and increase certainty to resolve family law disputes. We also make recommendations with respect to language and terminology that are intended to promote consensual dispute resolution as the norm in family property proceedings.

ADR promotion and awareness-raising are only one prong of a strategy to promote greater consensual dispute resolution. The Action Committee on Access to Justice in Civil and Family Matters has pointed to the need for a culture change in guiding an approach to reform and in promoting the use of ADR services.²⁰⁰

The Nova Scotia Family Law Practice Standards, approved by the Nova Scotia Barristers’ Society Council in 2011, require that, “A lawyer must be knowledgeable about dispute resolution options relating to family law matters to a degree sufficient to advise the client of their characteristics, availability and appropriateness of each for a particular client.”²⁰¹

Similarly, the *Divorce Act* provides that:

9(2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

Saskatchewan’s *Family Property Act*²⁰² was amended in 2012 to require counsel not only to be knowledgeable about dispute resolution options but to discuss these options with the client. The provision also requires a lawyer to sign a certificate stating that he or she has complied with this obligation and present it to the court:

¹⁹⁹ *Ibid* at 56.

²⁰⁰ *A Roadmap for Change*, *supra* note 183.

²⁰¹ Lawyers' Insurance Association of Nova Scotia, *Professional Standards (Family Law)*, online: <<http://www.lians.ca/documents/2011%2003%2028%20Current%20Family%20Standards.pdf>>.

²⁰² *The Family Property Act*, SS 1997, c F-6.3.

Obligations of lawyer

44.1(1) It is the duty of every lawyer who undertakes to act on behalf of a spouse in an application pursuant to this Act to:

- (a) discuss with the spouse the advisability of using alternative methods to resolve the matters that are the subject of the application; and
- (b) inform the spouse of the collaborative law services and mediation services known to him or her that might be able to assist the spouses in resolving those matters.

(2) Every application presented to the court by a lawyer pursuant to this Act is to contain a statement signed by the lawyer certifying that he or she has complied with subsection (1).

We recommend that a similar obligation should be included in Nova Scotia's family property legislation. This will not only signal a commitment to consensual decision making but also assist in raising awareness about alternative forms of dispute resolution.

We would not require counsel to raise and discuss available ADR options in every case, however. There are circumstances where ADR will clearly not be appropriate, such as in situations of domestic violence. The client should not be put to the expense of having to meet with the lawyer to discuss ADR options in these circumstances.

Recommendations:

New family property legislation should require legal counsel acting for a spouse or partner who is party to an application pursuant to the legislation, where appropriate, to:

- (a) discuss with the spouse the advisability of using alternative methods to resolve the matters that are the subject of the application; and
- (b) inform the spouse of the collaborative law services and mediation services known to him or her that might be able to assist the spouses in resolving those matters.

Finally, we point out that the promotion of appropriate ADR in the context of matrimonial property disputes requires not just awareness-raising initiatives but the allocation of public resources, particularly in areas of rural Nova Scotia where there is no unified family court. Proper

funding of alternative dispute resolution services is a social justice concern. Most low and middle-income persons in Nova Scotia are not able to hire private mediators or arbitrators. As a consequence, Nova Scotians may have no alternative but to use adversarial court processes to resolve disputes, or abandon their claims.

Increased funding and support for alternative dispute resolution services, as well as for legal aid, *pro bono* services and other services promoting access to legal advice, representation and information are all necessary for ensuring access to justice for Nova Scotians. Promoting the use of alternatives to court requires both legislative and administrative reforms. This will require investment of public funds, but there is evidence that investing in alternatives to court actually saves money especially in terms of the reduction in the number of hearing days.²⁰³

Recommendation:

The Government of Nova Scotia should provide funding and support for greater access to justice for Nova Scotians, including greater access to legal advice and free or subsidized consensual dispute resolution of family property matters where appropriate, for persons who do not currently qualify for legal aid and cannot otherwise afford these services.

²⁰³ Canada, Department of Justice, *DR Fund Evaluation: Overview of the Return on Investment from the DR Fund as of March 2004* (Ottawa: Department of Justice, 7 January 2015), online: <<http://www.justice.gc.ca/eng/abt-apd/dprs-sprd/eval/peval-evalp.html>>.

3. GENERAL ISSUES

3.1. Model of Property Division

Nova Scotia's matrimonial property regime is a deferred sharing regime. Upon marriage spouses continue to hold property separately, in their own names, until an order for division is made.²⁰⁴ In a deferred sharing regime, unless the legislation specifically provides otherwise,²⁰⁵ spouses do not have an interest in the other spouse's property by virtue of the marriage alone. This can be contrasted to a "community of property" regime, where each spouse is automatically deemed to have an interest in the property of the other spouse on marriage.²⁰⁶

At the broadest level, deferred sharing of family property regimes tend to fall on a spectrum between a "universal" approach and an "economic partnership" regime. The "universal" model sees the institution of marriage as a sufficient basis for a presumptive equal division of family assets at separation or divorce, regardless of nominal ownership.²⁰⁷ On this account, marriage gives rise to a level of personal and economic interdependence such that all property brought into or acquired during the marriage ought to be presumptively shared on divorce, death or separation, subject to definite, limited exclusions - e.g., for gifts and inheritances given by a third party to one spouse only. This model is also referred to as a "hotchpotch"²⁰⁸ or "integrated" model.²⁰⁹ Nova Scotia's *Matrimonial Property Act* falls closer to the "universal" end of the spectrum, although Nova Scotia is one of the only jurisdictions in Canada to exclude business assets from a presumption of equal sharing.

²⁰⁴ See for example, *Maroukis v Maroukis*, [1984] 2 SCR 137, 12 DLR (4th) 321.

²⁰⁵ In Newfoundland and Labrador, for example, the *Family Law Act*, RSNL 1990, c F-2, s 8(1) provides that regardless of title, "each spouse has a 1/2 interest in the matrimonial home owned by either or both spouses, and has the same right of use, possession and management of the matrimonial home as the other spouse has." These rights vest on marriage and do not require an order for division of property or a separation agreement.

²⁰⁶ For a discussion see *Quebec (Attorney General) v A*, 2013 SCC 5, 1 SCR 61 at paras 52-59.

²⁰⁷ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Proposed Final Draft Part I (14 February 1997) (Philadelphia: ALI, 1997) at 88.

²⁰⁸ *Ibid.*

²⁰⁹ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 26.

The “economic partnership” model of property division shares only the property, or value of deemed matrimonial property acquired during the marriage. Other property is presumptively excluded, but the increased (or decreased) value of excluded or non-matrimonial assets at separation or divorce may be shared. In an economic partnership regime pre-matrimonial property is usually considered excluded, or non-matrimonial, along with inheritances, gifts and other classes of property.²¹⁰ Property tends to be characterized in terms of when it was acquired, rather than how it was used.

In practice, the matrimonial or family property regimes of the provinces and territories in Canada are all hybrids, integrating to some extent the principles of universal and economic partnership regimes. Nova Scotia’s *Matrimonial Property Act* includes pre-matrimonial property in a presumptive equal division, and inherited and gifted property used for a family purpose is considered to be a matrimonial asset. On the other hand, the *Matrimonial Property Act* excludes certain categories of property, such as business assets, from a presumptively equal division of assets even if these were acquired during the marriage.

Reform of the *Matrimonial Property Act* does not involve deciding between one model or another; as indicated, every jurisdiction in Canada adopts elements from both models. Conceivably a reformed *Matrimonial Property Act* could continue to include pre-matrimonial property in the pool of matrimonial assets, but significantly tighten the threshold for an unequal division, and/or the factors the court may consider in making such an order. We address these as separate issues in this report. But it is worth identifying at this stage the conceptual underpinnings of each general model, for purpose of grounding the discussion of various specific reform issues in later sections.

3.1.1. Manner of dividing property

Matrimonial property legislation may also be distinguished based on how it effects a distribution of property: either by division of property or by an equalization payment. Manitoba, Ontario, Prince Edward Island, Quebec, Northwest Territories and Nunavut are equalization jurisdictions, while Nova Scotia, British Columbia, Saskatchewan, Alberta, New Brunswick, Newfoundland and Labrador and Yukon are division of property jurisdictions. Equalization regimes tend to be linked to an economic partnership approach to dividing property, while division of property regimes may occur both in regimes closer to the universal end of the spectrum (e.g., Nova Scotia, Newfoundland and New Brunswick) and where a more economic partnership approach is adopted (e.g., British Columbia and Alberta).

²¹⁰ See, for example, Alberta, *Matrimonial Property Act*, RSA 2000, c M-8, s 7(3).

The equalization model has been referred to as a “debtor-creditor regime”. That is, rather than dividing family property, it creates a debt on behalf of the owner or titled spouse to the non-owner or non-titled spouse for half the net value of property acquired during marriage.²¹¹ In Ontario, for example, all assets owned by both or either spouse are valued and the lower value of assets of one spouse is deducted from the higher value of assets of the other. The spouse with the higher value of assets is then obliged to make a payment of money to the other spouse, so as to bring the spouses to an equal position with respect to value of family property.²¹² The equalization payment is a debt owed by one spouse to the other. Proprietary interests may be granted only to ensure that this payment is actually made.

In division of property regimes, such as Nova Scotia’s *Matrimonial Property Act*, while spouses may be awarded an equalization payment to effect an equal division of matrimonial assets, they are *prima facie* entitled to an interest in the property to be divided.

The practical differences between the two models were highlighted in the Supreme Court of Canada’s decision in *Schreyer v. Schreyer*.²¹³ The issue was whether an equalization payment, ordered to be made before the insolvent spouse declared bankruptcy, survived the discharge from bankruptcy. In finding that the equalization debt did not survive bankruptcy the court explained the distinction between equalization and division of property regimes:

[15] The equalization model involves a valuation of the family assets and an accounting. The value of the assets is then divided between the spouses, usually in equal parts, although family courts have a limited discretion to order an unequal division. The valuation and the division give rise to a debtor-creditor relationship in the sense that the creditor spouse obtains a monetary claim against the debtor spouse. But the assets themselves are not divided. Each spouse retains ownership of his or her own property both before and after the breakdown of the marriage. Neither acquires a proprietary or beneficial interest in the other’s assets. Assets are transferred only at the remedial stage, as agreed by the parties or as ordered by the family court in exercising its discretion, as a form of payment or execution of the judgment. The division of property schemes, on the other hand, give rise to a proprietary or beneficial interest in the assets themselves, not just in their value.²¹⁴

²¹¹ James G MacLeod & Alfred A Mamo, *Matrimonial Property Law in Canada*, loose-leaf (consulted on 03 September 2014), (Markham: Carswell, 1988) at PEI-2.

²¹² *Family Law Act*, RSO 1990, c F.3, s 5.

²¹³ 2011 SCC 35, 2 SCR 605.

²¹⁴ *Ibid* at para 15 [citations omitted].

An equalization payment is in the nature of a debt, then, which the court found was discharged pursuant to the provisions of the *Bankruptcy and Insolvency Act*. The choice of model for effecting a division has important consequences when thinking about the intersection of bankruptcy and matrimonial property law. A division of property model offers better protection against insolvency to the extent that the presumptive entitlement is an interest in property. In an equalization context, the spouse must apply for a property interest by way of the court's remedial discretion.

On the other hand, equalization effects a simpler division in some ways. Sharing the value of a business asset, for example, will generally be simpler than dealing with a newly-arisen half interest of the spouse.

Nevertheless, given the clarity and familiarity of the current regime for effecting a matrimonial property division, along with the benefits to spouses of insolvents noted by the Supreme Court in *Schreyer v. Schreyer*, we recommend that family property law should continue to reflect a division of property model, and not an equalization regime. Where appropriate, the court will have discretion to order an equalization payment rather than an interest in property.

Recommendation:

New family property legislation should continue to provide for a division of property model, and not an equalization regime.

3.2. Principles Underlying the Act

The *Matrimonial Property Act* is one of only a few statutes in Nova Scotia that commences with a preamble. The preamble states:

WHEREAS it is desirable to encourage and strengthen the role of the family in society;

AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;

AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;

AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;

AND WHEREAS it is desirable to recognize that childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets:

In its 1997 Report, this Commission recommended that the preamble to the *Matrimonial Property Act* should be reformed. The Commission noted that “strengthening the role of the family in society” was not necessarily an appropriate goal for the law governing the division of property upon relationship breakdown.²¹⁵ The Commission commented,

... [A] law providing “default rules” regarding the division of property where the parties have not privately agreed to a division is not a law which promotes the family or marriage or any particular form of relationship. Rather it is a law designed primarily to provide for an orderly and equitable settlement of the economic affairs of persons who have been parties to a domestic relationship which involves economic interdependence.²¹⁶

We agree that the *Act* should not identify “strengthening the role of the family in society” as a guiding principle of matrimonial property law.

The 1997 Report concluded that the Preamble to the *Act* should continue to make reference to the objective of providing for orderly and equitable settlement of financial affairs at the end of the relationship. In particular, the Commission reasoned:

The principal way in which the *Act* seeks to achieve an “equitable settlement” is by deeming contributions to a marriage relationship to be equal, regardless of their form. This effected an important change in the law, which had traditionally ignored or undervalued unpaid work in the home. The economic interdependence involved in a marriage, and the social worth of the efforts of both spouses, are recognized by treating monetary and non-monetary contributions as equal in principle. At the time, this change was considered an important victory in the cause for legal equality of the sexes. It also has a number of other benefits. The deemed equal contribution restricts judicial discretion and provides clarity in the law, which facilitates the negotiation of agreements between

²¹⁵ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 14-15.

²¹⁶ *Ibid* at 14.

the parties. It also reflects the difficulty of deciding who contributed what to a marriage. Not only does the deemed equal contribution accord with current notions of spousal equality, but it is also a practical solution which avoids resort to notions of fault or gender stereotypes in evaluating the parties' contributions.²¹⁷

The principle of deeming contributions to the relationship to be equal regardless of their form is of central importance and should continue to be recognized in reformed family property legislation. The same is true of the goal of orderly and equitable settlement of affairs upon relationship breakdown. We would add the importance of reaching consensual settlements wherever possible.

The principle of providing for "mutual obligations in family relationships including the responsibility of parents for their children" continues to be an important consideration in the division of family property. The best interest of the child is a central principle in family law. The parties' mutual obligations for children, both during the relationship and in terms of their financial circumstances going forward, may be critical considerations in the equitable and orderly settlement of the affairs of the parties upon relationship breakdown.

Recommendations:

Family property legislation should recognize the following principles and goals in its preamble:

- (a) Childcare, household management and financial support are the joint responsibilities of spouses, registered domestic partners and common law partners; spouses and partners are presumed to have made an equal contribution to the relationship, financial and otherwise, that presumptively entitles each equally to the family assets;
- (b) The orderly and equitable settlement of the affairs of the spouses and partners upon the termination of a relationship is an important objective of the law;
- (c) The settlement of the affairs of the spouses and partners upon the termination of a relationship should be on a consensual basis wherever possible;

²¹⁷ *Ibid* at 15.

(d) Spouses and partners have mutual obligations in family relationships including the responsibility of parents for their children.

3.2.1. Language and Terminology

The language of the *Matrimonial Property Act* continues to reflect an outdated, heteronormative conception of the family and should be reformed. As it reads now, the statutory definition of “spouse” in the *Matrimonial Property Act* appears to limit the common law definition of spouse to a man and a woman. While it is understood that such a definition would not survive *Charter* scrutiny, the *Act* should not reflect a discriminatory definition of spouses.

The definition of “spouse” must no longer refer to “either of a man and woman”²¹⁸ but should refer to marriage as the union of two persons.²¹⁹ The same change was made to the definition of “spouse” in the new *Pension Benefits Act* which came into force on June 1, 2015.²²⁰

²¹⁸ Section 2(g).

²¹⁹ In *Boutilier v Nova Scotia (Attorney General)*, [2004] NSJ No 357 (QL) it was ordered that the common law definition of marriage for civil purposes is declared to be “the lawful union of two persons to the exclusion of all others” and that civil marriage between two persons of the same sex is therefore lawful and valid in Nova Scotia.” In the Civil Marriages Act, SC 2005, c 33, s 2, marriage for civil purposes is defined as “the lawful union of two persons to the exclusion of all others.”

²²⁰ See *Pension Benefits Act*, SNS 2011, c 41, s 2(ax):

- (ax) “spouse” means either of two persons who
 - (i) are married to each other,
 - (ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity,
 - (iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or, where they have ceased to cohabit, have cohabited within the twelve-month period immediately preceding the date of entitlement,
 - (iv) are domestic partners within the meaning of Section 52 of the Vital Statistics Act, or
 - (v) not being married to each other, cohabited in a conjugal relationship with each other
 - (A) for a period of at least three years, if either of them is married, or
 - (B) for a period of at least one year, if neither of them is married.

Furthermore, since the introduction of the *Act*, the *Vital Statistics Act*²²¹ has been amended to provide for registered domestic partners.²²² As of the date of registration of a domestic partnership declaration, domestic partners have the same rights and obligations as married spouses, pursuant to a number of pieces of legislation in Nova Scotia, including the *Matrimonial Property Act*.²²³ The language of the *Matrimonial Property Act* should reflect the inclusion of registered domestic partners in the matrimonial property regime.

Recommendations:

The term “spouse” in family property legislation should no longer refer to “either of a man and woman” but should be defined as “either of two persons who are married to each other”.

The provisions of the new legislation should reflect the inclusion of registered domestic partners in the family property regime.

3.3. Disclosure and Division of Property

The just and effective division of family property depends on proper disclosure. All of the assets and debt held by each spouse or partner, and their values, must be clearly established before they can be divided according to the *Act*. Non-disclosure and inadequate disclosure in the family law context are significant barriers to settlement and legal proceedings.

The Supreme Court of Canada has stressed the importance of financial disclosure in a number of cases. In *Leskun v. Leskun*,²²⁴ the court quoted a British Columbia decision as follows:

Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know

²²¹ RSNS 1989, c 494.

²²² Sections 52-58.

²²³ Section 54(2)(g).

²²⁴ [2006] 1 SCR 920, 268 DLR (4th) 577 at para 34.

about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done.²²⁵

Ensuring full and accurate disclosure in the context of family law disputes is therefore an important aspect of access to justice. The April 2013 Report of the Family Justice Working Group highlighted the need for legislation to codify an ongoing, positive duty to disclose on persons involved in the family law system:

Provisions governing disclosure should treat full disclosure as an affirmative obligation that rests upon all participants throughout, backed up by serious consequences for failure to comply with those obligations. Statutory provisions should be aimed at supporting the development of a culture of disclosure and good faith in family matters.

Recommendation 30:

That substantive family laws provide more support for early and complete disclosure by providing for positive obligations to govern all stages of a case and serious consequences for failure to comply.²²⁶

The *Matrimonial Property Act* addresses disclosure at section 14, in particular, indicating that each spouse must deliver a statement of all property owned by that spouse, verified by sworn affidavit. Section 14(3) allows the court to keep disclosure confidential, where public disclosure “would constitute a hardship to a spouse”.

But the *Matrimonial Property Act* does not indicate when the statement must be delivered, nor place an on-going and affirmative duty on parties to make full and accurate disclosure. Nor does the *Act* set out penalties for a knowing failure to disclose.

The *Civil Procedure Rules*, the Districts’ Family Rules²²⁷ and Family Division Rules²²⁸ set out the rules of disclosure in the context of family law proceedings in the respective courts. Rule 14.08 of the *Civil Procedure Rules* explains the need for full disclosure: “Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.”

²²⁵ *Ibid* at para 34, quoting *Cunha v da Cunha* (1994), 99 BCLR (2d) 93 (SC) at para 9, per Fraser J.

²²⁶ *Meaningful Change for Family Justice*, *supra* note 12 at 57.

²²⁷ Rule 62.07, 62.18.

²²⁸ Rule 59.

The *Rules* provide that Judges at Supreme Court and Family Division can make orders for disclosure in the context of family law proceedings. The text of the order indicates that if the party fails to obey, an order for costs may be made against him or her, usually in the amount of \$250.00.²²⁹ The party may also be liable for contempt.

We have heard from family law practitioners that the amount of \$250 provides little incentive for disclosure especially where higher income litigants are concerned. Orders for contempt are often difficult to obtain, requiring that the applicant show beyond a reasonable doubt that the respondent was aware of the order and willfully failed to obey it.

Disclosure was a significant concern in British Columbia's family law reforms.²³⁰ The *Family Law Act* provides for a general, positive duty to disclose, as follows:

Duty to disclose

5 (1) A party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute.

(2) A person must not use information obtained under this section except as necessary to resolve a family law dispute.²³¹

Importantly, the British Columbia *Act* also provides for orders enforcing disclosure. The court may order disclosure,²³² and assign the costs necessary to comply with the order to one party.²³³ There are privacy protections against unauthorized release of information disclosed.²³⁴ If a person fails to comply with any requirement for disclosure, or provides incomplete, false or misleading information, the court may draw an evidentiary inference against that person,²³⁵ require a party

²²⁹ Form 59.26B.

²³⁰ *White Paper on Family Relations Act Reform*, *supra* note 83 at 134.

²³¹ SBC 2011, c 25, s 5(1).

²³² *Family Law Act*, s 212(1).

²³³ *Ibid*, s 212(2).

²³⁴ *Ibid*, s 212(3).

²³⁵ *Ibid*, s 213(2)(b).

to post security,²³⁶ require a person to pay the other party's costs and expenses,²³⁷ or a penalty or fine of up to \$5,000.²³⁸

Imposing an ongoing duty to disclose and providing effective sanctions for non-disclosure are particularly important in the context of family property. The fair and effective division of assets depends on full knowledge of the parties' assets and debts, and their values. It is important that these duties be clear in the legislation, and an express provision will aid in educating litigants - particularly those without legal counsel - as to their disclosure obligations.

In our view the *Act* should provide that every party to a family law dispute has a duty to provide to the other party full and accurate financial disclosure for the purposes of resolving a family law dispute. Rules governing the scope, timing and enforcement of disclosure obligations should be left to court rules. In order to ensure that people know to consult them, family property legislation should refer to the Rules of Court.

Rules of court should permit a party to waive receipt of disclosure by the other party. It may be that in some situations disclosure would involve a complicated and expensive valuation, for example. In this situation a spouse may wish to waive the requirement in favour of efficiency and expediency in settling the spouses' affairs.

The duty to disclose should be ongoing, in the sense that a material change in circumstances (e.g. the value of an asset) must be disclosed.

Rules of court should also provide powers of the court, when a party fails to make full disclosure, including drawing an adverse inference, posting security, and payment of the other party's solicitor-client costs and expenses. Allowing judges to make awards for the legal bills of parties forced to pursue a non-disclosing spouse or partner may serve as a strong incentive for full and timely disclosure.

²³⁶ *Ibid*, s 213(2)(c).

²³⁷ In the case of *TJB v BAF*, 2014 BCPC 290, the judge awarded compensation for the other party's legal bills as a result of the non-disclosure, holding:

80 I find that in order to sufficiently penalize Mr. B., discourage other litigants from providing incomplete, false, and misleading disclosure; and properly compensate Ms. F. for legal bills incurred as a direct result of Mr. B.'s incomplete disclosure, an order pursuant to *FLA*, s 213(d)(i) requiring Mr. B. to pay the legal fees incurred by Ms. F. is an appropriate penalty in the circumstances.

²³⁸ *Ibid*, s 213(2)(d).

Furthermore, the court should have powers to impose penalties on persons who knowingly fail to make full disclosure. The current notice to disclose indicates a penalty of \$250, but this is not a strong disincentive, particularly for persons with higher incomes. In the Discussion Paper, the Commission proposed that the court should be able to impose a fine or payment for non-disclosure in the amount of \$5000. In response, the Commission heard that this amount may not serve as sufficient incentive to disclose where the non-disclosing party is hiding thousands or even millions of dollars in assets.

The Commission is therefore of the view that while the courts should be able to impose a penalty of up to \$5000 for failing to disclose, the court should also be able to “make any other order the court considers appropriate.”²³⁹ This provision may be important where previous orders have not been effective in encouraging full disclosure. One respondent, for example, suggested that judges should be able to impose fines that reflect a percentage of undisclosed assets to a maximum of 25% of the value of undisclosed assets.

Public legal information should explain parties’ disclosure obligations, not just in family property disputes but also when negotiating marriage contracts, cohabitation contracts, and separation agreements. Public legal information should also explain the consequences of a party waiving disclosure.

Recommendations:

New family property legislation should require that every party to a family property dispute has a duty to provide to the other party full and complete financial disclosure for the purposes of resolving the dispute.

Matters regarding the timing, scope and enforcement of disclosure obligations should be left to rules of court.

Family property legislation should refer to the rules of court.

Rules of court should permit a party to waive disclosure from another party.

Rules of court should provide that a material change in the information previously disclosed (e.g., the value of an asset) must be disclosed.

²³⁹ This provision is included in the British Columbia *Family Law Act* at section 213(2)(e).

Rules of court should provide for a variety of enforcement powers of the court when a party fails to make full disclosure, including drawing an adverse inference against that party, requiring the party to post security, and requiring payment of the other party's solicitor-client costs and expenses.

Parties who fail to make full disclosure should be subject to a fine or payment not exceeding \$5000.

The court should be able to make any other order it considers appropriate.

Public legal information should explain disclosure obligations in the context of family property proceedings. This should include disclosure required when negotiating marriage contracts, cohabitation contracts, and separation agreements. Public legal information should also explain the consequences of a party waiving disclosure.

4. COMMON LAW COUPLES

For legal purposes there are four basic categories of cohabiting, conjugal family forms in Nova Scotia:

1. married couples;
2. common law partners;
3. registered domestic partners;
4. unmarried, cohabiting couples who do not qualify as common law or registered domestic partners.

Common law partners are variously defined in Nova Scotia legislation as two “persons” or “individuals” cohabiting in a conjugal relationship for at least one²⁴⁰ or two²⁴¹ years or more.²⁴² Common law couples have equivalent rights to those of married spouses under the *Parenting and Support Act*,²⁴³ the *Pension Benefits Act*,²⁴⁴ the *Fatal Injuries Act*,²⁴⁵ *Fatality Investigations Act*,²⁴⁶ the *Health Act*,²⁴⁷ the *Hospitals Act*,²⁴⁸ *Involuntary Psychiatric Treatment Act*,²⁴⁹

²⁴⁰ Acts that use a one-year duration requirement to define common law partner status include: *Personal Directives Act*, *Workers Compensation Act*, *Hospitals Act*, *Fatal Injuries Act*, *Insurance Act*, the *Pension Benefits Act*, and the *Labour Standards Code*.

²⁴¹ Acts that use a two-year duration requirement to define common law partner status include: *Parenting and Support Act*, *Employment Support and Income Assistance Act*, *Fatality Investigations Act*, *Members Retiring Allowances Act*, *Involuntary Psychiatric Treatment Act*, and the *Provincial Court Act*.

²⁴² See *Pension Benefits Act*, SNS 2011, c41, s 2(ax)(v) defines spouses to include two persons who have cohabited in a conjugal relationship with each other for a period of at least three years if either of them is married.

²⁴³ RSNS 1989, c 160.

²⁴⁴ RSNS 1989, c 340.

²⁴⁵ RSNS 1989, c 163.

²⁴⁶ SNS 2001, c 31.

²⁴⁷ RSNS 1989, c 195.

²⁴⁸ RSNS 1989, c 208.

²⁴⁹ SNS 2005, c 42.

Insurance Act,²⁵⁰ *Members' Retiring Allowances Act*,²⁵¹ *Labour Standards Code*,²⁵² *Provincial Court Act*,²⁵³ *Income Tax Act*,²⁵⁴ *Domestic Violence Intervention Act*,²⁵⁵ and the *Workers Compensation Act*.²⁵⁶ Federally, common law partners have equivalent or similar rights and obligations under the *Income Tax Act*,²⁵⁷ the *Pension Benefits Division Act*,²⁵⁸ the *Old Age Security Act*,²⁵⁹ and the *Canada Pension Plan Act*.²⁶⁰

Unmarried cohabitants are unmarried, cohabiting couples who do not necessarily meet the definition of a common law couple. Like common law couples they may register their relationships under the *Vital Statistics Act*.²⁶¹ By registering the relationship they become domestic partners and thereby opt into various legal regimes, including the *Matrimonial Property Act*.

Common law couples and unmarried cohabitants who have not registered their relationship are excluded from the definition of "spouse" in the *Matrimonial Property Act* and are therefore not entitled to seek a statutory division of property. Common law couples and unmarried cohabitants can bring equitable claims in order to determine division of property upon relationship

²⁵⁰ RSNS 1989, c 231.

²⁵¹ RSNS 1989, c 282.

²⁵² RSNS 1989, c 246.

²⁵³ RSNS 1989, c 238.

²⁵⁴ RSNS 1989, c 217.

²⁵⁵ SNS 2001, c 29.

²⁵⁶ SNS 1994-95, c 10.

²⁵⁷ RSC 1985, c 1 (5th Supp).

²⁵⁸ SC 1992, c 46, Sch II.

²⁵⁹ RSC 1985, c O-9.

²⁶⁰ RSC 1985, c C-8.

²⁶¹ See RSNS 1989, c 494, s 2(ha) "domestic partnership" means a relationship between two persons who have filed a domestic-partner declaration in accordance with Part II.

breakdown,²⁶² but there is no deeming of assets to be “matrimonial” in nature and no presumptive rule of 50-50 division.

4.1. Evolution of Common Law Partners’ Entitlement to Division of Property

Common law partners are excluded from the *Matrimonial Property Act*, but they may make a claim in court for an interest in property held in the other partner’s name, or compensation, based on equitable principles. The case of *Murdoch v. Murdoch*²⁶³ was the first Supreme Court of Canada case to consider an action on the basis of unjust enrichment and resulting trust in the context of relationship breakdown. The Murdochs were married and living on a ranch in Alberta, before the enactment of matrimonial property legislation in that province. The Murdochs had acquired substantial ranch property during their twenty-five year marriage. Title to the property was held in Mr. Murdoch’s name only. Mrs. Murdoch brought an action in equity for unjust enrichment and resulting trust to property acquired by her husband during their marriage. As noted earlier, the Supreme Court of Canada upheld the decision of the trial judge to deny her claims because her work on the ranch amounted to “the work done by any ranch wife.”²⁶⁴ The decision prompted widespread matrimonial law reform in Canada. Although the claim did not succeed, the case opened up the possibility of equitable claims based on unjust enrichment, not just for married persons, but for unmarried cohabitants as well.

The Supreme Court of Canada confirmed that the principles of unjust enrichment and constructive trust would be available to unmarried cohabiting couples in the 1980 case of *Pettkus v. Becker*.²⁶⁵ Ms. Becker had been living with Mr. Pettkus for nineteen years. They were not married but they had established and maintained a farm property and bee-keeping business during cohabitation. The Ontario Court of Appeal found that Ms. Becker was entitled to a one-half interest in the property based on unjust enrichment and a constructive trust in the property.

The Supreme Court upheld the decision on appeal. The court clarified that in order to ground a claim for unjust enrichment and constructive trust the claimant must show a connection between labour or money and acquisition of the property.

²⁶² See *Kerr v Baranow*, 2011 SCC 10, 1 SCR 269.

²⁶³ (1974) 41 DLR (3d) 367, 13 RFL 185 (SCC).

²⁶⁴ [1975] 1 SCR 423 at 436.

²⁶⁵ [1980] 2 SCR 834, 19 RFL (2d) 165.

In the 1986 case of *Sorochan v. Sorochan*,²⁶⁶ the Supreme Court awarded a woman in a common law partnership an equal share of a ranch property on the basis of her contribution to the property. The court held that “[a] contribution relating to the preservation, maintenance or improvement of property may also suffice” to ground a claim for unjust enrichment and constructive trust.²⁶⁷

In *Peter v. Beblow*²⁶⁸ the Supreme Court returned to the issue, examining whether “ordinary housekeeping duties” would suffice to ground a claim for unjust enrichment.²⁶⁹ The majority of the court held that Ms. Peter’s claim of unjust enrichment was made out by her contribution to child-caring and work in the home performed over the course of the twelve-year relationship. The court held that there was “no logical reason to distinguish domestic services from other contributions”.²⁷⁰ Justice McLachlin (as she then was) explained:

The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse. ... The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty which this Court identified in *Moge v. Moge*, [1992] 3 S.C.R. 813, *per* L’Heureux-Dubé J., at pp. 853-54.²⁷¹

Justice McLachlin considered whether or not to remedy the unjust enrichment by *quantum meruit* (ie., money for value of work undertaken) or constructive trust (ie., a proprietary interest in the property). She held that where a monetary award is sufficient there will be no need for a constructive trust on the property. Sufficiency of a monetary award, for example, will be determined on the basis of the “probability of the award’s being paid as well as the special interest in the property acquired by the contributions.”²⁷² Only where there is a link between services

²⁶⁶ [1986] 2 SCR 38.

²⁶⁷ *Ibid* at para 24.

²⁶⁸ [1993] 1 SCR 980.

²⁶⁹ See discussion in Mary Jane Mossman, “Equity and Family Relationships: Cohabitation and Constructive Trusts” in Jeffrey Bruce Berryman, Mark R Gillen and Faye Woodman, eds, *The Law of Trusts: A Contextual Approach*, 2nd ed (Toronto: Emond-Montgomery Publishing, 2007).

²⁷⁰ *Peter v Beblow* at para 16.

²⁷¹ *Ibid*.

²⁷² *Ibid* at para 31.

rendered and the specific property in which the trust is claimed will a constructive trust be awarded – the “amount of contribution governs the extent of the constructive trust.”²⁷³

In 1999, as the courts were extending equitable principles to afford common law partners some limited rights to family property, the exclusion of common law couples from the Nova Scotia *Matrimonial Property Act* was challenged, in the case of *Walsh v. Bona*,²⁷⁴ as a violation of the equality rights in section 15(1) of the *Charter*. Justice Haliburton of the Nova Scotia Supreme Court found the exclusion was not discriminatory.²⁷⁵ The Court of Appeal reversed, holding that the exclusion was discriminatory and was not justified under section 1 of the *Charter*.²⁷⁶

In November of 2000, the Nova Scotia government introduced *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, otherwise known as the *Law Reform (2000) Act*. The law was introduced seven months after the Court of Appeal decision in *Walsh v. Bona*, which gave the legislature twelve months to remedy the unconstitutional exclusion. The Crown had appealed the decision, but in the meantime the provincial government sought to provide an option for unmarried cohabitants to bring themselves within the scheme of matrimonial property by registering their relationships.

The *Law Reform (2000) Act* provided for unmarried cohabitants and common law partners – including same sex partners – to opt into the scheme of deferred sharing of matrimonial property in the *Matrimonial Property Act* if they made a domestic partner declaration and registered their relationship pursuant to the *Vital Statistics Act*. Unmarried same and opposite sex couples could access the protection of the law by indicating they had made an affirmative choice to enter into the regime of deferred sharing of property.

In 2002, the Supreme Court of Canada reversed the Court of Appeal’s decision.²⁷⁷ The majority found that there was no discrimination under section 15(1) of the *Charter*. In particular, the court emphasized the distinction between couples who have chosen to marry, and therefore may be taken to have affirmatively signified their consent to be bound by the *Matrimonial Property Act*,

²⁷³ *Ibid* at para 27.

²⁷⁴ (1999), 178 NSR (2d) 151, 67 CRR (2d) 297.

²⁷⁵ *Ibid* at para 32.

²⁷⁶ 2000 NSCA 53, 183 NSR (2d) 74. Section 1 of the *Charter* provides: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

²⁷⁷ *Walsh v Bona*, 2002 SCC 83, 221 DLR (4th) 1.

and common law couples who have not. The court also noted common law couples' option to opt in to the regime of equal sharing:

... The decision to marry, which necessarily requires the consent of each spouse, encapsulates within it the spouses' consent to be bound by the proprietary regime that the *Matrimonial Property Act* creates.

Unmarried cohabitants, on the other hand, maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. These couples are free to marry, enter into domestic contracts, to own property jointly. In short, if they so choose, they are able to access all of the benefits extended to married couples under the *Matrimonial Property Act*.²⁷⁸

In February 2011, the Supreme Court of Canada further clarified the law of unjust enrichment as it relates to the division of property upon relationship breakdown, in *Kerr v. Baranow*.²⁷⁹ The court examined when and how to apply an analysis of unjust enrichment, and in particular how to quantify a monetary award. Following *Peter v. Beblow* the courts had looked to either a *quantum meruit* ('fee for service') remedy, or a proprietary remedy - that is, an award of an interest in the property itself - in constructive trust. Justice Cromwell, for the court, held that in the case of a "joint family venture" a spouse should be able to obtain a monetary award that is not based in *quantum meruit*. Among other things, Justice Cromwell was concerned that a fee-for-service calculation does not reflect the reality of integrated family life for many common law couples. Practically speaking in many cases it requires an assessment of competing *quantum meruit* claims, as each partner seeks to offset the quantifiable 'services' or contributions of the other.

For spouses in a 'joint family venture', in place of a *quantum meruit* calculation, *Kerr* instead requires that compensation be assessed on the basis of the proportionate contributions of the spouse to the accumulation of the family's wealth over the course of the relationship. Therefore, following *Kerr* a common-law spouse in a joint family venture may make a claim for a monetary sum equal to a share of the family's accumulated wealth, which share will be proportionate to the spouse's relative contribution to the relationship, and in particular its accumulation of wealth. Justice Cromwell explained a number of factors that the courts are to examine in assessing whether there has been a joint family venture - in effect inquiring into the degree of economic integration and interdependence over the course of the relationship.

²⁷⁸ *Ibid* at paras 48-49.

²⁷⁹ 2011 SCC 10, 1 SCR 269.

Most recently, the constitutionality of excluding common law partners from matrimonial property legislation in Quebec was considered by the Supreme Court of Canada in 2013. A slim majority of the court (5 to 4) found that the exclusion was discriminatory under section 15 of the *Charter*.²⁸⁰ But four of those judges considered the exclusion was justified under section 1, and they joined the four who considered it was not discriminatory in order to uphold the exclusion. The judgment in effect upheld the decision in *Walsh* that the exclusion of common law couples from a statutory regime of equal sharing upon relationship breakdown is not a violation of the *Charter*.²⁸¹

Absent a constitutional obligation to include common law couples, it remains up to provincial legislatures to decide whether or not to extend their matrimonial property regimes.

In its 1997 Report, this Commission recommended that common law couples should be covered by a new family property statute.²⁸² The Report recommended the inclusion of the following types of non-married couples in a proposed *Domestic Property Division Act*:

Two adults in a personal relationship where one provides personal or financial commitment and support of a domestic nature for the benefit of the other, where the parties have cohabited for a period of at least one year.²⁸³

The 1997 Report indicated that unmarried cohabitant couples should be included because, “relationships based on cohabitation are increasing in popularity and are likely to continue to do so....it is important to ensure that the law applicable on their termination be reasonably clear and fair.”²⁸⁴

In summary, common law partners continue to be excluded from the *Matrimonial Property Act* in Nova Scotia. Only unmarried cohabitants who have registered a domestic partnership are entitled to a presumptive 50-50 division of matrimonial assets under the *Matrimonial Property Act*. All other unmarried partners must apply to court for a share of family property on the basis

²⁸⁰ See *Quebec (Attorney General) v A*, 2013 SCC 5, 1 SCR 61.

²⁸¹ It is nevertheless noteworthy that while in *Walsh* seven of nine judges found the exclusion of common law couples from matrimonial property legislation was not discriminatory, by 2013, in *Quebec (Attorney General) v A*, a majority found that it was.

²⁸² *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 1.

²⁸³ *Ibid* at iii.

²⁸⁴ *Ibid* at 19.

of equitable principles, and in particular, the law of unjust enrichment articulated by the Supreme Court in *Kerr v. Baranow*.

4.2. Other Jurisdictions

In 1999, the Supreme Court of Canada in *M. v. H.*,²⁸⁵ held that excluding same sex couples from the definition of common law partner in Ontario's *Family Law Act* was discriminatory under section 15(1) of the *Charter*, and was not justified under section 1. The decision paved the way for same sex marriage to become legal across Canada, between 2003 and 2005. In the years after *M. v. H.* and *Walsh*, provincial legislatures extended rights to common law couples, recognizing that this promoted greater equality between same sex and opposite sex couples. Federally, in 2000, the government amended several pieces of legislation with the *Modernization of Benefits and Obligations Act*,²⁸⁶ in order to extend rights and obligations to common law partners – the definition of which was amended to include same sex partners.²⁸⁷ In 2000, Nova Scotia passed the *Law Reform (2000) Act* extending rights and obligations of common law partners to eligible same sex partnerships, and making provision for registered domestic partnerships.²⁸⁸

Between 1997 and 2005, a number of provinces and territories began to amend their matrimonial property legislation to include common law couples within the presumption of equal sharing of matrimonial assets upon relationship breakdown. The first jurisdictions to do so were the Northwest Territories and Nunavut, in 1997.²⁸⁹ Saskatchewan's *Matrimonial Property Act* was amended in 2001²⁹⁰ to include common law partners who have cohabited as spouses for at least two years.²⁹¹ The *Act* was renamed the *Family Property Act* and terminology throughout the *Act* was altered accordingly.

²⁸⁵ [1999] 2 SCR 3.

²⁸⁶ SC 2000, c 12.

²⁸⁷ The *Modernization of Benefits and Obligations Act* amended 68 laws, including the *Income Tax Act*, the *Canada Pension Plan Act*, and the *Old Age Security Act*, to give equal benefits and obligations to married spouses and common-law partners, including same sex couples.

²⁸⁸ SNS 2000, c 29.

²⁸⁹ SNWT 1997, c 18, s 1(1).

²⁹⁰ SS 2001, c 51.

²⁹¹ Section 2(1).

Manitoba included common law couples in 2004.²⁹² Common law couples who are either registered under the *Vital Statistics Act*²⁹³ or who have cohabited in a relationship for three years are included in the scheme of equalization of family property.²⁹⁴

In March 2013, British Columbia included common law couples for purposes of family property division under the new *Family Law Act*. Common law couples living in a “marriage-like relationship...continuously for two years” may claim rights to property division under the *Act*.²⁹⁵

In Nova Scotia, where the federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* applies, common law partners are included in the family property regime created by that *Act*, if one or both partners is “a First Nation member or an Indian”.²⁹⁶ On April 30, 2016, the Chief and Council of Membertou passed the *Membertou Family Homes Law, 2016*, which provides differentiated rights to common law partners and married spouses. In particular, common law partners do not share in the value of the “family home” unless they have made a domestic agreement to that effect.²⁹⁷

Beyond Canada, a number of jurisdictions have included unmarried cohabitant or “de facto” couples under matrimonial property legislation. Matrimonial property legislation in Australia (in all states and territories except Western Australia)²⁹⁸ and New Zealand²⁹⁹ extends matrimonial property rights to *de facto* couples who meet the eligibility criteria.

In 2009, the Australian *Family Law Act 1975* was amended to extend to *de facto* partners equal rights to the resolution of property and financial matters upon relationship breakdown as those provided to married spouses.³⁰⁰

²⁹² *Family Property Act*, s 2.1(1).

²⁹³ CCSM c V60.

²⁹⁴ *Ibid.*

²⁹⁵ *Family Law Act*, SBC 2011, c 25, s 3(1)(b).

²⁹⁶ SC 2013, c 20, s 6.

²⁹⁷ *Membertou Family Homes Law, 2016*, s 78(1)(b).

²⁹⁸ *Family Law Act, 1975*, s 4AA.

²⁹⁹ *Property (Relationships) Act 1976*, s 4C.

³⁰⁰ *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). *The Family Law Act 1975* (Cth), s 4AA defines de facto relationship as:

In New Zealand, *de facto* partners have the same rights as married spouses (and parties to a civil union) with regards to the division of property on separation or death.³⁰¹

The American Law Institute (“ALI”), in its recommendations concerning the *Principles of the Law of Family Dissolution*,³⁰² recommended including “domestic partners” (ie., unmarried cohabitants who fit a legislative definition) in the scheme of equal sharing if they met certain eligibility criteria. The ALI recommendations included provisions to determine which relationships should be recognized as domestic partnerships,³⁰³ and what property will constitute

(1) A person is in a *de facto relationship* with another person if:

- (a) the persons are not legally married to each other; and
- (b) the persons are not related by family (see subsection (6)); and
- (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

³⁰¹ *Property (Relationships) Act 1976*, (NZ), 1976/166. Section 2D of the Act defines *de facto* relationship:

- (1) For the purposes of this Act, a *de facto* relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
- (a) who are both aged 18 years or older; and
 - (b) who live together as a couple; and
 - (c) who are not married to, or in a civil union with, one another.

(2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) whether or not a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (e) the ownership, use, and acquisition of property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children;
- (h) the performance of household duties;
- (i) the reputation and public aspects of the relationship.

³⁰² *Principles of the Law of Family Dissolution: Analysis and Recommendations*, *supra* note 88.

³⁰³ § 6.03.

domestic-partnership property.³⁰⁴ The ALI further recommended that eligible property should be divided on the same basis as the division of marital property.³⁰⁵ In general, once a relationship is eligible for status as a domestic partnership the couple's property is effectively divided in the same way as that of married spouses. Partners would be entitled to contract out of the scheme as married couples can.

4.3. Prevalence of Common Law Couples in Nova Scotia

In 2016, common law couples³⁰⁶ represented 15.7% of all census families in Nova Scotia while married couples represented 67%.³⁰⁷ Common law couples with children represented 7% of all couple families in Nova Scotia, while married persons with children made up 36%.³⁰⁸ More common law couples lived without children, at 12% of all couple families.³⁰⁹ The largest category of couple families in 2016 - at 45% - was married couples without children.³¹⁰

Common law couples are less prevalent in Nova Scotia than married couples and indeed, slightly less prevalent than the Canadian average.³¹¹ But the number of common law couples in Nova Scotia as a proportion of all family forms is increasing over time, as in the rest of Canada. In 1981,

³⁰⁴ § 6.04.

³⁰⁵ § 6.05.

³⁰⁶ According to Statistics Canada, “[c]ommon-law status’ refers to whether the person is living with a person of the opposite sex or of the same sex as a couple but is not legally married to that person. All persons aged less than 15 are considered as not living common law”: “Dictionary, Census of Population, 2016 – Common-law status”, online: <<http://www12.statcan.gc.ca/census-recensement/2016/ref/dict/pop018-eng.cfm>>.

³⁰⁷ Census Profile, 2016, *supra* note 4.

³⁰⁸ Families, Households and Marital Status Highlight Tables (2016), *supra* note 9; Census Profile, 2016, *supra* note 4.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ In 2016, common law couples comprised 21.3% of all couples in Canada, but only 19.0% of couples in Nova Scotia: see *Focus on Geography Series*, 2016, *supra* note 3.

around the time when the *Matrimonial Property Act* came into force, they only made up 4.2% of all families.³¹² Now the figure is 15.7%.³¹³

National figures from the 2006 census reveal that common-law-couple families grew the quickest of all census families since 2001. The number of common-law-couple families in Canada grew 18.9% to 1,376,900, more than five times faster than for married-couple families. The census counted 6,105,900 married-couple families, up only 3.5% from 2001.³¹⁴ As of 2016, common-law couples accounted for 17.8 percent of all census families in Canada.³¹⁵ This is from 5.6 percent in 1981 – the first year that common-law families were included in the census.³¹⁶

In Nova Scotia, common law relationships are most prevalent among persons 25-29 years old, with 12,035 people between the ages of 25-29 living in one as of 2011. The second and third most prevalent age groups for common law relationships are 30-34 years old, with 9,730 people, and 45-49 years old, with 9,085.³¹⁷ The majority of persons under 50 years of age living in a common law relationship in Nova Scotia were never married, whereas the majority of those between the ages of 50-74 in common law relationships had been previously married.³¹⁸ The prevalence of common law relationships among the respective age groups set out above is consistent with national statistics.³¹⁹

³¹² *Ibid.*

³¹³ Census Profiles, 2016, *supra* note 4.

³¹⁴ Statistics Canada, *2006 Census: Family portrait: Continuity and change in Canadian families and households in 2006: National portrait: Census families*, online: <<http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-553/p2-eng.cfm>>.

³¹⁵ Census Profiles, 2016, *supra* note 4.

³¹⁶ Statistics Canada, “Fifty years of families in Canada: 1961 to 2011” (Ottawa: Minister of industry, 2012), online: <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011003_1-eng.pdf>.

³¹⁷ Statistics Canada, “2011 Census of Canada: Topic-based tabulations” (Ottawa: Statistics Canada, 2014) online: Statistics Canada <<https://www12.statcan.gc.ca/census-recensement/2011/dp-pd/tbt-tt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=1&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=108261&PRID=0&PTYPE=101955&S=0&SHOWALL=0&SUB=0&Temporal=2011&THEME=89&VID=0&VNAMEE=&VNAMEF=>>>.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

The option to register a domestic partnership under the *Vital Statistics Act* has not had a strong uptake. Vital Statistics reports for the years 2008 to 2014 indicate that an average of 59 domestic partnerships were registered with Vital Statistics each year.³²⁰

Manitoba includes common law couples for purposes of family property legislation, and has an only slightly larger population (1,278,365 versus 923,598 in Nova Scotia),³²¹ but its registered common law relationship numbers are almost on par with Nova Scotia's. Between 2012 and 2016, an average of 53 registrations took place each year in Manitoba.³²² These numbers are consistent with research in European countries which indicates that few people actually register their partnerships. The reasons include a lack of public legal education, lack of motivation, and refusal on behalf of one partner to register.³²³

In summary, common law couples are increasing in prevalence in Nova Scotia, however, the proportion and growth rates are below the Canadian average. Registered domestic partnerships are still relatively rare.

4.4. Whether to Include Common Law Couples

The majority of respondents to the Commission's Discussion Paper and online survey – approximately 71% – were in favour of including common law couples in Nova Scotia's matrimonial property regime. We recommend that family property legislation should apply to common law partners who have cohabited for a reasonably extensive period of time, giving them the right to a presumptively equal division of matrimonial assets. We address both arguments for and against the recommendation to include common law couples in the family property regime below.

³²⁰ Correspondence from Sarah Galloway, Research and Statistical Officer Nova Scotia Vital Statistics (5 May 2015) [on file with author].

³²¹ Statistics Canada, "Census Profile, 2016 Census – Manitoba", online: <<http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/Page.cfm?Lang=E&Geo1=PR&Code1=46&Geo2=PR&Code2=01&Data=Count&SearchText=Manitoba&SearchType=Begin&SearchPR=01&B1=All&GeoLevel=PR&GeoCode=46>>.

³²² See Government of Manitoba, Vital Statistics Agency, Annual Report 2015/2016, online: <https://vitalstats.gov.mb.ca/pdf/2016_vs_annual_report_en.pdf>.

³²³ Jennifer A Cooper, QC, *An Opinion Respecting Persons in Common-Law Relationships: Final Report*, Vol 1 (December 31, 2001) (Manitoba Justice) at 42, online: <https://www.gov.mb.ca/justice/publications/pubs/commonlawreviewpanel/vol1/common-law_panel_vol1.pdf>.

In response to the Commission's survey on family property division, the majority of respondents indicated that they thought common law relationships were functionally similar to married relationships in that there was an equal sharing of responsibility for work – whether inside or outside the home – within the family unit.

We are of the opinion that after a sufficient period of time common law partners are likely to function economically like married spouses in all the relevant ways: economic integration, the possibility and even likelihood that one partner has foregone economic advantages for the benefit of the family, potential vulnerability at the end of the relationship, and the need for orderly division of shared family assets upon relationship breakdown. "Childcare, household management and financial support"³²⁴ are likely to be every bit as much the joint responsibilities of common law partners as married spouses.

Without legislative protection common law partners can be left in a vulnerable financial situation at the end of a relationship, whether by separation or by death of a partner.³²⁵ Many common law couples will be in relationships that are functionally equivalent to marriage in terms of both integration, long-term stability, and economic vulnerability at the relationship's end.³²⁶ The same concerns that led to the introduction of matrimonial property legislation as remedial legislation are present in common law relationships, especially where they are of longer duration.

To this it may be argued that common law relationships are not like those of married couples after all. They are generally less stable and long lasting.³²⁷ Some Canadian research indicates that

³²⁴ *Matrimonial Property Act*, Preamble.

³²⁵ Several studies in Europe and the United States have noted a decline in economic well-being after the dissolution of the relationship for both married and cohabiting partners, with divorced women faring the worst, followed by cohabiting women, followed by cohabiting men, with divorced men experiencing the least economic decline of all partners. S Avellar & PJ Smock, "The economic consequences of the dissolution of cohabiting unions" (2005) 67.2 *Journal of Marriage and Family* at 315; D Manting & AM Bouman, "Short- and long-term economic of the dissolution of marital and consensual unions: The example of the Netherlands" (2006) 22.4 *European Sociological Review* 413; Sabrina de Regt, Dimitri Mortelmans and Tinne Marynissen, "Financial Consequences of Relationship Dissolution: A Longitudinal Comparison of Formerly Married and Unmarried Cohabiting Men and Women" (2013) 47.1 *Sociology* 90.

³²⁶ See *Walsh v Bona*, 2002 SCC 83, 221 DLR (4th) 1 at para 118 (per L'Heureux-Dubé J); *Quebec (Attorney General) v A*, 2013 SCC 5, 1 SCR 61 at para 353 (per Abella J).

³²⁷ See *Walsh v Bona*, at para 40. The 2006 General Social Survey reported that from 2001 to 2006 the number of individuals who divorced and the number of individuals who dissolved their common-law relationship were approximately the same. Given that in 2006 there were 6.1 million married and 1.4

common law couples tend to have higher levels of economic independence than married couples.³²⁸ To that extent, the decision to remain unmarried may reflect underlying differences and expectations that also relate to the degree of economic integration and the corresponding need for property sharing on relationship breakdown.³²⁹ Common law couples may avoid or limit economic integration because they do not have the same expectations of sharing on relationship breakdown, and their relationships are generally more fleeting than married relationships.³³⁰

As well, some analysts argue that the gendered division of labour in opposite sex relationships is no longer as predominant as it used to be. Women are increasingly making as much or more money than their male counterparts.³³¹ Statistics also show that while in opposite sex relationships men are increasingly taking on more work in the home, women continue to provide more childcare than men. This means that potentially there is an increasing number of relationships where women are both the primary breadwinner and the primary caregiver. The argument is that it would be unfair to impose a regime of deferred equal sharing, where one partner has undertaken both primary caregiving *and* is the primary earner, without her affirmative consent to be so bound.³³² It may be that the partner who plays both the primary role in childcare and is the primary breadwinner has specifically chosen not to marry the other partner because of an unequal division of labour in the home, but has nonetheless chosen to live with the other partner because of bonds of affection and the presence of children.

In our view, while there may be statistical evidence indicating that common law relationships are less prone to the kind of economic interdependence and resulting differentiated contributions between spouses that create the need for matrimonial property legislation, that is not the same as

million common-law families the results suggested a “greater tendency of the latter to dissolve compared with marriage”: see Milan, Keown & Robles Urquijo, *supra* note 128 at 16.

³²⁸ See for example, Nora Bohnert, “Examining the determinants of union dissolution among married and common law unions in Canada” (2011) 38 Can Stud in Pop at 76-77.

³²⁹ *Walsh v Bona* at para 43.

³³⁰ Per Bastarache J, *ibid* at para 40, citing Zheng Wu, *Cohabitation: An Alternative Form of Family Living* (Don Mills, Ont: Oxford University Press, 2000).

³³¹ One figure estimates that in 29% of opposite-sex couples in Canada in 2011, women made more than their male counterparts: Meg Luxton, *Changing Families, New Understandings* (Toronto: Vanier Institute of the Family, 2011) at 3, online: <http://vanierinstitute.ca/wp-content/uploads/2015/12/CFT_2011-06-00_EN.pdf>.

³³² See June Carbone and Naomi Cahn, *Marriage Markets: How Inequality is Remaking the American Family* (Oxford: Oxford University Press, 2014) at 189.

saying that those differences do not exist within a substantial number of common law relationships. They may be less prominent but after a period of time common law partners do tend to economically integrate. We do not recommend including common law partners immediately upon cohabitation, but only after a period of time has passed. And more to the point, there is just as much need for remedial legislation to ensure the orderly and fair division of assets among those who do experience such integration, at the end of the relationship.

This is even more the case if the couple has children. It is more likely that the custodial parent after separation will have been the primary caregiver during the relationship, compromising their ability to acquire property and earn income during the relationship. As a result the primary caregiver may leave the relationship with less than half the value of the family's property and reduced income-earning capability. Child and spousal support are not an adequate substitute for a share of the property the spouses have acquired together.³³³

A presumptive equal division of matrimonial assets helps to ensure that where the division of labour within the home has compromised the ability of one partner to acquire property and earn income her standard of living - and that of her children - will be protected on relationship breakdown. But under the existing law this protection is not available to children of unmarried spouses. As discussed by L'Heureux-Dubé J. in her dissent in *Walsh v. Bona*, the distinction between the children of unmarried and married spouses has been the basis of claims of "illegitimacy";³³⁴ a legal doctrine which has been overridden in Canadian law and jurisprudence. Yet its effects continue to be felt in Nova Scotia's matrimonial property law.

According to 2016 census figures there were 32,505 common law partners in Nova Scotia with children at home.³³⁵

The *Matrimonial Property Act* provides protections beyond the presumption of equal division of matrimonial assets. The *Matrimonial Property Act* provides the non-titled spouse with rights to the matrimonial home, which provide important protections for that spouse and children. Titled spouses are not able to dispose of or encumber the matrimonial home without the consent of the other spouse and the untitled spouse has a right of relief from forfeiture. These are important protections for the untitled spouse and they help to protect the spouse's equal right of possession

³³³ For a discussion of the issues see, Johanne Elizabeth O'Hanlon and Armenia Teixeira, "Left Behind: Property and Alimentary Rights for Couples in *de facto* Unions in Quebec" (Paper delivered at the National Family Law Program, Halifax, July 2012).

³³⁴ *Walsh v Bona* at para 95-96.

³³⁵ Families, Households and Marital Status Highlight Tables (2016), *supra* note 9.

of the matrimonial home as against the other spouse. Failing to include common law partners in the matrimonial property regime also deprives them of these important protections to facilitate a right of exclusive possession.

It is clear that women are more likely than men to be living at or below the poverty line - referred to as the feminization of poverty³³⁶ - and it is women who are more often subject to domestic violence than men.³³⁷ Failing to provide the same rights to property division for women leaving common law relationships as is currently provided to married spouses may further expose some women to domestic violence as they fear the financial consequences of leaving their abuser, especially where there are children involved.

The present situation raises access to justice concerns. The Supreme Court of Canada's decision in *Kerr v. Baranow* attempts to provide a more certain roadmap to resolve property disputes between common law partners, but joint family venture claims are complicated, time consuming and uncertain.³³⁸ The uncertainty makes settlement more difficult and unlikely. Self-represented persons will typically have great difficulty advancing the evidence and argument necessary to make the claim. Particularly where the other party is represented by legal counsel the difficulties will ensure that at least some former common law partners will simply walk away from a valid claim. This is a pressing concern, since common law couples are increasing in Nova Scotia, making up an ever greater proportion of families.

It may be argued that couples who have remained outside the institution of marriage should be able to walk away cleanly, rather than be drawn into litigation over the extent to which they must share property they previously held separately. Counter to the goals of promoting consensual settlement of disputes, subjecting common law partners to family property legislation without their express consent will create more contentious litigation and be more costly.

³³⁶ In 2008, 10% of women and 9% of men lived in low income. See Cara Williams, "Economic Wellbeing," in *Women in Canada: A Gender-Based Statistical Report* (Ottawa: Ministry of Industry, 2010) at 20, online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11388-eng.pdf>>; Women in Canada are more likely to find themselves living on a low income when they are from Aboriginal, or other racialized communities, when they are recent immigrants, or disabled, or where they are lone-parents. See Monica Townson, *Canadian Women on Their Own are the Poorest of the Poor*, online: Canadian Centre for Policy Alternatives <<https://www.policyalternatives.ca/publications/commentary/canadian-women-their-own-are-poorest-poor#sthash.oVaGiRmq.dpu>>.

³³⁷ In 2010, 7 in 10 (70%) of victims of police-reported family violence were girls or women: Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: Minister of Industry, 2011) at 13.

³³⁸ See Berend Hovius, "Property Disputes Between Common-Law Partners: The Supreme Court of Canada's Decisions in *Vanasse v. Seguin* and *Kerr v. Baranow*" (2011) 30 Can Fam L Q 129 at 163.

But this is to ignore the need for remedial legislation in this area. The law should respond to injustice and social need in the most certain, expedient and inexpensive way possible, but avoiding litigation is not an end in itself. Access to justice requires, first of all, justice.³³⁹ As it stands now, the law of unjust enrichment is complicated, time consuming, expensive and uncertain. The rights of common law couples should be codified in family property legislation in order to provide the same opportunity afforded to married couples to consensually, predictably and equitably settle their affairs upon relationship breakdown.

Including common law couples in a regime of deferred sharing of family property will aid the predictability and certainty of the law in terms of how such couples are generally treated in other areas. In Nova Scotia common law partners are entitled to apply for spousal support, workers compensation benefits and occupation of the matrimonial home, among other things. Federal legislation tends to treat common law partners the same as married partners. The *Income Tax Act*, *Indian Act*, *Family Homes on Reserves and Matrimonial Interests or Rights Act*, and *Canada Pension Plan Act*, for example, all extend rights and responsibilities to eligible common law couples on the same basis as married couples. Common law couples of one year conjugal cohabitation have to file taxes together, and for status Indians on reserve, common law partners inherit a preferential share on intestacy.³⁴⁰ Eligible common law partners have rights to real property under the provisional federal rules applicable on reserve, if at least one partner is a status Indian and/or a First Nation member.³⁴¹

Common law partners are also entitled to apply to split Canada Pension Plan (“CPP”) credits upon relationship breakdown.³⁴² Partners who have cohabited in a conjugal relationship for at least 12 consecutive months are entitled to credit split upon relationship breakdown, unless they have agreed in writing not to split their credits.

Credit splitting between common law partners is an important extension of the CPP’s basic policy of socializing economic risks associated with retirement and/or disability. It ensures the economic security of common law partners who shared in building the family’s assets, even if they haven’t paid into the plan themselves.

³³⁹ *A Roadmap for Change*, *supra* note 183 at 9.

³⁴⁰ *Indian Act*, RSC, 1985, c I-5, s 2(1) “survivor” in relation to a deceased individual, means their surviving spouse or common-law partner; s 48(1).

³⁴¹ See *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20, s 4.

³⁴² *Canada Pension Plan*, RSC 1985, c C-8, ss 2(1) & 55.

The same can be said with regard to division of private pensions. Indeed, the legislature's intent seems to have been to give common law partners the equal right to a division of pensions. On second reading of Bill 96, which amended the *Pension Benefits Act*,³⁴³ the Honourable Marilyn More indicated that pension rules must keep pace with societal change, including the increase in common law relationships:

Earlier, I said the workplace had changed and we needed to change to stay current. There have been societal changes and we need to keep up with those as well. This legislation will better protect the interests of people in common-law relationships. One partner could be eligible to receive the other partner's pension if a common-law relationship has existed for one year or more and there is no spouse from an earlier relationship. This is similar to the Canada Pension Plan. If there is a remaining spouse, the common-law relationship must exist for three or more years. Currently, a common-law partner cannot receive pension benefits if the plan member is still married to someone else.³⁴⁴

But while the *Pension Benefits Act* purports to include common law couples for purposes of pension division, they are not entitled to a presumptive equal division because that entitlement is provided by the *Matrimonial Property Act*, which excludes them.³⁴⁵ Instead, common law couples may be entitled to a division of pension benefits only where they can establish a right to property division in another way; e.g., by a successful unjust enrichment claim or pursuant to a cohabitation or separation agreement.

Requiring common law partners to share pensions will help to ensure that common law partners, especially those who remained out of the workforce, are entitled to the same level of financial security in retirement years as married spouses, and to prevent such spouses from having to rely upon social assistance in their elder years. It may help to address the feminization of poverty amongst older women. Women who undertake the bulk of childcare and domestic work will in most cases be less active in the labour force and will as a consequence generally have less access to a private pension plan of their own. Division of pensions responds to issues of need, economic security and protection of a particular quality of life.

Even if common law partners are included in the statutory regime for division of family property in Nova Scotia they will not be protected to the same extent as married spouses in the event of the death of one of the partners. Common law partners are not able to bring applications for relief

³⁴³ SNS 2011, c 41 (in force since June 1, 2015).

³⁴⁴ Nova Scotia, Legislative Assembly, Hansard, 61st Ass, 3rd Sess (25, November 2011) at 4376 (Honourable Marilyn More) re: Bill no 96 *Pension Benefits Act*, Second Reading.

³⁴⁵ *Morash v Morash*, 2004 NSCA 20.

under the *Testators' Family Maintenance Act*,³⁴⁶ and are not included as spouses under the *Intestate Succession Act*.³⁴⁷ Public legal education materials that are developed to accompany the inclusion of common law couples under family property legislation should include discussion of the situation of common law partners when one partner has died. They should point out that registered domestic partners have the same rights as married spouses under provincial law in Nova Scotia, including succession rights on death.³⁴⁸

But what of couples who have chosen not to marry precisely to avoid the legal obligations that attend marriage, such as division of matrimonial assets? And what of those who don't intend to accept matrimonial obligations but don't give the matter much thought before moving in together?

For some, it is clear that common law couples should not be subject to matrimonial property obligations absent an affirmative act of choice by the spouses.³⁴⁹ Marriage is for many a sacred institution that connotes lifelong commitment and acceptance of legal obligations, which should not be equated with a couple's decision to live together.

While the majority of respondents to the Commission's Discussion Paper were in favour of including common law couples in Nova Scotia's matrimonial property regime, those that were opposed to the proposal largely cited lack of consent as the primary reason for their continued exclusion. Most people who were against the proposal felt that these couples had actively made the choice not to marry and should not be forced into the matrimonial property regime. Several respondents indicated they thought that common law partners were functionally dissimilar enough to married partners to justify their exclusion from the regime.

One respondent indicated that including common law couples in the matrimonial property regime would create a great deal of confusion. Currently, married couples are well aware that when they marry they will be subject to the matrimonial property regime. However, deeming persons who cohabit together for two years to be common law partners included in a regime of deferred sharing

³⁴⁶ RSNS 1989, c 465.

³⁴⁷ RSNS 1989, c 236.

³⁴⁸ See for example, Cynthia Chewter, *And They Lived Happily Ever After: Rights and Responsibilities of Common Law Partners*, 2^d ed (Halifax: Nova Scotia Advisory Council on the Status of Women, 2009) at 5, online: Nova Scotia Advisory Council on the Status of Women <<http://women.gov.ns.ca/sites/default/files/documents/andtheylivedhappily2de.pdf>>.

³⁴⁹ *Walsh v Bona*, 2002 SCC 83, 221 DLR (4th) 1.

of property will not be so certain. Couples may disagree as to whether or not they are in fact in a common law relationship, when the relationship began and when the relationship ended.

One respondent noted that including common law couples in the family property regime could have the effect of furthering the feminization of poverty. This respondent noted that where a woman has already gone through a divorce and has retained the family home, for example, subjecting the value of the home to an equal division in a subsequent division of property may prevent her from being able to remain in the home, potentially with her children. We address this concern in part below in recommending the presumptive exclusion of the cohabitation date value of the family home from division.

As indicated in the Discussion Paper, the Commission is of the opinion that where common law partners wish to keep their affairs separate they may do so by entering into a domestic contract. However, several respondents indicated that they were skeptical that these contracts would be upheld in all cases where the couple had, for example, agreed to entirely remove themselves from the deferred sharing regime. These respondents indicated that autonomy and the ability to choose whether to share one's property are fundamental values and including common law partners in a matrimonial property regime against their will would undermine these values. Several respondents suggested that the Commission should consider recommending a transition period within which common law partners could opt out of the regime absolutely without having their agreements subject to judicial review.

The Commission agrees that these arguments are compelling. The autonomy to choose to enter into relationships and certain legal obligations - or not - is fundamental in our society. We do not agree, though, that concerns about autonomy should outweigh the need for a deferred sharing regime given: a) the individual and social harms that result from the kind of economic interdependence and corresponding vulnerability that some common law partners experience; and b) the injustice of allowing joint contributions to the acquired wealth of the couple to be unequally shared at the end of the relationship. This is not a new dilemma and it has been solved before. Before matrimonial property legislation was passed couples married with no obligation to share their property - these spouses made no choice to be bound, but when the law changed they were bound nonetheless, because there was a social need and injustice revealed in cases like *Murdoch* that had to be remedied.

We are sensitive to concerns regarding awareness. Common law partners should be informed about when they can be said to be in an eligible partnership for inclusion in the *Act*. Below, we discuss the notion of conjugality and when two persons can be said to be cohabiting. Furthermore, we recommend that the *Act* should specifically set out when a common law relationship ceases. We also recommend that an extensive public legal education campaign should accompany the inclusion of common law couples in the family property regime so that these couples are aware of their rights. Public legal education should include the following information and advice:

- define the three types of relationships included in the Act: common law partnerships, registered domestic partnerships and married relationships;
- advise common law partners of their rights to an equal division under the Act, set out what constitutes non-family assets and when these may be divided by way of an unequal division;
- advise common law partners that after two years of cohabitation they will have possessory rights in the family home even if they are not on title;
- advise common law partners of their ability to make a domestic contract and the importance of getting independent legal advice and seeking and providing full financial disclosure in making these agreements;
- set out when a couple can be said to be in a common law relationship, when this relationship becomes an eligible relationship under the Act (ie., at two years cohabitation) and when the relationship can be said to be at an end;
- explain the concept of cohabitation and set out the factors that the courts have used to establish cohabitation; and
- set out the importance of keeping documentation to establish the value of property at the date of cohabitation.

We did hear from a number of respondents that there is currently confusion among many common law partners as to whether or not they are included in the matrimonial property regime. A number of lawyers indicated to us that they often see common law partners who assume that they are included in the regime only to find out at the end of the relationship that they will not be compensated for their contributions to the relationship by way of a presumptively equal sharing of property.

As discussed in the Discussion Paper, the Commission is of the view that the fact that a couple has not married is not necessarily an indication that the partners wish to remain outside the matrimonial property regime. Indeed, there may be little planning that goes into a couple's decision to cohabit and remain unmarried. In one survey conducted by Statistics Canada only 4% of common law respondents cited "financial independence" as their main reason for not marrying.³⁵⁰ There may also be legal, social or religious impediments to marriage which the couple is not able to overcome.³⁵¹ Finally, while one party may wish to marry, the other party may not.

³⁵⁰ Statistics Canada, General Social Survey, 2011 "Table 3: Main reason why people living in common-law do not intend to marry their current partner, Canada, 2011" (Ottawa: Ministry of Industry, 2012, October 2012 modified) online: <<http://www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl03-eng.htm>>.

³⁵¹ Per McLachlin J in *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693 at para 153:

In theory, the individual is free to choose whether to marry or not to marry. In practice, however,

For those partners who are concerned that they will not be able to opt out of the regime without having their domestic contracts overturned by the courts, we would point to jurisprudence from both the Nova Scotia courts and the Supreme Court of Canada³⁵² recognizing the importance of allowing couples to order their affairs by contract. Pursuant to section 29 of the *Act*, the courts may only overturn domestic contracts where they are “unconscionable, unduly harsh on one party or fraudulent”. Unduly harsh has been interpreted by the Nova Scotia courts to mean, “so severely unjust as to show on its face a disregard for the rights of one party”.³⁵³ The court in *Zimmer v. Zimmer* held that this test would be more difficult to meet where the parties have obtained independent legal advice.³⁵⁴ Where the courts have overturned contracts for being unduly harsh on one party, in the majority of cases there tends to also be other injustices present in the formation of the contract, such as the presence of emotional distress or domestic violence,³⁵⁵ the failure to disclose assets, and/or failure of the party(ies) to obtain adequate independent legal advice.³⁵⁶

Given the relatively high bar to review domestic contracts we do not see the need to recommend a transition period that would insulate from judicial review all contracts entered into during this period.

Finally, including common law couples in the matrimonial property regime means that the *Act* will no longer govern matrimonial property alone. It should be retitled the *Family Property Act*. It should also refer separately to common law partners and registered domestic partners, rather than grouping them together with married spouses under an expanded definition of ‘spouse’.

the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one’s partner to marry; financial, religious or social constraints – these factors and other commonly function to prevent partners who otherwise operate as a family unit from formally marrying.

³⁵² *Hartshorne v Hartshorne*, [2004] 1 SCR 550, 2004 SCC 22.

³⁵³ *Zimmer v Zimmer* (1989), 90 NSR (2d) 243 (TD), at p 250.

³⁵⁴ *Ibid.*

³⁵⁵ See, for example, *Rizzo v Rizzo*, 2007 NSSC 358.

³⁵⁶ *Zimmer v Zimmer*; *Ritcey v Ritcey*, 2002 NSSF 30; *MacDonnell v MacDonnell*, 2005 NSSC 182; *Rizzo v Rizzo*, 2007 NSSC 358; *MacLean v MacLean*, 2009 NSSC 216.

Recommendations:

Common law couples should be included in Nova Scotia's matrimonial property regime.

The *Matrimonial Property Act* should be retitled the *Family Property Act*.

Common law partners and registered domestic partners should not be included in the definition of "spouse" under the *Act*.

The *Family Property Act* should incorporate the definition of "domestic partner" from Nova Scotia's *Vital Statistics Act*.

Public legal education should:

- define the three types of relationships included in the *Act*: common law partnerships, registered domestic partnerships and married relationships;
- advise common law partners of their rights to an equal division under the *Act*, set out what constitutes non-family assets and when these may be divided by way of an unequal division;
- advise common law partners that after two years of cohabitation they will have possessory rights in the family home even if they are not on title;
- advise common law partners of their ability to make a domestic contract, the importance of getting independent legal advice and seeking and providing full financial disclosure in making these domestic contracts;
- set out when a couple can be said to be in a common law relationship, when this relationship becomes an eligible relationship under the *Act* (ie., at two years cohabitation) and when the relationship can be said to be at an end;
- explain the concept of cohabitation and set out the factors that the courts have used to establish cohabitation; and
- set out the importance of keeping documentation to establish the value of property at the date of cohabitation.

4.5. How the Act Should Apply to Common Law Partners

Bringing common law couples under the *Matrimonial Property Act* raises several practical issues. They include:

1. Whether common law couples should be included on the same basis as married couples and registered domestic partners; and,
2. According to what eligibility criteria should common law couples be included?

4.5.1. Scope of Inclusion of Common Law Couples

In Canada, in jurisdictions where common law couples have been included under family property legislation, their property is usually divided on the same basis as that of married couples - that is, according to the same list of presumptively included and excluded property, and the same model of presumptive equal sharing. Where the common law relationship deviates markedly from an economic partnership, there is always judicial discretion to order an equitable, rather than a strictly equal division, based on a variety of “unequal division” factors. There is nothing in the unequal division factors that is limited to a married couple. The factors allow the judge to deviate where the marriage doesn’t evidence the required level of economic interdependence. Although those factors differ between the jurisdictions, they apply the same way within each jurisdiction to married and common law partners.³⁵⁷

The alternative to full inclusion in a regime of family property would be something akin to a legislated “joint family venture” regime, or entitlement to a presumptive equal division of only certain assets - for example, the family home. Some jurisdictions outside Canada have legislated a regime of deferred sharing for common law couples, but not on the same footing as married couples.³⁵⁸

In our view, given the reasons in principle for including common law couples in a regime of family property, there is no reason to differentiate the scope of their inclusion. The same reasons that

³⁵⁷ Manitoba amended its unequal division section to make specific reference to common law relationships, although the new provisions do not substantively change the position of common law partners *vis a vis* their married counterparts; see *The Family Property Act*, CCSM c F25, s 14(2).

³⁵⁸ See for example, *Family Law (Scotland) Act 2006*, 2006, asp 2. The Act gives judges the discretion to correct economic advantages and disadvantages between the parties by ordering a sum of money to be paid from the more advantaged to the less advantaged spouse, or to divide household goods acquired during cohabitation equally.

prompted legislatures to deem contributions to the relationship to be equal regardless of the character of those contributions exist for common law relationships. Common law relationships of a certain duration will in many cases be functionally equivalent to marriage relationships in terms of economic interdependence, especially where there are children. Experience with unjust enrichment claims thus far has indicated that determining the nature and extent of each partner's contribution is complex, time-consuming, expensive and unpredictable.³⁵⁹ Given their functional equivalence and the importance of providing for a cost effective and predictable way to settle their affairs, the contributions of common law partners to the relationship should likewise be deemed to be equal once they have met the stipulated eligibility criteria.

For relationships that do not have the requisite level of interdependence, the *Act* includes sufficient flexibility. Where one partner disputes the presumptively equal division as unfair or unconscionable he or she may argue for an unequal division. For example, where a couple has cohabited for a short period of time, it will be open to one partner to request an unequal division. As it stands now, married couples in relationships of short duration – less than 4 years – are more likely to make the case for an unequal division of matrimonial assets.³⁶⁰ There is no reason why common law couples would not likewise be subject to the same flexibility in appropriate cases.

Recommendation:

Family property legislation should apply to common law couples in the same way as to married couples and registered domestic partners.

4.5.2. Inclusion Criteria: Conjugality and Duration

In Canada, those jurisdictions that include common law partners under family property legislation tend to define eligible common law relationships with reference to years spent living

³⁵⁹ See Berend Hovius, "Property Disputes Between Common-Law Partners: The Supreme Court of Canada's Decisions in *Vanasse v. Seguin* and *Kerr v. Baranow*" (2011) 30.2 CFLQ 129; DA Rollie Thompson, "Annotation: Droit de la famille – 091768" (2013) 21 RFL-ART 325. Thompson observes:

In practice, *Kerr* has not proven to have improved the predictability of fairness of unjust enrichment decisions, with few partners being granted 50 per cent of the accumulated wealth and many claims being reduced to the 25 to 35 per cent range.

³⁶⁰ See *Roberts v Shotton*, 1997 NSCA 197, 156 NSR (2d) 47; Justice Theresa M Forgeron, M Jean Beeler, QC and Robyn L Elliott, "'It's Not Fair!' - Unequal Division of Assets" (Halifax: *Matrimonial Property Act* @ 30 Conference, Canadian Bar Association, 15 October 2010).

together. The duration requirement is a minimum of two continuous years living together in Saskatchewan,³⁶¹ British Columbia³⁶² and Nunavut and the Northwest Territories,³⁶³ and three years in Manitoba.³⁶⁴

In Nunavut and the Northwest Territories partners need not meet the two-year cohabitation requirement if the spouses have a child and “the relationship is one of some permanence.”³⁶⁵ The presence of a child can be “treated as a proxy for the commitment involved in formal marriage”³⁶⁶ and may therefore be reason enough to bring the family within the family property scheme. As well, the children may have an interest of their own in the equitable division of family property.

The *Saskatchewan Family Property Act* defines a “spouse” to include a person who “is cohabitating or has cohabitated with the other person as spouses continuously for a period of not less than two years”.³⁶⁷ Spouses may still be deemed to have lived “continuously” despite the existence of small gaps in their relationship. The Saskatchewan Queen’s Bench in *Bryant v. Bryant*³⁶⁸ reviewed the issue as it relates to eligibility for a division of family property, referring in particular to the Ontario Court of Justice’s decision in *Boothe v. Gore*.³⁶⁹ In *Boothe*, the judge considered whether a temporary separation can serve to negate the continuous nature of the cohabitation for the purposes of making a claim for spousal support:

The law in Ontario recognizes that a man and a woman are considered to have continuously cohabited, despite that while living together, there might have been separations for varying periods of time before reconciling. Cohabitation does not terminate until either party regards it as being at an end, and, demonstrate convincingly

³⁶¹ *The Family Property Act*, SS 1997, c F-6.3, s 2(1).

³⁶² *Family Law Act*, SBC 2011, c 25, s 3(1)(b)(i).

³⁶³ *Family Law Act*, SNWT (Nu) 1997, c 18, s 1(1) “spouse” (b)(i).

³⁶⁴ *Family Property Act*, CCSM c F25, s 1(1).

³⁶⁵ *Family Law Act*, SNWT (Nu) 1997, c 18, s 1(1) “spouse” (b)(ii).

³⁶⁶ Heather Conway & Philip Girard, “‘No Place Like Home’: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain” (2004-2005) 30 *Queen’s LJ* 715 at 730.

³⁶⁷ *The Family Property Act*, SS 1997, c F-6.3, s 2(1).

³⁶⁸ 2005 SKQB 298.

³⁶⁹ (1996) 20 OTC 207, 67 ACWS (3d) 1149 (OCJ).

that this is the party's intent. A brief cooling off period does not convincingly show a settled state of mind that cohabitation has terminated.

"Cohabit" means to live in a "marriage like" relationship and, in order to bring it to an end, there must be a physical withdrawal together with an intention to end the relationship. When a temporary separation is no more than a period of reflection and reassessment, and there is no termination of the "consortium", the cohabitation is considered to be continuous.

In an application for support by an unmarried "spouse", the onus is on the applicant to establish the existence of cohabitation over the requisite period of time and, if there is a break in continuity due to separation, the burden remains on the applicant to prove that there was no intention that the separation be permanent.

The effects of temporary separations depends on the intention of the parties. When one party leaves the other and provides an objective basis to believe that they do not intend to resume cohabitation and the separation lasts for a meaningful period of time, the period of cohabitation could well have been interrupted.³⁷⁰

Therefore, where the respondent argues that there were breaks in the relationship "for a meaningful period of time" such as to negate the continuous nature of the relationship, the applicant must show that there was no intention to separate permanently.

Some jurisdictions in Canada that include common law couples in family property legislation base eligibility not only on duration or presence of a child, but on more vague conditions like "conjugal", "marriage-like" or cohabitation "as spouses". These terms are not defined in any piece of legislation in Nova Scotia, but the courts have often cited the following passage from *Soper v. Soper*:

What is a common law relationship? Counsel for the Appellant referred the court to the case of *Jansen v. Montgomery*, 30 R.F.L. (2d) 332, wherein Hall Co. Ct. J. said the following regarding common law relationships:

From the foregoing it will be seen that to 'live together as husband and wife' connotes an element of permanence and commitment to each other by the parties to the relationship to a substantial degree. Certainly it should not be thought that every arrangement where a man and woman share the same living accommodations and engage in sexual activity to some extent should be regarded

³⁷⁰ *Ibid* at paras 10-13.

as living together as husband and wife. In these times men and women have a much more casual attitude toward sexual conduct than was prevalent even two decades ago. Now it is not unusual for a man and woman to live in the same apartment, sharing expenses, and engaging in sexual activity with each other, knowing full well that the relationship will not last for the rest of their lives and will likely end when another person comes along or circumstances change. In my opinion such a relationship does not come within the definition of 'spouse' as set out in the [Family Maintenance] Act.

I think it would be fair to say that to establish a common law relationship there must be some sort of a stable relationship which involves not only sexual activity but a commitment between the parties. It would normally necessitate living together under the same roof with shared household duties and responsibilities as well as financial support. I would also think that such a couple would present themselves to society as a couple who were living together as man and wife. All or none of these elements may be necessary depending upon the intent of the parties.³⁷¹

Cases in a number of jurisdictions in Canada – including Nova Scotia³⁷² – have referred to the criteria of conjugality in *Molodowich v. Penttinen*:³⁷³

- 1) Shelter:
 - (a) Did the parties live under the same roof?
 - (b) What were the sleeping arrangements?
 - (c) Did anyone else occupy or share the available accommodation?
- 2) Sexual and Personal Behaviour
 - (a) Did the parties have sexual relations? If not, why not?
 - (b) Did they maintain an attitude of fidelity to each other?
 - (c) What were their feelings toward each other?
 - (d) Did they communicate on a personal level?
 - (e) Did they eat their meals together?
 - (f) What, if anything, did they do to assist each other with problems or during illness?
 - (g) Did they buy gifts for each other on special occasions?

³⁷¹ *Soper v Soper* (1985), 67 NSR (2d) 49 (CA) at paras 17-18. Cited for example in *Clark v Kelly*, 2002 NSSF 33, 206 NSR (2d) 61 at para 29; *Hatchard v Hatchard*, 2003 NSCA 100, 45 RFL (5th) 357 at para 6; *Brownie v Hoganson*, 2005 NSSC 314, 238 NSR (2d) 170, para 6.

³⁷² See, for example, *Wittich v Wittich*, 2005 NSSC 265, 236 NSR (2d) 338.

³⁷³ *Ibid.*

3) Services

What was the conduct and habit of the parties in relation to:

- (a) Preparation of meals
- (b) Washing and mending clothes
- (c) Shopping
- (d) Household maintenance; and
- (e) Any other domestic services?

4) Social

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

5) Societal

What was the attitude and conduct of the community towards each of them as a couple?

6) Support (economic)

- (a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinate of their overall relationship?

7) Children

What was the attitude and conduct of the parties concerning children?

While courts have acknowledged the highly intrusive character of the analysis,³⁷⁴ the continued reliance on the *Molodowich* factors is said to be on account of their objective character; that is, they focus on observable behaviour that indicates a relationship comparable to marriage, rather than vague and subjective ideas like 'love' or the intent of only one of the parties.

It is important to note that not all of the factors listed above are required to be present in order for a judge to find that a couple is cohabiting in a conjugal relationship.³⁷⁵ The factors considered

³⁷⁴ See *Provencher v Miller*, 2011 SKQB 375 at para 23.

³⁷⁵ *M v H*, [1999] 2 SCR 3, 171 DLR (4th) 577 at para 59 per Cory J:

Molodowich v. Penttinen (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal

to establish conjugality are based upon an ideal which might not be appropriate for all situations. In fact, some partners have been found to be cohabiting even though they maintain their own residences.³⁷⁶ Furthermore, some have criticized the factors as perpetuating a stereotyped ideal of marriage.³⁷⁷

Some have advocated for doing away with the concept of conjugality and taking a strictly functional approach to identifying relationships which qualify for rights and benefits based upon their level of emotional and economic interdependence.³⁷⁸ Internationally, some jurisdictions have ascribed spousal-type status to non-conjugal relationships in their family property regimes. The Australian Capital Territory and New South Wales extend rights to some non-conjugal

perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal.

³⁷⁶ See for example, *Nowell v Town Estate* (1997), 30 RFL (4th) 107, 35 OR (3d) 415.

³⁷⁷ For example, in the 1993, the Ontario Law Reform Commission released its *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* in which it recognized the intrusive and stereotypical nature of the investigation of conjugality as required by *Molodowich* amongst other cases. Despite this, however, the Commission ultimately recommended retaining the concept of conjugality for its ability to set out a functional equivalence between marriage and those common law relationships which should be ascribed spouses status under the *Family Law Act*:

The statutory phrase "conjugal relationship", which is introduced into the definition by the requirement that the spouses "cohabit", directs the courts to consider whether a couple has a relationship that is functionally equivalent to marriage. Commentators have criticized a tendency in the jurisprudence for courts to interpret "conjugal relationship" against an idealized model of marriage, placing considerable emphasis on the existence of economic dependency, a sexual relationship, and the parties being identified in public as a couple. This jurisprudence propagates a stereotypical model of marriage that fails to account for the existing diversity of marital relationships. Reliance on this approach also leads courts to engage in inquiries into the intimate details of relationships, intruding on personal privacy. The tendency to measure common law relationships against a stereotypical view of marriage is regrettable and should be resisted. The Commission also believes that intrusive examination of the intimate details of a relationship is undesirable. Yet, functional similarities between marriage and common-law relationships are central to the recommendation to include the latter in the *Family Law Act*. The Commission would therefore not recommend removing the requirement that a couple live in a "conjugal relationship" unless that phrase is replaced with a defining term that also captures the requirement of functional similarity.

See Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto: Ontario Law Reform Commission, 2001) at 62.

³⁷⁸ See Brenda Cossman & Bruce Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugality" (2001) 18 Can J Fam L 269.

“domestic relationships”³⁷⁹ and “close personal relationships”³⁸⁰, respectively, upon relationship breakdown. The Australian Capital Territory, for example, recognizes a domestic relationship where “one provides personal or financial commitment and support of a domestic nature for the material benefit of another.”³⁸¹ Cohabitation is not a requirement in the Australian Capital Territory.

In Tasmania and in Victoria, Australia, persons in non-conjugal relationships are entitled to register their relationship in order to bring themselves within the property sharing regime enjoyed by married couples.³⁸² By contrast, in Nova Scotia only “two individuals who are cohabiting in a conjugal relationship” may register a domestic partnership.³⁸³

In our view, family property legislation in Nova Scotia should continue to use the language of conjugality to delineate the types of non-married relationships that will qualify for rights to

³⁷⁹ *Domestic Relationships Act 1994* (ACT), s 3(1):

"domestic relationship" means a personal relationship between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a domestic partnership but does not include a legal marriage.

³⁸⁰ *Property (Relationships) Act 1984* (NSW), s 5(1)(b):

(b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

³⁸¹ *Domestic Relationships Act 1994* (ACT), s 3(1). Section 3(2)(a) provides: “a personal relationship may exist between people although they are not members of the same household.”

³⁸² See *Relationships Act 2003* (Tas), s 5 “caring relationship”; *Relationships Act 2008* (Vic), s 5:

"registrable caring relationship" means a relationship (other than a registered relationship) between two adult persons who are not a couple or married to each other and who may or may not otherwise be related by family where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support and personal care to the other person—

- (a) for fee or reward; or
- (b) on behalf of another person or an organisation (including a government agency, a body corporate or a charitable or benevolent organisation);

³⁸³ *Vital Statistics Act*, RSNS 1989, c 494, s 54(1).

property division under the *Act*. While the term is not self-evident, the jurisprudence has explained guidelines and factors to establish its presence or absence. And, the elements of conjugality help to establish the existence of a relationship of some emotional and economic interdependence and functional similarity to a marriage.

The question of whether non-conjugal partners should be able to register their domestic relationships under the *Vital Statistics Act* in order to accept the same rights and responsibilities as spouses is outside of the scope of this project and is worth pursuing on its own review.

While some respondents to the Commission's Discussion Paper indicated that the factors establishing conjugality should be included in family property legislation, the Commission is of the view that this may prevent the factors from evolving over time with different social expectations about what constitutes conjugality and cohabitation. As recommended above, public legal education materials should explain the concepts of cohabitation and conjugality and how they may be relevant in an application for property division. The factors that are considered to establish conjugality should also be included in these materials.

We also recommend that family property legislation should include a duration requirement during which the couple has cohabited in a conjugal relationship in order to be included in the regime. In the Discussion Paper, the Commission recommended a two-year duration requirement before a couple will be subject to obligations under family property legislation.

We are of the opinion that couples should have an opportunity to live together for a period of time before they are required to decide whether to accept the legal obligations under the legislation, or opt out by way of a cohabitation agreement. A duration requirement goes some way to addressing concerns that common law relationships are often fleeting or that partners will be bound to divide property with a person to whom they have no commitment or interdependence.

We recommend that this duration requirement should also apply where a couple has children. Views about whether the presence of a child immediately indicated a sharing of responsibility for work and support within the family were mixed. While the majority of respondents to the Commission's online survey – 55% of respondents – indicated that a couple is more likely to share responsibility for work and support within the family where they have a child, the majority of respondents to the Commission's in-person session indicated that they did not believe this to be the case. Given the variety of views on this issue, as well as the level of concern over the ability of partners to choose to enter the regime, we believe that a two-year duration requirement should still be imposed on couples with children.

As indicated in the Discussion Paper, the choice of specific duration establishing a common law relationship is necessarily arbitrary. There is no timeframe which is consistent across other Nova Scotia legislation.

While forty-six per cent of respondents to the Commission's online survey indicated that they felt the sharing of responsibility for work within the family occurred right at the start of the relationship the same number of respondents indicated that this could vary depending on the individual couple.³⁸⁴ Very few respondents to the Commission's online survey indicated a specific duration requirement for entry into the family property regime for common law couples in their response.

It should be kept in mind that where a couple has been together for a short time there will be very little property to divide in any event.

The Commission also recommends that family property legislation should specifically set out when common law partners can be said to be separated for the purposes of the Act. The courts in Nova Scotia have held that common law partners cease to cohabit when they begin "living separate and apart and there is no reasonable prospect of the resumption of cohabitation".³⁸⁵ However, the courts have also held that even where partners live under the same roof they may still be considered to be living "separate and apart".³⁸⁶

British Columbia's *Family Law Act*³⁸⁷ provides the following guidance on when common law partners cease to cohabit:

3(4) For the purposes of this Act,

(a) spouses may be separated despite continuing to live in the same residence, and

(b) the court may consider, as evidence of separation,

(i) communication, by one spouse to the other spouse, of an intention to separate permanently, and

(ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

³⁸⁴ Eight per cent of respondents indicated they did not have an opinion on the issue.

³⁸⁵ *Brownie v Hoganson*, 2005 NSSC 314, 238 NSR (2d) 170 at para 12.

³⁸⁶ *Ibid.*

³⁸⁷ SBC 2011, c 25.

We recommend that similar guidance should be provided in Nova Scotia's family property legislation.

We have also considered the situation of multiple common law partners.³⁸⁸ We have in mind a situation in which three or more people have been living together in a conjugal relationship for longer than the qualifying two year period, and one or more of them leaves the relationship. In that case any of the partners might be eligible to make a claim.

In our view these circumstances do not require special provision in the legislation. The relevant principle is that a partner leaving a conjugal relationship of some permanence should have a presumptive right to an equal division of family assets. The *Act* should not limit that principle to a two-person relationship, and the definition of common law partner should be careful not to do so. As we recommend in a later section, the *Act* will provide for the presumptive equal division of assets acquired by the partners, and the increase in value of pre-acquired assets, during the relationship. In most cases these principles should be applicable to the claim of someone leaving a multiple common law relationship with potentially greater complexity but no greater uncertainty. In our view the *Act* will provide for sufficient flexibility and discretion to deal with more difficult cases.

Recommendations:

A "common law partner" should be defined for the purposes of family property legislation as a person who is cohabiting or has cohabited with another person in a conjugal relationship continuously for a period of not less than two years.

The legislation should provide that a common law partnership ceases when the partners live separate and apart with the intention to separate permanently. Partners may be separated despite continuing to live in the same residence. The court may consider as evidence of separation communication or action by one partner that demonstrates an intention to separate permanently.

³⁸⁸ Section 293(1)(a)(ii) of the *Criminal Code of Canada* prohibits "... any kind of conjugal union with more than one person at the same time," but the British Columbia Supreme Court read this provision down to apply only to multiple partners in a marriage: *Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 28 BCLR (5th) 96 at para 1037.

4.5.3. Time Limit for Bringing a Claim for Division

There is no time limit for bringing a claim under the *Matrimonial Property Act* unless one spouse has died.³⁸⁹ The spouses may be separated for many years, and yet remain entitled to bring an application for division of property. But the expectation is that spouses will generally wish to finalize a divorce at some point in the near future to provide finality to the couple's affairs.³⁹⁰ While some couples may stay separated for decades, at least the possibility of divorce increases the likelihood of a final determination of rights.

This is not so in the context of a common law relationship, however, where a divorce or termination of registered domestic partnership is not available to the parties. In our view there should be a limitation period for an application for a division of family property by a common law partner. This creates inconsistency between married spouses and common law partners, but it will minimize the potential for situations in which multiple common law partners bring claims for division against the same spouse. The situation is different for spouses as a divorce will be required in order for there to be a potential claim by another spouse (although admittedly, not a subsequent common law partner).

Saskatchewan³⁹¹ and British Columbia³⁹² require common law partners to bring an application within two years from separation. In Manitoba the limit is three years.³⁹³ In British Columbia the two-year limitation period applies to married spouses, from the date of divorce or declaration of

³⁸⁹ *Matrimonial Property Act*, s 12(2). We examine the limitation period following the death of a spouse in a later section.

³⁹⁰ Pursuant to the *Vital Statistics Act*, RSNS 1989, c 494, s 55(1)(b) a domestic partnership terminates after the parties live separate and apart for more than one year and one or both parties has the intention that the relationship not continue.

³⁹¹ *The Family Property Act*, SS 1997, c F-6.3, s 3.1.

³⁹² *Family Law Act*, SBC 2011, c 25, s 198:

(1) Subject to this Act, a proceeding under this Act may be started at any time.

(2) A spouse may start a proceeding for an order under Part 5 [*Property Division*] to divide property or family debt, ...no later than 2 years after,

...

(b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

³⁹³ *The Family Property Act*, CCSM c F25, s 19.1(3)(b).

nullity.³⁹⁴ The limitation period prevents multiple claims by multiple common law partners being brought for the same period of time (as the duration requirement for a new relationship to qualify under the legislation would be 24 months) but it is also a long enough period that a common law partner will have an adequate opportunity in which to bring an application.

Where the parties have settled their affairs by way of a separation agreement, a 24-month limitation period would run from the time the partner first discovered or reasonably ought to have discovered the grounds for making such an application.³⁹⁵ A two-year limitation period is consistent with the general limitation period in the *Limitation of Actions Act*.³⁹⁶

We are also of the view that this time limit should apply to registered domestic partners. While the *Vital Statistics Act* provides a number of different ways by which a domestic partnership is terminated: by filing a statement of termination, living separate and apart for one year and one or both parties has the intention that the relationship will not continue, when one partner marries another person, and where the parties register an agreement under the *Parenting and Support Act*,³⁹⁷ these methods may not provide sufficient time for a partner to bring an application.

Public education materials should ensure that common law partners are aware not only of their rights to bring a family property application, but also the operation of the limitation period.

Recommendations:

Family property legislation should require a common law partner, registered domestic partner or former domestic partner to bring an application for division no later than 24 months following the date of separation, unless a court order or domestic contract provides otherwise.

³⁹⁴ *Family Law Act*, SBC 2011, c 25, s 198(2)(a).

³⁹⁵ See for example, *Family Law Act*, SBC 2011, c 25, s 198(3).

³⁹⁶ SNS 2014, c 35, s 8(1)(a). It should be noted that this does not include a claim to which the *Real Property Limitations Act* applies.

³⁹⁷ RSNS 1989, c 494, s 55.

The limitation period should not operate where the delay in bringing a claim is due to circumstances beyond the claimant's control.

Public education materials should ensure that common law partners and registered domestic partners are aware of the operation of the limitation period.

5. WHAT PROPERTY SHOULD BE DIVIDED?

Section 4(1) of the *Matrimonial Property Act* provides that matrimonial assets are “the matrimonial home or homes and all other real and personal property” acquired by either one or both spouses, both before and during the marriage, subject to certain exclusions. The following types of property are presumptively excluded from an equal division:

- (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
- (b) an award or settlement of damages in court in favour of one spouse;
- (c) money paid or payable to one spouse under an insurance policy;
- (d) reasonable personal effects of one spouse;
- (e) business assets;
- (f) property exempted under a marriage contract or separation agreement;
- (g) real and personal property acquired after separation unless the spouses resume cohabitation.³⁹⁸

These non-matrimonial assets are only presumptively excluded from a 50/50 division. The *Matrimonial Property Act* provides that a court may divide non-matrimonial assets where an equal division of only matrimonial assets would be “unfair or unconscionable”.³⁹⁹

The legislation in most jurisdictions in Canada expressly excludes some types of property from matrimonial property or net family property. The most common types of excluded or non-matrimonial property are gifts, inheritances, damage awards or settlements, and insurance proceeds, in the name of one spouse only.⁴⁰⁰ However, there is variation between the provinces as to how these excluded assets are treated and what other assets are excluded. In Alberta, for

³⁹⁸ *Matrimonial Property Act*, s 4(1).

³⁹⁹ *Ibid*, s 13.

⁴⁰⁰ See for example, the definition of “matrimonial interests or rights”, *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20, s 2(1) “matrimonial interests or rights”.

example, gifts, inheritances, pre-relationship property, awards or settlement for damages and proceeds of an insurance policy belonging to just one spouse are all excluded from distribution,⁴⁰¹ but their increase or decrease in value from the date of the marriage is divisible.⁴⁰² Alberta's *Matrimonial Property Act* provides that a judge may divide the difference in value "equitably" taking into consideration a number of factors.⁴⁰³

In the following sections we examine what assets should be presumptively excluded from division.

5.1. Pre-Cohabitation Property

Nova Scotia is one of the only jurisdictions in Canada that provide for the presumptive equal division of assets acquired before marriage in the name of one spouse only, along with New Brunswick.⁴⁰⁴ Manitoba's legislation, which applies to common law partners includes assets that a married couple may have acquired while unmarried but in a common law relationship, as well as assets "acquired before, but in specific contemplation of, the cohabitation with, or the marriage to, the other spouse."⁴⁰⁵ On First Nations reserves in Nova Scotia on which the *Family Homes on Reserves and Matrimonial Interests or Rights Act* applies, the definition of matrimonial interests or rights does not include rights or interests acquired before the couple entered into a conjugal relationship unless these rights or interests were acquired in specific contemplation of the relationship or unless they appreciated in value during the relationship.⁴⁰⁶

In its review of matrimonial property, the American Law Institute (the "ALI") recommended that pre-matrimonial assets should be excluded from a presumptive equal division of property, commenting: "the majority view reflects the widespread consensus that marriage alone should not affect the ownership interest that each spouse has over property possessed prior to the

⁴⁰¹ *Matrimonial Property Act*, RSA 2000, c M-8, s 7(2).

⁴⁰² *Ibid*, s 7(3)(a).

⁴⁰³ *Ibid*, ss 7(3) and 8.

⁴⁰⁴ *Marital Property Act*, SNB 2012, c 107, s 1 "marital property". However, pursuant to section 6, the court may exclude pre-marital property from a division if it would be unfair and unreasonable to include it.

⁴⁰⁵ *Family Property Act*, CCSM c F25, s 4(2)(b). Yukon's legislation defines family assets to include property acquired while the spouses are residing together. See *Family Property and Support Act*, RSY 2002, c 83, s 4.

⁴⁰⁶ *Family Homes on Reserves and Matrimonial Interests or Rights Act*, s 2(1), "matrimonial interests or rights".

marriage ...”.⁴⁰⁷ The ALI insisted that including pre-matrimonial assets would necessarily require substantial deviation from the presumption of equal division, relying more on judicial discretion to divide assets “equitably” in individual cases.⁴⁰⁸

In the ALI’s view, excluding pre-matrimonial assets permits a presumption of equal division, eliminates the need for a case-specific, highly discretionary provision for unequal division, and better accords with people’s sense of fairness as to what is rightly “theirs”.

In its most recent reforms, British Columbia excluded pre-cohabitation property from a presumptive equal division of family property. The rationale was in part to ensure greater clarity and predictability, but also that the exclusion better accords with people’s sense of fairness in terms of ‘what is theirs’.⁴⁰⁹

In its 1997 Report, this Commission recommended that pre-matrimonial assets should continue to be included in a presumptive equal division.⁴¹⁰ In particular, the Commission noted that excluding pre-matrimonial assets may involve a more complicated valuation.⁴¹¹ Since the increase or decrease in the value of pre-matrimonial assets is shared, even though the assets themselves are excluded, a valuation of excluded assets is required for both the beginning and the end of the marriage.

It may be difficult after a long marriage, in particular, to ascertain what assets were brought into the marriage, and the value of those assets at the date of marriage.⁴¹² The Commission observed that in many cases there will not be much in the way of pre-matrimonial assets anyway, particularly if the partners are young. For those cases in which there are substantial pre-matrimonial assets, the Commission recommended the use of domestic contracts.⁴¹³

⁴⁰⁷ *Principles of the Law of Family Dissolution: Analysis and Recommendations*, *supra* note 88 at 723.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act*, *supra* note 83 at 81.

⁴¹⁰ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 26-28.

⁴¹¹ *Ibid* at 27.

⁴¹² *Ibid* at 26-28.

⁴¹³ *Ibid.*

In our view, the cohabitation date value of family assets acquired by one spouse or partner before cohabitation should be presumptively excluded from division. This accords with the purpose of family property legislation to recognize contributions to the relationship and the acquisition of assets prior to the start of the relationship cannot be said to be a product of these contributions.

The profile of families in Nova Scotia has changed since the *Act* came into force, and even since the Commission released its 1997 report. Second and third marriages are becoming more common than they were when the *Matrimonial Property Act* was first introduced, and with the introduction of common law couples into the regime it will become more likely that spouses and partners will experience multiple divisions of property in their lifetime. Furthermore, people are getting married later in life and entering marriage with more assets and larger pensions. The majority of respondents to the Commission's online survey indicated that they entered either their common law or married relationships with investments and RRSPs.

Presumptively excluding cohabitation date values from division – as opposed to the asset itself – ensures that while couples do not share in the value of the property as of the date of cohabitation, they do share in the increase in value from the date of cohabitation to the valuation date. By cohabitation date values we are referring to net values, so that only the equity in the property acquired to the date of cohabitation will be treated as non-family property. Just like other types of non-family assets, cohabitation date values should be capable of being divided by way of an unequal division application or by agreement.

In response to our recommendation to exclude cohabitation date values from a presumptive equal division, several respondents indicated that this recommendation may promote litigation as Nova Scotians are accustomed to sharing pre-matrimonial assets equally. We acknowledge that this recommendation may have this effect, especially at first. Ultimately, however, we believe the recommendation will reduce litigation as it will reduce the number of unequal division claims by spouses and partners wishing to exclude cohabitation date values on assets such as pensions and RRSPs.⁴¹⁴

Excluding cohabitation date values of matrimonial assets should also encourage settlement, to the extent that the exclusion accords with what people in general can agree is fair. It is important to note that the majority of respondents to both the Commission's online survey and in-person

⁴¹⁴ In Nova Scotia a good deal of litigation arose in the 1990s in particular, as parties attempted to exclude the pre-cohabitation value of pensions from a division. See for example, *Connolly v Connolly* (1999), 172 NSR (2d) 382, 44 RFL (4th) 86 (CA); *Dort v Dort* (1994), 130 NSR (2d) 108, 3 CCPB 233 (SC); *Adie v Adie* (1994), 134 NSR (2d), 7 RFL (4th) 54 (SC); and *Frost v Frost* (1996), 154 NSR (2d) 341, CarswellNS 418 (SC).

consultation sessions agreed that couples should not share the value of property brought into the relationship. This may indicate that the presumptive exclusion of asset values that were earned outside of the relationship may accord more with both parties' sense of fairness and to that extent promote consensual settlement.

The problem of how to value an asset that is owned before cohabitation and subsequently depreciates was raised during consultation. Some respondents did not think it was fair that the owning spouse or partner should get an exemption for the cohabitation date value of the asset, requiring the non-owning spouse or partner to share in the depreciation of value of an asset acquired before the parties even began cohabitating and likely without the knowledge of the other spouse or partner.

The problem of depreciating pre-cohabitation family assets raised concern for the Commission. On the one hand it can be argued that if the increase in value of a pre-cohabitation family asset will be presumptively shared between the parties, then a decrease in value of a pre-cohabitation family asset should likewise be shared. After all, it may be that during the course of the relationship both parties had use of the asset. A vehicle is an example of a depreciating asset that may be used by both parties during the relationship.

On the other hand, allowing an owning spouse or partner to claim an exemption from the family pool of assets for the cohabitation date value of a depreciating asset – a value which is presumptively excluded from division on the theory that it is acquired outside of the relationship – will create a debt which will have to be accounted for by family assets. Where the parties have considerable assets this may not be much of an issue. However, where the parties have few family assets of value and/or where one party has pre-cohabitation assets of considerable value this may leave the non-owning spouse or partner in a precarious financial position on relationship breakdown. Presumptively sharing in the depreciation in value of pre-cohabitation assets may place an additional financial strain on the non-owning spouse or partner to bring an application for unequal division.

The Commission recommends that the increase in value from the date of cohabitation to the valuation date should be presumptively shared between the parties. Where a pre-cohabitation family asset has depreciated from the date of cohabitation to the valuation date, the owning spouse will only be able to receive an exemption for the cohabitation date value of the asset on an application for unequal division. The owning spouse or partner would have to show that it would be unfair or unconscionable on a consideration of the “unequal division” factors for the non-owning spouse or partner to fail to share in the depreciated value of the family asset.

Presumptively sharing the increase in value of a pre-cohabitation asset is the approach taken in two other “division of property” provinces: Alberta and British Columbia. In British Columbia, an asset owned prior to cohabitation is classified as excluded property and only the increase in value

of this asset is classified as family property.⁴¹⁵ On the other hand, in Alberta, only the value of the pre-cohabitation asset is presumptively excluded from division and then the increase or decrease in value of the asset during the marriage is divisible.⁴¹⁶ Case law in that province has presumptively exempted from an equal division the depreciated market value of pre-marriage property at the date of trial.⁴¹⁷ Where a pre-marriage asset has been traded in and a new asset bought, the courts have applied a *pro rata* approach to calculate the depreciated value of the pre-marriage asset relative to the depreciated value of the replacement asset to the valuation date.⁴¹⁸

The Commission recommends that the value of pre-cohabitation property that should be presumptively excluded from an equal division should be the value at the valuation date. Where the asset has been disposed of or traded in prior to the valuation date, the value of the asset at disposition should be used. The Commission appreciates the logic of Alberta's *pro rata* approach to valuing depreciated property, however, this is a complicated calculation that may itself frustrate settlement. Furthermore, Nova Scotia has not applied a tracing approach to family property divisions as is used in the Western provinces.

A number of respondents were concerned that the Commission's recommendations regarding pre-cohabitation assets would give rise to valuation issues. As noted in the Discussion Paper, we acknowledge that in some cases presumptively excluding cohabitation date values will require a more complicated valuation of the relevant assets, for the beginning and the end of the relationship. But the difficulty should not be exaggerated. The presumption will remain that all property is included unless it is subject to an express exclusion; a party seeking to exclude the value of pre-cohabitation property will have to establish the value at the time of cohabitation and in some cases at the date of disposition or separation, and argue that this value is exempt.

For longer marriages or partnerships it may be more difficult to prove cohabitation date values. However, as the ALI has suggested there will typically be greater interdependence in these longer relationships and the parties will come to think of such assets as less separate:

After many years of marriage, spouses typically do not think of their separate property assets as separate, even if they would be so classified under the technical property rules. Both spouses are likely to believe, for example, that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for other personal

⁴¹⁵ *Family Law Act*, SBC 2011, c 25, ss 85(1)(a), 84(2)(g); *Remmem v Remmem*, 2014 BCSC 1552.

⁴¹⁶ *Matrimonial Property Act*, RSA 2000, c M-8, ss 7(2)(c), 7(3)(a).

⁴¹⁷ See, for example, *Lovich v Lovich*, 2006 ABQB 736.

⁴¹⁸ *Ibid.*

emergencies. The longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of the marital assets that are premised in part on such expectations about the separate property of both spouses.⁴¹⁹

In many cases third party records will be available to prove the value of property. We recommend that public legal education materials raise awareness of documents that spouses and partners may need to prove cohabitation date values. These include: bank statements including retirement savings account statements, investment account statements and loan statements including mortgages, lines of credit, and credit card statements, assessment statements for real property, and statements from pension plans. Spouses and partners should be advised to keep these documents themselves as banks may not retain records older than seven years.

Recommendations:

Cohabitation date net values of family assets owned by a spouse, registered domestic partner, or common law partner prior to cohabitation should be presumptively excluded from an equal division of family assets.

Only the increase in value of pre-cohabitation family assets will be presumptively shared. Where a pre-cohabitation family asset has depreciated in value such that the owning spouse or partner's equity in the property has decreased, the valuation date value or the value of the asset at the date of disposition should be presumptively excluded from an equal division subject to an application for unequal division.

Public legal education materials should raise awareness of documentation that spouses and partners may need to prove cohabitation date values. These include: bank statements including retirement savings account statements, investment account statements and loan statements including mortgages, lines of credit, and credit card statements, assessment statements for real property, and statements from pension plans. Spouses and partners should be advised to keep these documents themselves as banks may not retain records older than seven years.

⁴¹⁹ *Principles of the Law of Family Dissolution: Analysis and Recommendations*, supra note 207 at 858.

5.1.1. Property Acquired During Cohabitation

Many married couples cohabit prior to marriage. The question arises whether the pool of property subject to division includes property accrued during the entire period of the cohabiting relationship, or only that accrued after the couple has married?

The same issue arises with regard to common law couples, where there is a duration requirement before family property obligations apply: does the pool of family assets include property values which are acquired or accrue during this period, or only after the relationship “crystallizes”?

In Canada, there are two distinct approaches. In Manitoba and British Columbia once unmarried partners have cohabited for the statutory minimum duration period, the covered property extends back to the moment when the couple began living in a “conjugal” or “marriage-like” relationship.⁴²⁰

In the Manitoba case of *Stuart v. Toth*,⁴²¹ the court rejected the appellant’s contention that the accounting of assets only begins after the cohabitation period is complete. The court held that such an interpretation would create inequalities between married and common-law partners.⁴²²

Saskatchewan’s legislation, in contrast, has been held only to apply to property attained by a common law couple after the completion of the two-year requirement. Section 23(1)(c) of the *Family Property Act* excludes property acquired “before the commencement of the spousal relationship” from the distribution scheme.⁴²³ Saskatchewan courts have held that a spousal entitlement does not “crystallize” until spouses have completed the two-year minimum duration period, whereupon they become spouses for purposes of the *Act*.⁴²⁴

British Columbia is the only province to expressly address the issue of when entitlement arises under the *Act*. Pursuant to section 3(3) of British Columbia’s *Family Law Act*, a relationship between spouses begins at the earlier of the point a couple begins “to live together in a marriage-

⁴²⁰ *Stuart v Toth*, 2011 MBCA 42, 268 Man R (2d) 50.

⁴²¹ *Ibid.*

⁴²² *Ibid* at paras 32 to 34.

⁴²³ *The Family Property Act*, SS 1997, c F-6.3, s 23(1)(c).

⁴²⁴ See for example *Ruskin v Dewar*, 2003 SKQB 514; *Bryant v Bryant*, 2005 SKQB 298 at paras 23-24.

like relationship,” or marriage.⁴²⁵ Property and debt which is subject to division includes that which is acquired or incurred after this point.⁴²⁶

In our view, property acquired, and the value of property which accrues after the couple begins to cohabit should be presumptively included in an equal division. Cohabitation is generally the point at which the couple begins to make the joint contributions to family property that the *Act* is designed to recognize. The duration requirement for common law couples should define the existence of a relationship of sufficient interdependence to justify the imposition of family property obligations; it should not define the scope of property deemed to have been acquired by the joint efforts of the couple.

Using the “crystallization” definition of family property may prompt unjust enrichment claims in order for married spouses and common law partners to realize a division of property acquired by their joint efforts during cohabitation. As discussed above, unjust enrichment claims have proven costly, complex and uncertain, making settlement more difficult.

Recommendation:

Family property legislation should define the exclusion of cohabitation date values according to the earlier of the date when the spouses, common law partners or registered domestic partners began to live together in a conjugal relationship, or their marriage.

5.1.2. Dividing the Family Home: Excluding Cohabitation Date Values

The Commission received several submissions regarding the effect that the exclusion of cohabitation date values of pre-cohabitation family assets would have on the division of the matrimonial home. Some respondents were concerned that where one spouse or partner owned the home prior to cohabitation, the exclusion of the pre-relationship value of the family home from division would result in the other spouse being unable to afford to stay in the home after separation or divorce. For many families, the family home will be the only asset of substantial value. It is likely that both parties have been contributing to the home and maintaining it. Some respondents were of the opinion that without dividing the full value of the home, one partner

⁴²⁵ *Family Law Act*, SBC 2011, c 25, s 3(3)(a).

⁴²⁶ *Ibid*, s 85(1)(a), s 86(a).

would lose out on a fair division of assets.

On the other hand, a number of respondents were concerned that there would be too much potential for arbitrary treatment of excluded property if the family home were given preferential treatment.

In the Discussion Paper, the Commission noted that in 1993, the Ontario Law Reform Commission recommended ending the special status of the matrimonial home in that province, which sees the equal division of the total value of the home even where it is owned by only one party prior to marriage. The Commission noted that this provision gives rise to anomalous treatment between different types of property which might lead to unfairness. The Commission noted, for example that the special treatment of the matrimonial home “privilege[s] a spouse who possesses other forms of premarital property” and penalizes a spouse who had equity in the home before the relationship.⁴²⁷ Then Commission Chair John D. McCamus commented:

Problems such as these not only represent a departure from the cardinal principle that like cases ought to be decided in like fashion, they also create a trap for the unwary and create opportunities for strategic behaviour. Ending the special treatment of the matrimonial home for equalization purposes would eliminate anomalies of this kind.⁴²⁸

We continue to agree with this reasoning. The family home should not be excluded from the general model of family property we have recommended. Such an exclusion could have adverse consequences especially in second or third marriages or eligible common law relationships.⁴²⁹ If, for example, the primary caregiver of the children has already been through a family property division and received the home as part of that division, she may find herself unable to remain in

⁴²⁷ Ontario Law Reform Commission, *Report on Family Property Law* (Toronto: Ontario Law Reform Commission, 1993) at 80.

⁴²⁸ John D McCamus, “Family Law Reform in Ontario [1993],” *Special Lectures of the Law Society of Upper Canada* (Toronto: Carswell & Co, 1993) 451 at 459-460

⁴²⁹ See Robert Leckey, “Gimme Shelter”(2011) 34 Dal LJ 197 at 206:

One obvious class disadvantaged by [the rule in Ontario which prevents the deduction, from a spouse's "net family property," of the value of a matrimonial home owned by one spouse on the date of marriage] consists of women who enter a second marriage having retained, from the first, custody of the children and title to the family home. On a further division of property, they would be prevented from deducting from their net family property what might be their chief pre-marriage asset. Meanwhile, their spouses could deduct property of any other kind that they had owned on the date of marriage.

the home if the cohabitation date value of the home is not excluded from a subsequent division.

The cohabitation date value of property may be subject to division in certain circumstances, where an equal division of only the property acquired and accumulated during cohabitation would be unfair or unconscionable. An unequal division application is capable of addressing situations, for example, where the parties have cohabited for a long period of time, where the non-owning spouse or partner has made substantial contributions to the home or where there are no other assets of value and the full value of the home is necessary to effect an appropriate family property division.

Recommendation:

The cohabitation date value of a family home owned before cohabitation should not be subject to a presumptive equal division of assets.

5.2. Business Assets

The *Matrimonial Property Act* presumptively excludes business assets from the pool of assets subject to an equal division.⁴³⁰ Business assets are defined as follows:

"business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.⁴³¹

Such assets, if held in the name of one spouse rather than both, are not subject to a presumptive equal division.⁴³²

⁴³⁰ *Matrimonial Property Act*, s 4(1)(e).

⁴³¹ *Ibid*, s 2(a).

⁴³² *Ibid*, s 12(1).

The *Act* does provide that property which would normally be considered a matrimonial asset is not exempt simply because it is held by a spouse's corporation.⁴³³ Similarly, even where a home is owned by a corporation it may still fall within the definition of a matrimonial home, depending on its use.⁴³⁴

Business assets that do not fall within the definition of matrimonial assets can only be divided under section 13 – the “unequal division” section of the *Matrimonial Property Act* – or section 18, or by agreement. Section 13 provides that a judge may divide non-matrimonial assets, including business assets, where an equal division of matrimonial assets alone would be unfair or unconscionable. The section lists a number of factors that may be relevant to a claim for division of non-matrimonial assets, including, “the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset.”⁴³⁵

Section 18 provides that where a spouse has contributed “work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset” that is owned by the other spouse, the non-owning spouse may apply for a share of the interest in the asset, or monetary compensation.

Nova Scotia is one of only a few jurisdictions in Canada that exempts business assets from a presumptive equal division, along with New Brunswick⁴³⁶ and Newfoundland and Labrador.⁴³⁷ On First Nations reserves in Nova Scotia on which the federal provisional rules apply, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* does not exclude business assets from the matrimonial interests or rights subject to an equal division upon relationship breakdown under that Act.⁴³⁸

The exemption of business assets from a presumptive equal division reflects a conviction that there ought to be a distinction between spouses' business efforts and their efforts in the marriage.

⁴³³ *Ibid*, s 4(4). See *McNulty v McNulty* (1989), 94 NSR (2d) 387 (SCJ).

⁴³⁴ *Ibid*, s 3(3).

⁴³⁵ *Ibid*, s 13(f).

⁴³⁶ *Marital Property Act*, SNB 2012 c 107, s 1.

⁴³⁷ *Family Law Act*, RSNL 1990, c F-2, s 18(1)(c)(iv).

⁴³⁸ *Family Homes on Reserves and Matrimonial Interests or Rights Act*, s 2(1), “matrimonial interests or rights”.

The exemption also addresses concerns about valuation and potential damage that may be done to the business itself by its division.⁴³⁹

Work within the home provides the opportunity for the family to further a business venture, and so acquire business assets. In that light the exemption of business assets appears to be based upon outdated stereotypes about the value of work done inside the home. The *Matrimonial Property Act*'s preamble affirms the commitment to recognizing the equal value of labour performed in and outside the home. The exclusion of business assets from a presumptive equal division is not consistent with that commitment. As one lawyer put it: "If it is truly the case that child care, household management and financial support are equal contributors to a marriage, then business assets, even in a limited entrepreneurial sense, should not be distinguished from matrimonial property on marriage breakdown".⁴⁴⁰

As well, excluding business assets creates a disparity between different forms of asset holding which reflects no necessary distinction in fact. A self-employed individual may be building up a business asset which will one day serve as a retirement asset. The business asset will be presumptively exempt from division, while another spouse's pension will not be.

The scope of the presumptive exemption of business assets is also subject to a fair amount of uncertainty. Beyond the definition at section 2(a), the *Act* provides no guidance as to what property is to be considered a business asset. It has been left to the courts to develop the concept.

In the case of *Lawrence v. Lawrence*,⁴⁴¹ the Court of Appeal held that an asset can be said to be a business asset if the property is working to produce an income or profit. This may seem straightforward enough, but the last 30 years have seen a series of further explanations and limits.⁴⁴²

⁴³⁹ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 38.

⁴⁴⁰ Kenzie MacKinnon, "Business Assets in the *Matrimonial Property Act*: The Three Most Important Cases" (Halifax: *Matrimonial Property Act* @ 30 Conference, Canadian Bar Association, 15 October 2010) at 5.

⁴⁴¹ (1981), 47 NSR (2d) 100.

⁴⁴² See, e.g., *Hebb v Hebb* (1991), 103 NSR (2d) 147 where the court of appeal held that whether an asset was a business or matrimonial asset depended on the intentions of the parties. In *Best v Best* (1991), 102 NSR (2d) 61, the court of appeal held that a woodlot was not a business asset as it did not make immediate income but was a piece of property held in "hope of gain". In *Roberts v Shotton*, 1997 NSCA 197, 156 NSR (2d) 47 the Court of Appeal held that a static asset may in appropriate circumstances be classified as a business asset, but in *JWL v CBM* (2008) NSSC 215 at para 75, MacDonald J held that a GIC, while bought

In *Clarke v. Clarke*⁴⁴³ the Supreme Court of Canada held that an asset will be found to be a business asset when it is generating “income in an entrepreneurial sense” – that is, where it is actively generating profit as opposed to serving as a vehicle for savings. In *Tibbetts v. Tibbetts*, Hallett J.A. elaborated:

Notwithstanding the broad scope of the words used in the definition of business assets in the Act and the decision of Mr. Justice Hart in *Lawrence v. Lawrence*, *supra*, generally speaking, an investment portfolio of stocks, bonds, GICs, mutual funds or the like does not involve the employment of capital for the purpose of generating income in an “entrepreneurial sense”. An entrepreneur is defined in the Concise Oxford Dictionary as a “person in effective control of commercial undertaking”; one who “undertakes a business or enterprise, with chance of profit or loss”. Holding a stock portfolio does not normally equate with operating a business.⁴⁴⁴

It has also been held that business assets cannot be assets acquired from funds diverted from family purposes.⁴⁴⁵ Further, business assets cannot be assets intended for a family’s retirement⁴⁴⁶ or held primarily for the purpose of realizing a later gain, as opposed to working income.⁴⁴⁷

We have nevertheless heard that there remains some uncertainty as to whether certain property will be found to be a business asset.⁴⁴⁸

with money obtained from the sale of a business asset was not a business asset as it was “not working in an entrepreneurial way. It carries little risk and requires no management.” As such, she found it to be a matrimonial asset. In *Clarke v Clarke*, (1990) 2 SCR 795, the Supreme Court held that a business asset must be generating income in an “entrepreneurial sense”. In *Lawrence v Lawrence* (1981), 47 NSR (2d) 100 the court held that a business asset must be “working” and producing income or profit. In *Laprise v Crow*, while the trial level said a bank account was a business asset the appeal level said that the bank account was matrimonial property as it was not working. See *Laprise v Crow* (1991), 101 NSR (2d) 194, 32 RFL (3d) 82 (CA).

⁴⁴³ [1990] 2 SCR 795, rev’g (1986), 72 NSR (2d) 387 (CA), 29 DLR (4th) 492.

⁴⁴⁴ (1992) 98 DLR (4th) 609; 119 NSR (2d) 26 (CA).

⁴⁴⁵ DA Rollie Thompson, “Business Assets: a Note”, *Family Law Casebook* (Halifax: Schulich School of Law, 2012) at VII-56.

⁴⁴⁶ *Hebb v Hebb* (1991), 103 NSR (2d) 147.

⁴⁴⁷ *Best v Best* (1991), 102 NSR (2d) 61.

⁴⁴⁸ As reported by members of the Family Law Section of the Canadian Bar Association - Nova Scotia branch

Further uncertainty is created by sections 13 and 18 – the sections which permit business assets to be divided, notwithstanding their presumptive exclusion as non-matrimonial assets, based upon considerations of unfairness and contribution, respectively. Arguments for an unequal division under section 13 open up division of property disputes to judicial discretion. Section 18 requires the court to consider the proportion and value of the non-owning spouse's contribution to a business asset, and whether a share of the business or a payment in compensation is the appropriate remedy. This presents uncertainty and opportunity for litigation.⁴⁴⁹

The exemption of business assets from a presumptive equal division may be losing favour in the courts. Professor Thompson has noted that in recent years the cases have been steadily narrowing the scope of the exemption.⁴⁵⁰ This may indicate a growing recognition of the practical difficulty in parsing out each spouse's contribution to the economic whole in the context of marriage, and the increasing obsolescence of the business asset exclusion.

Response to the issue of business assets was mixed but overall, the majority of respondents were in favour of including business assets in a presumptive equal division of family assets. While 55% of respondents to the online survey indicated that they were not in favour of a presumptive equal division of business assets, the majority of respondents to the Commission's in-person consultation sessions were in favour of such a division. Interestingly, the majority of respondents to the online survey indicated that in their experience, of those businesses owned by themselves or persons they know, they thought the family as a whole contributed to the operating of the business either directly or indirectly. However, the majority of online respondents who were not in favour of including business assets in a presumptive equal division of assets indicated that they could not be sure that in all cases partners or spouses of business owners will have contributed equally to the business – either directly or indirectly – sufficient to ground a claim for presumptive equal division. These respondents indicated that as is currently the case, the issue should be assessed on a case-by-case basis.

On the other hand, most respondents who were in favour of a presumptive equal division of business assets were of the view that there was no principled reason to exclude business assets from division as the family tends to work together as a unit, so that the work of one spouse outside the business will allow the other to work at the business. Furthermore, as one respondent

who attended a presentation by Commission staff on April 27, 2013. For example, corporate assets which are set up as a tax savings vehicle.

⁴⁴⁹ See, e.g., *Ryan v Ryan* 2009 NSSC 61, 2010 NSCA 2.

⁴⁵⁰ "Business Assets: a Note", *supra* note 445 at VII-55.

indicated, non-business owning spouses may be required to co-sign loans or consent to remortgage the family home in order to finance business assets. Failing to provide for a presumptive equal division of these assets will mean that these spouses will be expected to shoulder the risk of businesses failing without necessarily realizing the rewards.

Those respondents who expressed concerns over the Commission's proposals to include business assets in a presumptive equal division of assets upon relationship breakdown raised the following objections: that both spouses cannot be presumed to have contributed to the asset equally where one spouse is the primary business owner, that a presumptive equal division will create added cost and complexity and promote litigation, that a presumptive equal division of the value of the business would have a negative effect on the continued economic viability of the business and finally, that there is a potential for "double dipping" where the business-owner spouse or partner has been ordered to pay spousal support. We address these below.

As discussed in the Discussion Paper, there are generally three ways to value a business: the income approach, including a capitalization of earnings approach, a market approach which looks to market values for comparable businesses, and an asset approach which looks to a market value, replacement value or liquidation of assets approach.

Concerns over double-dipping usually arise when a capitalization of earnings approach is used to value a business as a calculation of income is used both to determine the value of spousal support and property division. However, even though the worth of a business is based upon the future benefits of ownership, it is still just a calculation of current value.⁴⁵¹ This value has already been received and must be divided as with any other matrimonial asset. Unlike a pension – the asset for which the "double dipping" concern usually arises – the business does not lose capital value as the income is paid out. Laura Morgan, for example, argues that double-dipping arguments should be confined to divisions of pensions where the asset being valued "is the income".⁴⁵² Courts have held that concerns over double-dipping are more appropriately confined to the division of pensions and not business assets.⁴⁵³

⁴⁵¹ Laura Morgan, "Note, 'Double Dipping': A Good Theory Gone Bad" (2012) 25 J Am Acad Mat L 133 at 142. Morgan cites the following helpful passage from the Colorado Court in the case of *re Marriage of Banning*:

The excess earnings method of valuation, like other similar ones, relies on a fictional purchase and sale of goodwill. In fact, at the time of dissolution the goodwill to be valued and divided has already been accumulated. It is an existing intangible asset, no different from any other marital asset that is fully owned.

⁴⁵² *Ibid.*

⁴⁵³ See, for example, *Cosentino v Cosentino*, 2016 ONSC 4021, WDFL 4111; *Halliwell v Halliwell*, 2016

With respect to the effect that an order for a division of family property might have on the economic viability of the business, as noted in the Discussion Paper, we are of the view that family property legislation must provide for remedies that affect the viability of the business as little as possible. Several respondents to the Paper, however, urged the Commission to make recommendations to ensure that proper remedies are available so that an order for a division of family property does not impair the economic viability of the business as an income producing vehicle.

While section 15 of the *Matrimonial Property Act* provides the court with the ability to make a broad variety of orders, given the special nature of business assets it may be important to set out specific orders with respect to these assets that address concerns over their continued viability. These orders, however, should not restrict the ability of the court to make orders currently contained in section 15 where the continued viability of the business asset is at issue.

First, we recommend that family property legislation contain an explicit assurance that an order that may have the effect of impairing business operations will not be made unless there is no alternative to satisfy an award. A similar provision is contained in Ontario's *Family Law Act*. The Act provides:

11. (1) An order made under section 9 or 10⁴⁵⁴ shall not be made so as to require or result in the sale of an operating business or farm or so as to seriously impair its operation, unless there is no reasonable alternative method of satisfying the award.

In provinces where business assets are included in a presumptive equal division of family assets the court can order one spouse to transfer shares to the other spouse, or the court may order that

ONSC 182, WDFFL 1698. In *Halliwell* at para 121, Harper J cited the Supreme Court of Canada in *Boston v Boston*, [2001] 2 SCR 413 at para 57:

When a pension produces income the asset is being liquidated. The same capital that was equalized is being converted into an income stream. By contrast, when a business or investment is producing income, that income can be spent without affecting the asset itself. In fact, the business or asset may continue to increase in value. The value of the business or investment can be equalized, but neither is depleted solely by producing income.

Affirmed in *Halliwell v Halliwell*, 2017 ONCA 349 at para 134.

⁴⁵⁴ Orders to effect an equalization between the spouses.

new shares issue to the spouse.⁴⁵⁵ This raises concerns about feuding spouses becoming business partners, as well as the potential concerns of third parties - other shareholders and clients in particular. This in mind, it may be preferable to divide the value of the business asset, rather than award a share of the business. Saskatchewan's *Family Property Act* provides:

Where a spouse has an interest in a corporation and where it would not be reasonable to give the other spouse shares in the corporation, the court may order the spouse who has the interest in the corporation to pay to the other spouse, in addition to any other sums payable pursuant to this Act, a sum no larger than the value of the benefit the spouse has with respect to the assets of the corporation.⁴⁵⁶

We agree that the court must have the power both to order a transfer of shares to the other spouse or partner where appropriate, as well as the ability to order a payout to the spouse or partner in lieu of the shares they would have otherwise received in a division.

In some provinces the court will defer the distribution of the family property so that one spouse or partner only receives their share of the family property either over time or at some specific future point in order to ensure the continued viability of the business. This method of distribution is controversial and should only be used where necessary to ensure the continued viability of the business and the income earning capacity of the spouse or partner. In their project on Matrimonial Property Legislation, the Saskatchewan Law Reform Commission made the following recommendation regarding deferred distributions where business assets are concerned:

Deferral of distribution is not appropriate in most cases. The spouse leaving the farm or business may require considerable capital to re-establish himself or herself, and it must always be recognized that the non-property owning spouse has a right to share in the matrimonial property. Maintaining viability is not, in itself, a sufficient justification for deferring distribution of all or most of the matrimonial property for an unreasonable length of time. In the Commission's opinion the Court should be empowered to defer distribution to preserve a viable economic unit where it is essential to enable a spouse to earn a living. Where distribution is deferred, the other spouse should be compensated in a fair manner. The spouse whose share is deferred is, in essence, making an investment in the farm or business operated by the other spouse. The court should be satisfied that the investment is adequately protected and produces a reasonable rate of return, through interest payments or otherwise.⁴⁵⁷

⁴⁵⁵ See *Family Law Act*, RSO 1990, c F.3, s 11(2)(b).

⁴⁵⁶ *Family Property Act*, SS 1997, c F-6.3, s 26(5).

⁴⁵⁷ Law Reform Commission of Saskatchewan, *Proposals Relating to Matrimonial Property Legislation*

In Ontario, in order to avoid hardship the court is able to make an order that an equalization payment be deferred or paid in instalments over a period of time not exceeding 10 years.⁴⁵⁸ This is done where the payor spouse does not have the funds to pay out the equalization payment in a lump sum. Before making such an order the court will look at the impact of delay on the recipient spouse.⁴⁵⁹

The Commission is of the view that where the court determines that an order to effect the division of a business asset would impair the economic viability of the business as a source of income for the spouse or partner the court should be able to defer distribution of the asset or order that payments be made in instalments. The term for making these payments should not exceed 10 years. The court may order the payor spouse or partner to pay interest on this amount. The court should not order a deferred payment if to do so would cause undue hardship on the payee spouse or partner.

Furthermore, the court may order that a charge be placed on the property in order to secure the order of the payee spouse or partner.

Finally, as in Saskatchewan's *Family Property Act*, we recommend that the Act should set out that the court should be able to vest the property in both spouses and make an order of possession to one spouse.⁴⁶⁰ This may be important where, for example, there is farmland or machinery that one spouse or partner may require access to, to ensure the continued economic viability of the business.

Given our recommendations with regard to the presumptive exclusion of the pre-cohabitation value of family assets brought into the relationship, only the net value of business assets acquired or accrued after cohabitation would be subject to a presumptive equal division.

We agree that dividing business assets will introduce complexity in family property divisions. The question of how to value a business has given rise to litigation in jurisdictions that divide these assets.

(Saskatoon: Law Reform Commission of Saskatchewan, 1985) at 16.

⁴⁵⁸ *Family Law Act*, RSO 1990, c F.3, s 9(1)(c).

⁴⁵⁹ See *Serra v Serra* (2007), 36 RFL (6th) 66, WDFL 2153.

⁴⁶⁰ *Family Property Act*, SS 1997, c F-6.3, s 26(1)(g) & (i).

Furthermore, given the complexity of valuing a business, parties will need to hire a business valuator in many cases. This could further add to the expense of dividing family property.

In our view, notwithstanding these complications business assets should be included in a presumptive equal division. It is important to note that Nova Scotia's current exclusion of business assets from a matrimonial property division has itself fostered litigation. As well, family property legislation serves an important remedial purpose, based on the fundamental principle that families are interdependent economic units and contributions to a spousal relationship should be deemed equal, whether remunerative or not. Business assets will in many cases have been the primary means of family support and a major focus of time and effort during the relationship. To presumptively exclude them from division is simply inconsistent with the basic framework of family property legislation.

Recommendations:

Family property legislation should not exclude business assets from a presumptive equal division of family assets.

The legislation should provide that the court should be permitted to order, or the parties to agree, that a spouse, common law partner or registered domestic partner may be paid the value of the spouse or partner's portion of a business asset, in lieu of a divided portion of the asset itself.

The legislation should provide that an order to effect the division of a business asset shall not be made so as to require or result in the sale of an operating business or so as to seriously impair the operation of the business unless there is no reasonable alternative of satisfying the award.

In addition to the remedies currently available to the court under section 15 of the *Matrimonial Property Act*, where the court determines that an order to effect the division of the business asset would impair the viability of the asset as a source of income for the spouse or partner the court should be able to defer distribution of the asset. The legislation should provide that the court may also do any of the following:

Order a spouse or partner to make payments in instalments;

Place a charge property in order to secure the order of the payee spouse or partner;

Vest the property in both spouses and make an order of possession to one spouse.

The legislation should provide that the term for deferring a payment should not exceed 10 years. The court may order the payor spouse or partner to pay interest on this amount. The court should not order a deferred payment if to do so would cause undue hardship on the payee spouse or partner.

5.2.1. Family Assets Held by a Corporation

Section 4(4) of the Act provides:

Where property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of that property are matrimonial assets.

The purpose of s 4(4) was explained by Davison J. in *McNulty*:

This section is indicative of the intention of the legislature to prohibit assets being retained by a corporation for the purpose of thwarting the objectives of the Act. It is easy to see the evil that would be encouraged if courts simply labeled assets which were connected with a business as “business assets” without a more careful analysis of the use to which the assets are put or held.⁴⁶¹

The section pierces the corporate veil to a limited extent; it does not divest the corporation of the asset but rather grants the other spouse an interest in the corporation.⁴⁶²

The section does not deal with business assets *per se* - the property in question is owned by a corporation rather than the spouse. But it is connected to the treatment of business assets to the extent that the spouse holds shares in the corporation that under the *Matrimonial Property Act* are presumptively excluded from equal division as business assets. With our recommendation that business assets should not be presumptively excluded, this section should not be necessary.

⁴⁶¹ See *McNulty v McNulty* (1989), 94 NSR (2d) 387 (SC).

⁴⁶² See *Bregman v Bregman*, (1978) 91 DLR (3d) 470; 7 RFL (2d) 201 (Ont HC), cited in *Osmond v Osmond* (1990) 96 NSR (2d) 19, 67 DLR (4th) 719 (CA).

Where a spouse owns shares, the value of those shares acquired since cohabitation will be shared on a presumptively equal basis. It does not matter whether the corporation holds an asset which would otherwise be found on its own to be a matrimonial asset, if the non-shareholder spouse will have access to the shares.

Recommendation:

Family property legislation should not include a provision that where a corporation holds an asset that would otherwise be a family asset, shares in the corporation owned by one spouse or partner with equal value to the asset are family assets.

5.3. Gifts & Inheritances

Gifts, inheritances, trusts and settlements received by a spouse from a third party are presumptively exempt from an equal division, except to the extent that they are used for the benefit of both spouses and/or their children.⁴⁶³ Like other non-matrimonial assets, they may be divided by a court under section 13 if it would be unfair or unconscionable not to do so, having regard to a number of factors listed in that section.

Most provinces and territories exclude gifts and inheritances to some extent from a presumptive equal division of family assets. The logic of the exclusion accords with the logic of family property legislation as a whole. These assets are transferred from a third party on a gratuitous basis to one spouse, and are not attributable directly or indirectly to the joint contributions of the spouses. Including gifts and inheritances from a third party to one spouse only in the scope of matrimonial assets would discourage intra-familial transfers of wealth and frustrate the intentions and expectations of testators.

In its 1997 Report this Commission recommended retaining the exemption of gifts and inheritances. As the Commission remarked, “Comments received from the public were almost unanimously in favour of retaining the exemption, and most were in favour of strengthening it in some form.”⁴⁶⁴

⁴⁶³ *Matrimonial Property Act*, s 4(1)(a).

⁴⁶⁴ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 35.

We recommend that the presumptive exclusion of gifts and inheritances should be retained in new family property legislation.

Recommendation:

Family property legislation should presumptively exclude from an equal division gifts and inheritances received by one spouse, common law partner or registered domestic partner from a person other than the other spouse or partner.

5.3.1. The “Family Purpose” Test

Gifts and inheritances from a third party will be considered matrimonial assets to the extent that they are used for the benefit of both spouses or their children. This ‘family purpose’ exception recognizes that use of gifts and inheritances for the benefit of the family raises a reasonable expectation that such assets will be shared. Family use includes not only the use of a cottage as a summer vacation spot, but also, for example, using money from an inheritance to purchase a vehicle for the family.

In *Fisher v. Fisher*,⁴⁶⁵ Cromwell J.A. (as he then was) noted that “the correct interpretative approach to the ‘extent of use’ aspect of s. 4(1)(a) has not been authoritatively resolved.”⁴⁶⁶ He said:

It is not possible or desirable to set out any hard and fast rules for determining the extent of use of an asset for the benefit of both spouses or the children. The fundamental issue, to use an expression that appears in some of the cases, is the extent to which the asset has gone into “the matrimonial pot”: see *Rossiter-Forest v. Forest* (1994), 129 N.S.R. (2d) 130 (S.C.) and *Stoodley v. Stoodley* (1997), 172 N.S.R. (2d) 101 (S.C.). This determination must be made having regard to the nature of the asset and what use, in the normal course of life, would constitute integration of an asset of that nature into the life of the family. Factors such as the degree to which the asset was kept and treated separately from matrimonial assets, the amount and nature of its use by, or on behalf of, the spouses or the children and the contribution of family resources to maintain or enhance the asset may be factors which will be helpful to consider in making this determination. This, of course, is not an exhaustive list.

⁴⁶⁵ 2001 NSCA 18, 190 NSR (2d) 144.

⁴⁶⁶ *Ibid* at para 49.

In my view, the trial judge erred in not classifying Mr. Fisher's share of the Franke farm at the time of separation as a matrimonial asset to the extent of its use for the benefit of the spouses and children. However, having regard to the limited nature of such use as reviewed earlier, a classification in the order of 15% of the property as a matrimonial asset would have been appropriate. Therefore, Mrs. Fisher's share, subject to possible reduction pursuant to s. 13, would have been one-half of 15% of Mr. Fisher's one-third interest at the time of separation. This would be equal to approximately 2.5% of the total value of the Franke farm, an amount equal to about \$4,650.⁴⁶⁷

In its most recent reforms British Columbia eliminated the 'family purpose' test. Explanatory materials accompanying the new legislation explained that the test had caused a considerable amount of uncertainty in the resolution of family property disputes.⁴⁶⁸ The legislation instead excludes a variety of categories of property, including gifts and inheritances, but includes increases in the value of excluded property since the beginning of the relationship, regardless of family use.⁴⁶⁹ This eliminates the uncertainty surrounding the extent of family use, while permitting the sharing of value which has accrued through the relationship. On the other hand, it may prompt claims for unequal division, since in many cases it is hard to rationalize sharing the increase in value of a third party gift or inheritance on the principle of equal contribution.

Despite the potential for uncertainty, we have heard that the 'family purpose' test, and the extent of use interpretation that the courts have developed, have not caused significant difficulty in Nova Scotia. Practitioners have indicated to the Commission that the logic of the provision seems to accord with people's sense of fairness and their expectations about what belongs to them as a family.

Furthermore, the case law continues to refine the concept of "extent of use" in important ways. For example, in the case of *O'Neil-Rafuse v. Rafuse*,⁴⁷⁰ the court confirmed that when one party uses the income from an invested gift or inheritance on the family, this does not convert the whole investment to a family asset. Conversely, where a party has invested matrimonial funds and mingled these with inheritance money, matrimonial funds will be isolated and returned to the

⁴⁶⁷ *Ibid* at paras 51-52.

⁴⁶⁸ British Columbia, Ministry of Justice, *Family Law Act Explained: Part 5 – Property*, online: <<http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part5.pdf>> at 83 (re: s 84 "Family Property").

⁴⁶⁹ *Family Law Act*, SBC 2011, c 25, s 84(2)(g).

⁴⁷⁰ 2015 NSSC 374, 370 NSR (2d) 1, citing *Kennedy-Dowell v Dowell*, 2002 NSSF 13, 203 NSR (2d) 130.

matrimonial pool. This jurisprudence is important as it refines the concept in such a way so as not to penalize a spouse or partner for using the income from an inheritance on the family.

We recommend that the family purpose test should be retained in new family property legislation. We note that with the presumptive exclusion of the cohabitation date value of assets brought into the relationship, the value of the asset that arose prior to the couples' joint efforts will not be subject to division, regardless of the family's use of the asset.

Recommendation:

Gifts and inheritances received by one spouse or partner from a third party should be included as family assets to the extent they are used for the benefit of both spouses or partners, or their children.

5.4. Trusts

The use of trusts raises distinctive and complicated issues for family property law. To what extent should a spouse's interest in a trust be considered a family asset, subject to a presumptive equal division at the end of the relationship? Should property contributed by a spouse to a trust in which that spouse holds, or may hold, a beneficial interest be included as a family asset? What if the trust is partially, or solely for the benefit of third parties?

Put differently, to what extent, and in what circumstances, should family property legislation permit a spouse to remove property from the pool of family assets by placing it into trust?

Trust property contributed by third parties for the benefit of a spouse, registered domestic partner, or common law partner also raises issues. Should the spouse's beneficial interest in a third party trust be included? What if third parties also have a beneficial interest in the trust?

5.4.1. Trust Property Contributed by Third Parties

The *Matrimonial Property Act* includes as matrimonial assets, "the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage."⁴⁷¹ The *Matrimonial Property Act* excludes from a presumptive equal division, among other things, "gifts, inheritances, trusts or settlements received by one spouse from a person other

⁴⁷¹ *Matrimonial Property Act*, s 4(1).

than the other spouse except to the extent to which they are used for the benefit of both spouses, or their children."⁴⁷² [emphasis added]

It might be thought, therefore, that a spouse's interest in a third party trust, used for the benefit of both spouses or their children, will be subject to a presumptive equal division to the extent of the family use. Section 4(1)(a) does not distinguish between different types of interests that a spouse may have in a third party trust. However, Nova Scotia courts have held that a spouse's equitable interest in a trust settled by a third party is not a matrimonial asset "acquired by" the spouse at all, until the spouse becomes legally entitled to the corpus of the trust.

In *Kennedy-Dowell v. Dowell*⁴⁷³ Campbell J. excluded the wife's beneficial interest in a third party trust, even though the prior distributions from the trust had been entirely used for family purposes. The wife was the beneficiary of two substantial testamentary trusts set up by the will of her great-grandfather. She received distributions from the trusts prior to and during the marriage, which were spent on family expenses. She received half of the remaining corpus of the trust after separation, at age 30, and the rest was to be distributed to her at age 35 provided she finished university (unless the trustee waived the university requirement).

Justice Campbell held that the trust property was "acquired" by the wife after separation, and was therefore excluded under section 4(1)(g) of the *Matrimonial Property Act*. He explained why the wife's equitable interest in the trust was not a matrimonial asset on the basis of the *Act*'s underlying logic:

The scheme of that Act is to define all assets as "matrimonial assets" unless they fall within one of the listed exceptions, whether or not they are acquired before or during the marriage and then to presume an equal division of them after excluding those assets that fit the exceptions.

...

Through this process, and except to the extent that they are used to benefit the spouses or children, gifts, inheritances and trusts represent one such listed exception, the impact of which is that such items are not presumptively shareable. The obvious rationale for this scheme is to recognize that the spoils of the joint venture of the couple, regardless of financial contributions during the marriage, should be presumptively shared equally and that the net worth derived from an extra-marital source attracted by the one spouse and not the other should be exempted from that presumption. There is an obvious logic to the

⁴⁷² *Ibid*, s 4(1)(a).

⁴⁷³ 2002 NSSF 13, 203 NSR (2d) 130.

equal sharing concept in regard to a net worth that was accumulated by the parties combined efforts in the family and marital life. It is equally illogical to provide for the presumptive sharing of net worth derived from gifts, inheritances or trusts of the one spouse. Common fairness dictates that a marriage certificate should not qualify a spouse to inherit, equally with the other spouse, such legacies as that spouse would, by blood relationship, have some expectation.⁴⁷⁴

He went on to illustrate the illogic of considering the beneficiary's interest in a third party trust as a matrimonial asset, with reference to the *Act's* treatment of gifts and inheritances:

If one spouse inherited an investment portfolio and did not use it in the family, the legislature clearly intended it to be protected from division in favour of the other spouse. In the case of investments veiled behind a trust, the corpus is even further distanced from the family in the sense that the trustee has the legal ownership of it. Therefore, that distance should provide even greater protection from division. It would be most ironic if a portfolio of inherited investments held by a spouse can be protected from presumptive division while a portfolio shielded behind the veil of a trust cannot.⁴⁷⁵

But rather than hold the wife's equitable interest in the trust to be presumptively excluded under section 4(1)(a), like other gifts and inheritances, Campbell J. held it to be a non-matrimonial asset under section 4(1)(g) - an asset acquired after separation - and therefore not capable of being brought into the pool of matrimonial assets by family use. He concluded that the legislature must have meant to exclude such interests, and only to include trust property when it is actually distributed to the spouse prior to separation:

... [I]t is not reasonable, in my view, to conclude that the legislature, in excluding from presumptive division "personal property acquired after separation" intended to recognize mere equitable interests as having been "acquired". I conclude that it is essential for the corpus in the fund to have been "acquired" before separation in order for the exclusion not to apply.⁴⁷⁶

⁴⁷⁴ *Ibid* at paras 37-38.

⁴⁷⁵ *Ibid* at para 40.

⁴⁷⁶ *Ibid* at para 41. At para 42, Campbell J pointed to the reasoning of Glube CJSC in *Coady v Coady* (1995), 144 NSR (2d) 106, 416 APR 106 at paras 27-28 as supporting his position. Chief Justice Glube (as she was then) held:

27 The main concern must be the wording of the legislation, namely, "gifts, inheritances ... *received*...". (emphasis added) In my opinion, the language of the section clearly anticipates the gift or inheritance has moved into the ownership of the spouse who is receiving the gift or

Justice Campbell was also concerned about the practical problems of valuing contingent interests in a trust. He explained:

Clearly, the legal interest in the fund is worth exactly the market value of the securities in it. What then is the equitable interest worth? There is no portion of the total value of the corpus that could be assigned to the equitable interest. The answer, in my view, is that the equitable interest has a very theoretical value only. The trust is not assignable and it is subject to contingencies. Accordingly the equitable interest - that is the right to acquire the corpus subject to contingencies - has no real value.⁴⁷⁷

Wolfson *et al.* consider that there was something other than the plain wording of section 4(1) of the *Matrimonial Property Act* at play in the case:

It was open to the court to find that the acquisition of an equitable interest in a trust was sufficient to satisfy the requirement that a matrimonial asset be acquired before or during marriage. Instead the court decided to interpret the wording of the statute in accordance with a "common fairness" understanding of the Legislature's intent. Although the court's decision may be consistent with other Nova Scotia cases dealing with this issue, the court's reasoning appears to have been motivated by its desire to prevent Mr. Dowell, for whom the court clearly had little affection, from benefiting from his wife's trust fund.⁴⁷⁸

Indeed, Campbell J. went on to hold that even if the wife's interest in the fund was property acquired prior to separation, it would have been excluded by section 4(1)(a) of the *Matrimonial Property Act* (the exclusion for gifts, inheritances, trusts and settlements), despite the extensive

inheriting. Also, in the present case, no use has been made of the funds for the benefit of both spouses or the children since no funds have been transferred to Mr. Coady. There may have been discussions and wishful thinking, but until the event occurs allowing the gift or inheritance to pass to the proposed recipient, at which time the amounts left, if any, in each of the funds can be determined, any use to which the monies are to be put is pure speculation.

28 I find the three Trust funds are not matrimonial assets. They have not been "received" or "used" by the Coady's or their children before or during their marriage.

It is worthwhile pointing out, however, that in *Coady*, unlike *Kennedy-Dowell*, no income received from the trust were used for a family purpose.

⁴⁷⁷ *Ibid* at para 44.

⁴⁷⁸ Lorne H Wolfson et al, "The Valuation of Trusts Under the Family Law Act" (2013) 32 CFLQ 275 at 284.

family use of almost all of the distributions from the trust during the couple's relationship. He distinguished between use of the income from a trust, and the trust property itself, holding that, "use of an income from a trust or inheritance does not taint the fund itself."⁴⁷⁹

In Ontario, the *Family Law Act* includes as net family property, "any interest, present or future, vested or contingent, in real or personal property."⁴⁸⁰ There is no question that an equitable interest in a trust is property under this definition. Wolfson et al. argue that, had *Kennedy-Dowell* been decided in that province, the spouse's interest in the trust would have been valued in an equalization claim.⁴⁸¹

British Columbia's *Family Law Act* expressly excludes a spouse's beneficial interest in third party trust property from the definition of family property:

85 (1) The following is excluded from family property:

...

(f) a spouse's beneficial interest in property held in a discretionary trust

(i) to which the spouse did not contribute, and

(ii) that is settled by a person other than the spouse;⁴⁸²

As well, any property which would be otherwise excluded from family property, including gifts from a third party and inheritances, which is held in trust for the benefit of a spouse, is likewise excluded.⁴⁸³

These exclusions are not subject to any exception for use for a family purpose, but as with other types of excluded property the increase in value of the property or interest from the time of cohabitation or marriage, or the acquisition of the asset, is included.⁴⁸⁴

⁴⁷⁹ *Kennedy-Dowell* at para 56.

⁴⁸⁰ *Family Law Act*, s 4(1) ("property").

⁴⁸¹ *Ibid* at 284.

⁴⁸² *Family Law Act*, SBC 2011, c 25, s 85(1)(f).

⁴⁸³ *Ibid*, s 85(1)(e).

⁴⁸⁴ *Ibid*, s 84(2)(g).

In our view, family property legislation should expressly include in a presumptive equal division a beneficial interest in property, whether vested or contingent. We will discuss this recommendation in greater detail below. We are also of the view, however, that a spouse's beneficial interest in a third party trust, and property contributed by a third party to a trust, should be presumptively excluded from a division. Use for a family purpose should not bring the asset into a division. Third party trusts are often set up by third party donors specifically to keep property out of the reach of the beneficiary's creditors, including potentially his or her spouse. They are unlike other types of gifts and inheritances to this extent. As well, as Campbell J. noted in *Kennedy-Dowell*, the extent to which use of distributions from the trust was used for the family should not render the interest itself a family asset.

Some respondents to the Commission's Discussion Paper indicated that allowing donors to shield assets from spouses or partners through third party trusts would benefit wealthy families only. The Commission is of the view that establishing a trust is a relatively simple estate planning tool and is not necessarily reserved for wealthy families.

We would not follow the British Columbia approach of presumptively including the increase in value of the beneficial interest during the spouses' cohabitation in a division. The increase in value of the spouse's interest may depend on many things which are not related to the joint effort of the spouses. In particular, a third party may add additional property - e.g., investments - to the trust, significantly increasing the notional value of the spouse's interest.

Recommendations:

Family property legislation should expressly include in a presumptive equal division a beneficial interest in property, whether vested or contingent.

Family property legislation should presumptively exclude from an equal division:

- (a) property which would be excluded as a non-family asset (e.g., a gift or inheritance) which is held in trust for the benefit of a spouse or partner;
- (b) a spouse or partner's beneficial interest in a trust to which the spouse or partner has not contributed and which is settled by a person who is not the spouse or partner.

A spouse or partner's interest in a third party trust should not be included as a family asset regardless of whether the trust has been used for the benefit of both spouses or partners or their children.

The increase in value of a spouse or partner's interest in a third party trust during the parties' cohabitation should not be included in a presumptive equal division.

5.4.2. Trust Property Contributed by a Spouse

Under the *Matrimonial Property Act*, all real and personal property acquired by either or both spouses before or during their marriage, with the exception of assets defined as non-matrimonial assets (including gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse), are subject to presumptive equal division. It might be thought, then, that a spouse's beneficial interest in a trust settled by either or both spouses will be included as a matrimonial asset subject to an equal division, as long as the interest is not a non-matrimonial asset (e.g., a business asset).

But, as Campbell J. held in *Kennedy-Dowell*, a spouse's beneficial interest in a trust is not "acquired" property until the trust property is distributed. Though Campbell J.'s interpretation relied on the difference in principle between property given by a third party and property contributed by a spouse, his conclusion that equitable interests in a trust are not "acquired" as matrimonial assets applies to any interest a spouse may have as a beneficiary of a trust, even where the spouse has settled the trust or contributed the trust property.

In our view, family property legislation in Nova Scotia should more clearly address the status of trust property contributed by a spouse or partner. In what circumstances should a spouse be permitted to shield what would otherwise be matrimonial assets behind a trust? Clearly the purposes of the *Act* are thwarted where the spouse stands to benefit from such a trust, yet the trust property is excluded from division. On the other hand, it may be the intention of the spouses that, even if one or both of them is named as a potential beneficiary, the trust is in reality set up to benefit only third parties (e.g., their children).

The provisions of the British Columbia *Family Law Act* respecting trusts more clearly address a spouse's interest as a beneficiary of a trust. In the British Columbia *Act*, family property includes "a beneficial interest of at least one spouse in property"⁴⁸⁵ - although as we have seen a beneficial

⁴⁸⁵ *Family Law Act*, SBC 2011, c 25, s 84(1)(a)(ii).

interest in a third party trust is excluded. Property contributed by a spouse to a trust is specifically addressed:

(3) ... family property includes that part of trust property contributed by a spouse to a trust in which

(a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,

(b) the spouse has a power to transfer to himself or herself that part of the trust property, or

(c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.⁴⁸⁶

Note that it is not the spouse's equitable interest that is caught by this provision, but the trust property itself - property in the hands of a third party (the trustee). The court has power to make orders generally for the "possession, delivery, safekeeping and preservation of property"⁴⁸⁷ as well as an order "vesting all or a portion of property in, or in trust for, the applicant."⁴⁸⁸

We recommend adoption of a similar provision here. As a general principle property which is not otherwise excluded as a non-family asset (e.g., a gift or inheritance), which has been contributed by a spouse to a trust, and which might return to the spouse as a beneficiary or otherwise should be considered a family asset. Only where the transfer of property into a trust by one spouse is irrevocable for the benefit of a third party should the property be considered to be a non-family asset, akin to a gift.

We would not limit the spouse's beneficial interest in (a) to a vested interest not subject to divestment. In our view, where property that would otherwise be a family asset has been put into trust by a spouse, a contingent interest as beneficiary should suffice to retain the property's character as a family asset.

Therefore, we recommend that family property legislation should expressly include as a family asset property, other than property which is otherwise defined as a non-family asset, which has been contributed by a spouse to a trust in which:

⁴⁸⁶ *Ibid*, s 84(3).

⁴⁸⁷ *Ibid*, s 91(2)(a).

⁴⁸⁸ *Ibid*, s 91(2)(b)(ii).

1. the spouse has a beneficial interest, contingent or vested;
2. the spouse has a power to transfer to himself or herself that part of the trust property, or
3. the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

There are circumstances in which family assets may have been irrevocably transferred to a trust with no beneficial interest accruing to the transferring spouse, but yet the spouse stands to benefit at some point further on. For instance, the trustee may have a power to add beneficiaries, and the plan may be to add the spouse after the division of family assets has been finalized. Our recommended provision would not cover such a case of deliberate evasion. But other provisions will be of use in this case, including the court's power to order an unequal division. Assignments and preferences legislation⁴⁸⁹ may apply as well.

Recommendations:

Family property legislation should expressly include as a family asset property, other than property which is otherwise excluded from the definition of family assets, which has been contributed by a spouse, registered domestic partner, or common law partner, to a trust in which:

- (a) the spouse or partner has a beneficial interest, contingent or vested;
- (b) the spouse or partner has a power to transfer to himself or herself that part of the trust property, or
- (c) the spouse or partner has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

5.4.3. Valuation of Trust Interests

As Campbell J. pointed out in *Kennedy-Dowell*, it is practically very difficult to value an equitable interest in a trust. Depending on the circumstances it may depend on the nature of the spouse's interest, the number of present or future beneficiaries, their expected lifespans, the expected

⁴⁸⁹ *Assignments and Preferences Act*, RSNS 1989, c 25. See, e.g., *Stone v Stone* (1999), 46 OR (3d) 31.

performance of trust assets, the terms of the trust, and the exercise of the trustee's discretion in distributing the assets. Such interests are typically not marketable, and so would have a fair market value of zero. Courts in other provinces have tended therefore to prefer a "fair value" calculation that assesses the value of the interest to the holder.⁴⁹⁰ But the valuation can be complex. The fair value of the interest is "a value that is just and equitable in the circumstances" and will require a consideration of the nature of the property and the circumstances surrounding valuation.⁴⁹¹ The valuation may be expensive, and may frustrate attempts at settlement.

Some courts have preferred an "if and when" arrangement. The beneficiary spouse will be obliged to hand over a portion of any disbursement from the trust, if and when it is received. The division may be 50-50, but courts have made unequal 'if and when' orders as well.⁴⁹²

As an alternative, in some provinces, courts have awarded a spouse a share of the other spouse's contingent capital interest in a discretionary trust, deeming a realization amongst capital beneficiaries as at the date of separation, less contingent taxes.⁴⁹³

Neither solution is without problems, as Allen and Rivard explain:

The nature of [the 'if and when'] remedy raises the spectre of whether the trust could be managed in such a way as to avoid, or minimize, distributions to the Husband directly from the trust. On the other hand, the notion of directing a spouse to "pay" now for an undetermined contingent interest which may not be received for years (or ever) is equal (sic) troubling.⁴⁹⁴

In our view the "if and when" approach fosters too much uncertainty, and the "deemed realization" approach is highly arbitrary, ignoring the discretionary nature of the trust. In the case of large trusts, this unfairness could be substantial.

⁴⁹⁰ Wolfson et al, *supra* note 478 at 287.

⁴⁹¹ *Ibid.*

⁴⁹² See *Grove v Grove*, [1996] BCWLD 1095, WDFL 796. (SC); *DaCosta v DaCosta* (1992), 89 DLR (4th) 268 (Ont CA); *Grosse v Grosse*, 2012 SKQB 464.

⁴⁹³ See *Sagl v Sagl* (1997), 31 RFL (4th) 405, 72 ACWS (3d) 717. Per suggestion by Wolfson as counsel, see para 37.

⁴⁹⁴ Laurie E Allen & Bailey M Rivard, "Deconstructing the Trust: Issues in Matrimonial Property Claims" (Paper delivered at the National Family Law Program, Whistler, BC, 14-17 July 2014) at 19.

Instead, we recommend that a trust interest should be valued according to its ‘fair value’, taking into account (as necessary depending on the nature of the interest) the prior use of the trust, the number of beneficiaries and their expected lifespans, expected performance of the assets, expected or potential payout date and value, and other evidence that may be relevant.

Recommendation:

Family property legislation should provide that a trust interest shall be valued according to its fair value, taking into account (as appropriate depending on the nature of the interest) the prior use of the trust, the number of beneficiaries and their expected lifespans, expected performance of the assets, expected or potential payout date and value, and other factors and evidence that may be relevant.

5.5. Awards and Settlements of Damages and Insurance Policy Benefits

Section 4(1)(b) of the *Matrimonial Property Act* presumptively excludes “an award or settlement of damages in court in favour of one spouse” from a division of matrimonial assets.⁴⁹⁵ Section 4(1)(c) presumptively excludes “money paid or payable to one spouse under an insurance policy”. These two subsections are qualified by section 4(2) of the *Act* which provides that, “an award or settlement of damages in court or money being paid or payable under an insurance policy is a matrimonial asset to the extent that it is made, paid or payable in respect of a matrimonial asset.” In other words, a car insurance payment would be included in an equal division, if the vehicle in question was a matrimonial asset.

In its 1997 report this Commission observed that section 4(1)(b) is mainly aimed at personal injury damages, but on its face it is not restricted to those.⁴⁹⁶ The case law has tended to interpret section 4(1)(b) as referring to damages for personal injury.⁴⁹⁷ Even then the section does not distinguish between awards for pain and suffering, pecuniary loss including medical expenses, lost income and lost earning capacity.

⁴⁹⁵ *Matrimonial Property Act*, s 4(1)(b).

⁴⁹⁶ Law Reform Commission of Nova Scotia, *Discussion Paper on Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Halifax: Law Reform Commission of Nova Scotia, 1996) at 37.

⁴⁹⁷ E.g., *Fraser v Fraser*, 2011 NSSC 178, 4 RFL (7th) 62; *Lucas v Lucas* (1990), 95 NSR (2d) 45, 251 APR 45; *Archibald v Archibald* (1981), 48 NSR (2d) 361, 92 APR 361.

While there is considerable variation in interpretation, most jurisdictions in Canada provide that damages or settlements for personal injuries should not be shared as family assets.⁴⁹⁸ However, there is some variation in terms of whether damages and payouts for lost wages during the relationship are sharable.⁴⁹⁹ There is also variation across the jurisdictions in terms of whether disability payments from insurance policies⁵⁰⁰ or portions of insurance policies that relate to loss of income,⁵⁰¹ are shareable as family assets.

The American Law Institute (“ALI”) recommended that compensation for pain and suffering should be excluded from marital property on the basis that this is loss of a personal nature.⁵⁰² We agree. Damages or settlements for pain and suffering arising from a personal injury are clearly personal and should remain exempt from division.

On the other hand, when a person has used those damages or settlements to purchase an asset used by the family it can no longer be said that these have retained their “personal” character. Case law in Nova Scotia has refused to trace the exemption to such converted family assets on this basis, as well.⁵⁰³ We recommend that assets purchased from funds from an excluded damage

⁴⁹⁸ Newfoundland and Labrador, *Family Law Act*, RSNL 1990, c F-2, s 18(1)(c)(ii); Alberta, *Matrimonial Property Act*, RSA 2000, c M-8, s 7(2)(d); British Columbia, *Family Law Act*, SBC 2011, c 25, s 85(1)(c); Saskatchewan, *Family Property Act*, SS 1997, c F-6.3, s 23(3)(a); Manitoba, *Family Property Act*, CCSM c F25, s 8(1); Ontario *Family Law Act*, RSO 1990, c F.3, s 4(2)3; Northwest Territories and Nunavut *Family Law Act*, SNWT (Nu) 1997, c 18, s 35(2)(b); *Family Law Act*, RSPEI 1988, c F-2.1, s 4(1)(b)(iii)2.

⁴⁹⁹ Newfoundland and Labrador, *Family Law Act*, RSNL 1990, c F-2, s 18(1)(c)(ii) and British Columbia, *Family Law Act*, SBC 2011, c 25, s 85(1)(c)(ii), explicitly include as sharable the portion of personal injury awards attributable to compensation for economic loss. Yukon does not address the question. New Brunswick does not address the issue but case law indicates judges may exclude awards for pain and suffering and future wages.

⁵⁰⁰ The provinces that exempt insurance policies in total: Saskatchewan, *Family Property Act*, SS 1997, c F-6.3, s 23(3)(b); Alberta, *Matrimonial Property Act*, RSA 2000, c M-8, s 7(2)(e); Manitoba, *Family Property Act*, CCSM c F25, s 8(1); and Prince Edward Island, *Family Law Act*, RSPEI 1988, c F-2.1, s 4(1)(b)(iii)3.

⁵⁰¹ The provinces that include as sharable the portion of insurance policies for loss of income include: British Columbia, *Family Law Act*, SBC 2011, c 25, s 85(1)(d)(ii); Ontario only excludes insurance payouts on death: *Family Law Act*, RSO 1990, c F.3, s 4(2)4; Yukon does not address the issue; Northwest Territories and Nunavut only exclude payouts for life insurance; New Brunswick does not address the issue.

⁵⁰² *Principles of the Law of Family Dissolution: Analysis and Recommendations*, supra note 88 at 797.

⁵⁰³ E.g., *Lucas v Lucas* (1990), 95 NSR (2d) 45, 251 APR 45 (TD).

award or settlement for a family purpose should not be exempt from division. Where it would be unfair or unconscionable to divide the value of the home or asset equally, an application for unequal division can be made.

Awards and settlements for lost income during the relationship are more controversial. On one hand, an award for lost income during cohabitation represents income that would have been spent on the family. The ALI recommended that damages awarded for economic loss during the marriage should be divisible as family property.⁵⁰⁴ The ALI would also include personal injury recoveries that replace what would otherwise be marital property such as income earned during the marriage, and out of pocket medical expenses that are paid from marital funds.⁵⁰⁵

British Columbia's *Family Law Act* excludes from family property settlements and damages for injury or loss, and moneys payable under an insurance policy for personal loss, but in both cases an exception is made for compensation for lost income.⁵⁰⁶

In its 1997 report this Commission agreed that damages attributable to lost wages during cohabitation should not be exempt.⁵⁰⁷

We continue to recommend that family property legislation should exclude from a presumptive equal division awards and settlements of damages for personal injury or loss, and insurance payments, other than an award, settlement or payment that represents compensation for loss to both spouses or partners, a family asset, or lost income or pecuniary loss during the couple's cohabitation. The exclusion should not extend to assets acquired for the benefit of both spouses or partners or their children from the conversion of an award or settlement for personal injury or loss or insurance payment. Finally, a lump sum payment from disability benefit programs should be classified as a family asset where it is for lost income during the marriage or partnership.

While in practice it may be difficult to determine what portion of a settlement is attributable to lost income, we are of the view that the court hearing the application for division of family property may make a reasonable allocation.⁵⁰⁸

⁵⁰⁴ *Principles of the Law of Family Dissolution: Analysis and Recommendations*, supra note 88 at 796-97.

⁵⁰⁵ *Ibid* at 797.

⁵⁰⁶ *Family Law Act*, SBC 2011, c 25, ss 85(1)(c)(ii), 85(1)(d)(ii).

⁵⁰⁷ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, supra note 69 at 35.

⁵⁰⁸ A similar recommendation was made by the ALI, for example. See *Principles of the Law of Family*

Recommendations:

Family property legislation should exclude from a presumptive equal division awards and settlements of damages for personal injury or loss, and insurance payments.

The exclusion should not extend to an award, settlement or payment that represents compensation for loss to both spouses or partners, a family asset, or lost income or pecuniary loss during the couple's cohabitation.

The exclusion should not extend to assets acquired for the benefit of both spouses or partners or their children from the conversion of an award or settlement for personal injury or loss or insurance payment.

Lump sum payments from disability benefit programs for lost income during cohabitation should not be excluded from a presumptive equal division of assets.

5.6. Reasonable Personal Effects

Nova Scotia⁵⁰⁹ and Newfoundland & Labrador⁵¹⁰ exclude reasonable personal effects from a presumptive equal division of matrimonial assets. In principle, the exclusion would seem to accord with fairness and the reasonable expectations of spouses that they will not have to divide

Dissolution: Analysis and Recommendations, supra note 88 at 796-97.

⁵⁰⁹ *Matrimonial Property Act*, s 4(1)(d).

⁵¹⁰ *Family Law Act*, RSNL 1990, c F-2, s 18(1)(c)(iii).

personal effects that belong to them. However, the vagueness of the term has led to litigation over valuable personal effects such as jewelry,⁵¹¹ animals,⁵¹² and guns.⁵¹³

There does not appear to be a leading case or generally accepted rationale for sorting items as excluded or included. In some cases the courts have interpreted “reasonable personal effects” as equivalent to “personal assets”⁵¹⁴ or “personal property”⁵¹⁵ - which seem broader in application. Depending on the case the court has identified a number of relevant considerations, including:

- a) whether the couple purchased the item together;
- b) whether the item was purchased for the use or enjoyment of one spouse exclusively (e.g., as a hobby);
- c) whether the parties shared the expense of maintaining the item; and,
- d) whether the parties shared an intention that the item be considered an investment.

It is important that a spouse’s entitlement be clear in the *Act*. This is particularly so for a spouse, registered domestic partner, or common law partner who needs to leave the home immediately,

⁵¹¹ In *Bechard v Bechard (MacKenzie)*, (1991) 111 NSR (2d) 1, 303 APR 1, at paras 55-56, the court found items of jewelry valued at \$9,250 to be reasonable personal effects. The same was found in *Macdonald v Macdonald*, (2000) 184 NSR (2d) 350, 573 APR 350 at para 42, and *Pettigrew v Pettigrew*, 2005 NSSC 219, 34 RFL (6th) 184 at para 10.

⁵¹² In *Taylor v Taylor*, (1992) 111 NSR (2d) 91, 38 RFL (3d) 313 at paras 84-85 the court found that the proceeds from the sale of one spouse’s exotic birds was exempt as personal property under the *Matrimonial Property Act*, s 4(1)(d). On the other hand, in *Clarke v Clarke*, 2004 NSSF 43, 130 ACWS (3d) 790, at paras 60-62, the court found that a horse was not a reasonable personal effect, noting that, “... these horses were purchased by both parties, the expenses were covered by both parties and, in particular, by the Petitioner, given the Respondent’s income level, and ... the horses were used by the family and rented in order to pay off some of the expenses which takes it out of the realm of a personal effect of a spouse and out of the realm of a hobby ...”

⁵¹³ In *Sproule v Sproule*, (1985) 69 NSR (2d) 103, 45 RFL (2d) 273, the court held a gun collection, purchased over a number of years by one spouse for his personal use, was a reasonable personal effect. The same was found in *Cole v Luckman*, 2012 NSSC 118, NSJ No 186.

⁵¹⁴ E.g., *Cole v Luckman*, 2012 NSSC 118, NSJ No 186 at para 74; *MacDonald v MacDonald*, 2004 NSSF 43, 130 ACWS (3d) 790 at para 42; *Clarke v Clarke*, 2004 NSSF 43, 130 ACWS (3d) 790 at para 62.

⁵¹⁵ E.g., *Taylor v Taylor*, (1992) 111 NSR (2d) 91, 38 RFL (3d) 313 at para 85; *MacDonald v MacDonald*, 2004 NSSF 43, 130 ACWS (3d) 790 at para 42.

such as in cases where she has been forced out by her partner or is fleeing domestic violence. In those situations it should be clear to both parties, and potentially to law enforcement and other justice system representatives who become immediately involved that a spouse or partner is entitled to leave with her personal effects.

The legislation should also be clear that non-essential items of significant value, purchased with family assets, should not be covered by the exclusion. Otherwise a family which has invested in certain items that may be deemed 'personal' will have a distorted pool of property subject to division, as compared with a family which has invested in items which are unambiguously for a family purpose.

On the other hand, setting out with greater specificity what items constitute reasonable personal effects may in itself lead to litigation. In many cases the term "reasonable personal effects" is a common sense one. The general sense of the term may actually keep the couple from litigating the exclusion of certain property where they can both agree what is 'reasonable'.

On balance, given the need for clarity in light of the litigation that has arisen, we think that more specificity is needed. We recommend that family property legislation should include a non-exhaustive list of items encompassed by the term "reasonable personal effects", including clothing, footwear and outerwear, and personal care items, including medication and personal assistive devices.⁵¹⁶

Recommendation:

Family property legislation should exclude from a presumptive equal division of family assets reasonable personal effects of one spouse or partner, including clothing, footwear and outerwear, and personal care items, including medication and personal assistive devices.

⁵¹⁶ The list at section 45(1) of the *Judicature Act*, RSNA 1989, c 240 includes, among other things, "wearing apparel" and "all medical and health aids reasonably necessary for the [debtor] and family".

5.7. Post-Separation Property

The *Matrimonial Property Act* excludes post-separation property from a presumptive equal division of assets, unless the spouses have resumed cohabitation.⁵¹⁷ Spouses are deemed not to have resumed cohabitation where the duration of any resumption does not, in aggregate, exceed more than 90 days.⁵¹⁸

In *Simmons v. Simmons*, Campbell J. held that post-separation property is generally exempt from a presumptive equal division, except where it is part of a plan to rearrange separation date assets and debts:

It is often the case that the parties rearrange their assets and debts as part of the transition to separate finances. Examples would be the taking out of a consolidation loan to pay out separation date debts or to finance their interim living expenses. The liquidation of a vehicle to purchase alternative transportation is another example. If a transaction can be characterized as a plan to rearrange the separation date asset and debt mix, subject to an expressed or implied intention to account for these changes at trial, the fact that they did not exist at the time of the separation would not disqualify these post-separation assets and debts from being valued and divided, but only to the extent that they replace separation date assets and debts or funded the parties' transition.⁵¹⁹

British Columbia's *Family Law Act* provides that post separation property is family property where it is derived from family property or from the disposition of family property.⁵²⁰

We think this principle should be clear in the legislation. Excluding property and debt acquired post-separation from a presumptive equal division is consistent with the purpose of recognizing partners' joint contributions to the relationship, and sharing the results. But it is also important to presumptively include in a division of family assets property which is acquired post-separation to replace separation date assets and debts, so that property cannot be removed by one spouse from the family asset pool simply by converting it to a different asset.

⁵¹⁷ *Matrimonial Property Act*, s 4(1)(g).

⁵¹⁸ *Ibid*, s 4(3).

⁵¹⁹ *Simmons v Simmons*, 2001 NSSF 35 at para 17.

⁵²⁰ *Family Law Act*, s 84(1)(b).

Recommendation:

Family property legislation should exclude from a presumptive equal division property and debt acquired post-separation, except to the extent they are derived from family assets or debt or from the disposition of family assets or debt.

5.8. Valuation Date

The *Matrimonial Property Act* gives little guidance as to how assets and debts are to be valued. While the date of separation is in general the date at which one identifies the matrimonial property and debt subject to division,⁵²¹ it is not necessarily the date at which family property and debt is valued. Instead, case law has developed a set of approaches, depending on the type of property.

The leading Nova Scotia case on valuation of matrimonial property is *Simmons v. Simmons*.⁵²² Justice Campbell held that while the presumptive valuation date is the date of division (ie., the date of trial or agreement), some assets require different valuation dates, depending on the reasons for potential changes in value.

As indicated in *O'Hara v. O'Hara*,⁵²³ depreciating assets should be valued at separation date and appreciating assets should be valued at trial date or date of division. However, as Campbell J. held in *Simmons*, "I interpret the decision as standing for the proposition that when assets which existed at separation date are consumed or partly consumed prior to trial, the spouse who enjoyed that consumption must account to the spouse who lost out on it."⁵²⁴ He further gives the examples of "motor vehicles, furniture and household contents, bank accounts, recreational vehicles, boats and any other type of asset whose values tend to be consumed by usage" as appropriate to value at the date of separation.⁵²⁵ Justice Campbell also referenced pensions, income tax refunds, bank accounts, long service awards and frequent flier points as assets which should be valued as of the

⁵²¹ 2001 NSSF 35 at para 14.

⁵²² *Ibid.*

⁵²³ 104 NSR (2d) 426, 34 RFL (3d) 222.

⁵²⁴ *Simmons*, *supra* note 521 at para 24.

⁵²⁵ *Ibid* at para 25.

separation date. These assets are attributable either to work undertaken during cohabitation or are “capable of being related by acquisition to the period of cohabitation.”⁵²⁶

There are a number of assets which may appreciate between the date of separation and the date of division, that will usually be valued at the date of division including real estate, bonds, stocks, mutual funds, RRSP accounts, cash value of life insurance, and business assets.

There is some merit in leaving the valuation date to judges in individual cases. In *Simmons*, Campbell J. noted that judicial discretion in setting the valuation date was “a positive thing so that a fair and equitable result can be obtained on a case by case basis. The *Act* is based on the principle of fundamental fairness in the division of assets... ‘whatever the date has to be to accomplish this purpose is the proper date’.”⁵²⁷ And it may be that the *Simmons* principles are sufficiently well known, and need not be enshrined in the legislation.

The Ontario *Family Law Act* provides that valuation will be the earliest of the date of separation, grant of divorce, declaration of nullity, the date before the date of death or the date of an application for improvident depletion.⁵²⁸ A fixed date provides certainty and predictability, potentially facilitating settlement. On the other hand, it may lead to legal wrangling on other fronts, as couples argue over changes in value from separation to the date of trial or division, and prevents judges from using their discretion to order a division which is fair in the situation.

British Columbia’s *Family Law Act* fixes the date of valuation as the date of division – either by agreement or the date of court hearing.⁵²⁹ This date can be changed either by agreement or by court order.⁵³⁰ Only assets and debts as of the date of separation are included in the valuation.

The benefit of using the date of division as a presumptive valuation date rather than the date of separation is that it provides an easily identifiable date to divide property. The couple may have remained interdependent at least to some extent after separation, and there may be a long time between the date of separation and the date of trial. In these cases the date of division is the fairest and most easily identifiable valuation date.⁵³¹ Using the date of division reduces the need for

⁵²⁶ *Ibid* at para 32.

⁵²⁷ Per Campbell J at para 9 quoting Daley J in *Macdonald v MacDonald*, [1991] NSJ No 639.

⁵²⁸ *Family Law Act*, RSO 1990, c F.3, s 4(1).

⁵²⁹ *Family Law Act*, SBC 2011, c 25, ss 87(b)(i) and (ii).

⁵³⁰ *Family Law Act*, SBC 2011, c 25, s 92(d).

⁵³¹ See, for example, *Kazmierczak v Kazmierczak*, 2001 ABQB 610, 292 AR 233, affirmed by 2003 ABCA

unjust enrichment or unequal division claims, for example, to argue for division of the increase in value of the asset due to market forces after the separation date.⁵³²

On the other hand, in the case of depreciating assets, for example, it may be unfair to permit one spouse to use the asset from the date of separation to the date of division without having to account for the depreciation. For those assets the date of separation is an easily applicable and convenient date that realistically values property at the date that a couple has largely ceased their interdependent economic relationship.

Where an asset no longer exists at the date of division and it has not been replaced, substituted for, or liquidated for the mutual benefit of the spouses or partners, the separation date value should be used.

However, where one spouse or partner has unreasonably impoverished a family asset after separation a value should be imputed to the date of division for the benefit of the non-dissipating spouse or partner. This spouse or partner must show that, but for the intentional dissipation of the asset by the other spouse or partner, the asset in question would have increased in value to the date of division. Likewise, where a spouse or partner has unreasonably impoverished family debt after separation the separation date value should be used.

Furthermore, with the inclusion of eligible common law partners in a regime of family property, it is possible that two people – one the separated spouse and one the eligible common law partner – will have claims to post-separation date increases in value; for example, to property normally valued at trial, such as real property. It may be important to provide for judicial discretion in these rare situations.

In its 1997 Report – published before the decision in *Simmons* - this Commission recommended that the *Act* should include a fixed date for valuation, but permit some flexibility. The Commission was of the view that “an absolute date for valuation has proven inconvenient in other provinces and ... the approach adopted by the Nova Scotia courts should be codified.”⁵³³ We continue to be of the view that an inflexible valuation date may cause problems - for example, in arguing for

227, 45 RFL (5th) 373 (CA).

⁵³² See discussion: Philip M Epstein, QC, “Houston, We Have a Problem”: Constructive Trust and Unjust Enrichment (A Discussion of *Rawluk*, *Kerr*, *Vanasse* and *McNamee*) (Paper delivered at the “Kissing Cousins: Joint Issues in Family Law and Trusts and Estates Law” Conference, Ontario Bar Association Continuing Legal Education, Toronto, 1 May 2012).

⁵³³ *Final Report, Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 29-30.

increases or decreases in value, either after the date of separation, or before the date of division, respectively.

We recommend that family property legislation should provide that the date of division is the presumptive date of valuation subject to the court's order or the agreement of the parties. We would also include express reference to general exceptions to this date which are by now widely known and sufficiently recognized in Nova Scotia jurisprudence. This would have the benefit of bringing those principles to the attention of separating spouses and partners who might otherwise remain unaware of the presumptive valuation date and the various circumstances in which it will be displaced.

Recommendations:

Family property legislation should provide that, subject to the court's order or the agreement of the parties, family assets and family debts shall be valued as of the date of division, except that:

Post-separation changes in value that derive from consumption through usage of a depreciating asset by one spouse or partner only should not be shared;

Separation date assets that no longer exist at the date of division and have not been replaced, substituted for, or liquidated for the mutual benefit of the spouses or partners, should be valued as of the date of separation.

Family property legislation should provide an exception to these valuation rules where one spouse or partner has unreasonably impoverished a family asset or family debt after separation.

5.9. Disposition Costs

Disposition costs may significantly affect the value attributed to family property, and in particular the family home. In a valuation for purposes of division, notional disposition costs "reflect an amount to be deducted from property to account for certain liabilities such as income taxes, real estate commissions, brokerage fees, etc. that the asset might attract when it is disposed."⁵³⁴ In the case of the family home, they may include a 5 percent deduction for real estate commission, plus

⁵³⁴ Stacie R Glazman, "New Developments in Disposition Costs and Why They Matter" (2014) 33 CFLQ 49 at 49.

legal fees. In some cases HST and capital gains tax (where the property is not a principal residence) may be payable as well. In some cases a spouse may incur a mortgage penalty to re-finance the home (for example to finance an equalization payment) before the mortgage agreement has come to the end of its term.

Self-represented litigants may be unaware in negotiations that they are entitled to claim a deduction for disposition costs. They may also be unaware that disposition costs can be disputed, where it is unlikely that these costs will be incurred. Public legal education materials should address both points. They should also clarify under what situations these costs are likely to be incurred and what sort of costs may be included.

Recommendations:

Public legal education materials should clarify for self-represented persons that the value of property may include notional disposition costs.

Public legal education materials should clarify for self-represented persons under what situations these costs are likely to be incurred and what sort of costs may be included.

6. THE FAMILY HOME

Nova Scotia's *Matrimonial Property Act* creates a regime of equal possessory rights in the matrimonial home that arise on marriage. This is an important protection. The matrimonial home may not only be a family's largest asset but also provides stability and security for the members of the family that reside there. Because of the importance of the matrimonial home, the *Matrimonial Property Act* provides for equal personal rights of possession as between spouses during the marriage,⁵³⁵ and rights against disposition or encumbrance of the matrimonial home by either spouse without consent of the other spouse, regardless of title.⁵³⁶

6.1. Nature of the Spouse's Interest in the Family Home

6.1.1. A Joint Property Interest

The matrimonial home is defined in the *Matrimonial Property Act* as "the dwelling and real property occupied by a person and that person's spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest."⁵³⁷ The spouses may own more than one matrimonial home.⁵³⁸ Spouses may designate one property as their matrimonial home, thereby removing that status from any other properties.⁵³⁹

Nova Scotia's matrimonial property law is a regime of deferred sharing of matrimonial assets upon relationship breakdown. Until there is an order or agreement for division, spouses do not share in property and debt in the name of one spouse only. Since the introduction in the late-19th century of married women's property legislation, a regime of separate property applies to all assets not jointly held by the couple. Even though the matrimonial home is treated as a special asset in the *Matrimonial Property Act*, until there is an order or agreement for division, the untitled spouse has no property interest in the home.

By contrast, the Newfoundland and Labrador *Family Law Act* provides that regardless of title, "each spouse has a 1/2 interest in the matrimonial home owned by either or both spouses, and has

⁵³⁵ *Trask v Trask* (1997), 166 NSR (2d) 344, 32 RFL (4th) 368.

⁵³⁶ *Matrimonial Property Act*, s 8.

⁵³⁷ *Ibid*, s 3(1).

⁵³⁸ *Ibid*, s 3(4).

⁵³⁹ *Ibid*, s 7(1). Section 7(2) provides for the change or cancellation of a designation.

the same right of use, possession and management of the matrimonial home as the other spouse has.”⁵⁴⁰ The interest is deemed to be in joint tenancy,⁵⁴¹ unless the property is held by the spouses as tenants in common.⁵⁴² This right vests automatically on marriage and does not require an order or agreement.

We do not recommend extending property rights to the untitled spouse, prior to the division of property. It would provide a great deal of protection for the non-titled spouse, but in some cases it would create effects that were inconsistent with the basic framework of the law. For example, where a spouse has brought a residence into the relationship the other spouse would become entitled to half of its value, in contrast to other forms of pre-cohabitation property, the value of which we have said should be presumptively excluded.

Deeming the home to be held jointly on marriage also means that the surviving, untitled spouse will be automatically entitled to the right of survivorship. This means that upon the death of one spouse that spouse’s interest will pass to the surviving spouse. The titled spouse is therefore unable to leave their entire interest in the matrimonial home to chosen beneficiaries other than the other spouse, unless the spouses took the home as tenants in common in the first place. This may cause problems particularly in second and third marriages where the titled spouse may wish to leave their interest in the home to heirs who are not also the heirs of the surviving spouse.

As well, as the Ontario Law Reform Commission pointed out, deemed co-ownership in the matrimonial home can create practical problems for the secured creditor. Creditors may be unaware of a spouse’s co-ownership rights if these rights are not registered. And unregistered interests in the home may cause problems with the land registration system.⁵⁴³

Recommendation:

Family property legislation should not deem a spouse or partner to have a property interest in the family home upon marriage, registration of a domestic partnership or the beginning of an eligible common law relationship.

⁵⁴⁰ *Family Law Act*, s 8(1).

⁵⁴¹ *Ibid*, s 8(2).

⁵⁴² *Ibid*, s 8(3).

⁵⁴³ See Ontario Law Reform Commission, *Report on Family Property Law* (Toronto: Ontario Law Reform Commission, 1993) at 83.

6.1.2. Personal Rights

The *Matrimonial Property Act* provides for equal personal rights of possession as between spouses during the marriage,⁵⁴⁴ and rights against disposition or encumbrance of the matrimonial home by either spouse, regardless of title. This is an important provision. The matrimonial home will often be a family's largest asset. The home is also a unique asset that provides stability and security for the members of the family that reside there.

Unlike other rights in the *Act* these arise upon marriage, rather than when an order for division is made. Section 6 of the *Matrimonial Property Act* provides:

Equal right of possession of matrimonial home

6 (1) A spouse is equally entitled to any right of possession of the other spouse in a matrimonial home.

Termination of right of possession

(2) Subject to an order of the court under this or any other Act and subject to a separation agreement that provides otherwise, a right of a spouse to possession by virtue of subsection (1) ceases upon the spouse ceasing to be a spouse.

This means that on separation each spouse is equally entitled to stay in the home until a final order is made, an agreement as to ownership and/or possession is entered into, the parties have divorced or one spouse has died. Where spouses cannot live together in the matrimonial home and where they cannot agree as to who will have possession of the home, it is likely that one will request an order for interim exclusive possession of the home. We deal with exclusive possession orders below.

In *Hemeon v. Hemeon*, Warner J. held that the equal right of possession of the spouses is a personal right that does not create an interest in real property."⁵⁴⁵ He further held that the untitled spouse's right to possession did not survive the death of the titled spouse:

Section 6 provides that a spouse is equally entitled to "*any right of possession of the other spouse in a matrimonial home*" [Court's emphasis]. This is a codification of the common law. The words clearly provide that the entitlement of a spouse is limited and cannot exceed the right in the property of the other spouse. Said differently, when the other spouse ceases to have a right of possession (because she or he ceased to have more than a

⁵⁴⁴ *Trask v Trask* (1997), 166 NSR (2d) 344, 32 RFL (4th) 368.

⁵⁴⁵ *Hemeon v Hemeon*, 2014 NSSC 190, 345 NSR (2d) 350 at para 62.

leasehold interest), then the first spouse can have no greater right.⁵⁴⁶

Therefore, where the titled spouse dies leaving the home to a third party, the *Matrimonial Property Act* does not provide a right of occupation to the surviving spouse.⁵⁴⁷ A non-titled spouse who is seeking possession of the matrimonial home on the death of the titled spouse would have to seek an order for exclusive possession against the estate of the deceased spouse pursuant to section 11 of the Act.⁵⁴⁸

The *Matrimonial Property Act* also prevents a spouse from disposing of or encumbering an interest in the matrimonial home without the consent of or release from the other spouse or by order of the court, regardless of title. Section 8 of the *Matrimonial Property Act* provides:

Disposition of matrimonial home

8 (1) Neither spouse shall dispose of or encumber any interest in a matrimonial home unless

- (a) the other spouse consents by signing the instrument of disposition or encumbrance, which consent shall not be unreasonably withheld;
- (b) the other spouse has released all rights to the matrimonial home by a separation agreement or marriage contract;
- (c) the proposed disposition or encumbrance is authorized by court order or an order has been made releasing the property as a matrimonial home; or
- (d) the property is not designated as a matrimonial home and an instrument designating another property as a matrimonial home of the spouses is registered and not cancelled.

Disposition contrary to subsection (1)

(2) Where a spouse disposes of or encumbers an interest in a matrimonial home contrary to subsection (1), the transaction may be set aside by the other spouse upon an application to the court unless the person holding the interest or encumbrance acquired it for valuable consideration, in good faith and without notice that the property was a matrimonial home.

⁵⁴⁶ *Ibid.*

⁵⁴⁷ In *Rhodenizer v Rhodenizer*, (1998) 169 NSR (2d) 333, the Court of Appeal upheld the trial judge's dismissal of an application for vacant possession of a matrimonial home by the wife of the deceased, title-holding spouse. The title-holder's wife was attempting to expel the title-holder's former wife from the matrimonial home which the former wife had occupied for thirty years although not on title.

⁵⁴⁸ See *Hemeon*, *supra* note 545 at paras 73 & 75.

Both spouses also have a right of redemption or relief against forfeiture in the matrimonial home regardless of title. The spouses each have a right to be notified in the event that a third party is seeking to realize on a security interest in the home.⁵⁴⁹

In our view these rights of occupation and possession, and right of redemption and relief against forfeiture for both spouses regardless of title offer important protections during the marriage and should be included in new family property legislation. As Conway and Girard observe:

Such rights are clearly based not just on the need for shelter, which might be supplied in some other place, but on the desirability of providing continuity in a specific abode. ... The policy basis of such rights is clearly to encourage consultation between spouses before any major change is made to their living arrangements. These rights also recognize the uniquely personal nature of the matrimonial home; no other asset of the spouses is treated in this fashion. The law here recognizes a use-based personhood interest in a particular asset, even though the person possessing that interest may have no formal title to the asset at all.⁵⁵⁰

Recommendation:

The provisions of the *Matrimonial Property Act* extending equal possessory rights, as well as rights against unilateral disposition or encumbrance, and rights of redemption and notice, during the marriage should be included in new family property legislation.

6.1.3. Common Law Partners and Registered Domestic Partners

The right of equal possession in the *Matrimonial Property Act* subsists as long as the spouses remain married to each other.⁵⁵¹ This is important, so that neither spouse may compel the other to leave absent a court order. This may be particularly important especially where the couple has a child.

⁵⁴⁹ *Matrimonial Property Act*, s 9(1).

⁵⁵⁰ Heather Conway and Philip Girard, “‘No Place Like Home’: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain” (2004-2005) 30 *Queen’s LJ* 715 at 722-723.

⁵⁵¹ *Matrimonial Property Act*, s 6(2).

Rights of equal possession do not persist in perpetuity, however. They end upon an order or agreement for division, divorce or death of one spouse. The situation is more complicated for common law relationships, which have no definite end date except separation. The legislation must impose a reasonable end date beyond which a common law partner will no longer be entitled to advance a claim to equal possession, but which provides adequate time after the relationship ends to find alternative accommodation. This will also limit the possibility of multiple claims to equal possession by former and current spouses or partners.

The Northwest Territories *Family Law Act*⁵⁵² provides an equal right of possession to the family home to both spouses and common law partners.⁵⁵³ As in Nova Scotia, the right is personal as against the spouse who has the interest in the home.⁵⁵⁴ Section 51(2) of the *Family Law Act* provides:

51(2) Where only one of the spouses has an interest in a family home, the other spouse's right of possession is personal as against the spouse who has the interest and ends,

- (a) if the spouses are married, when they cease to be married, unless a domestic contract or a court order provides otherwise; or
- (b) if the spouses are not married and have ceased to cohabit, on the later of the following:
 - (i) such time as is provided in a domestic contract made no later than six months after the day on which the spouses ceased to cohabit
 - (ii) such time as is provided in a court order made or applied for no later than six months after the day on which the spouses ceased to cohabit;
 - (iii) **six months after the day on which the spouses ceased to cohabit. [emphasis added]**

The six month limitation on bringing an application or entering into an agreement regarding rights of possession ensures that one common law partner's right to possession will expire before a potential subsequent partner will have satisfied the two-year cohabitation requirement to qualify for rights under the *Act*.

⁵⁵² SNWT (Nu) 1997, c 18.

⁵⁵³ Section 51(1).

⁵⁵⁴ Section 51(2).

On the other hand, six months may be a very short time within which to seek alternate accommodation, especially with children, or to attempt to enforce one's rights to possession if there is a conflict as to who will remain in the home.

In our view two years is a more reasonable limitation period. A two-year limitation period is consistent with the time limit for a common law partner to bring an application for division. It will provide certainty for the titled common law partner as well as a more appropriate time frame for non-titled common law partners to remain in the home. In case of hardship the other partner may seek an exclusive possession order. This limit should also apply to registered domestic partners and former domestic partners.

Recommendation:

Family property legislation should provide that the equal possession rights of a common law partner, registered domestic partner or former domestic partner who does not have an interest in the family home or homes should expire two years after the parties separate.

6.1.4. Affidavit of Spousal Status Signed by Substitute Decision Maker

Section 8(1) protects the possessory rights of the non-titled spouse by preventing the disposition or encumbrance of the home by one spouse without the consent of the other spouse, regardless of how title to the home is held. As a result, when a titled spouse wishes to dispose of or encumber the matrimonial home, the non-titled spouse must also sign the instrument (eg., the deed, mortgage, etc),⁵⁵⁵ or a separation agreement or marriage contract releasing the spouse's claims.⁵⁵⁶ Alternatively the titled spouse may seek an order of court releasing the property.⁵⁵⁷ In the absence of the other spouse's signature or a court order the spouse disposing of the property may make an affidavit of spousal status, which states and is deemed to be proof that the property is not a matrimonial home or that the other spouse has released all rights to the home:

(3) An affidavit of the person making a disposition or encumbrance verifying that

(a) the person is not a spouse at the time of making the disposition or

⁵⁵⁵ *Matrimonial Property Act*, s 8(1)(a).

⁵⁵⁶ *Ibid*, s 8(1)(b).

⁵⁵⁷ *Ibid*, s 8(1)(c).

encumbrance;

(b) the property disposed of or encumbered has never been occupied by the person and the persons spouse as their matrimonial home; or

(c) the spouse of that person has released all rights to the matrimonial home by a separation agreement, marriage contract or designation made pursuant to this Act,

is, unless the property is designated or the person to whom the disposition or encumbrance is made had notice to the contrary, deemed to be sufficient proof that the property is not a matrimonial home.⁵⁵⁸

Section 8(2) further clarifies the respective rights of the untitled spouse and a third party to whom the disposition or encumbrance is made:

Where a spouse disposes of or encumbers an interest in a matrimonial home contrary to subsection (1), the transaction may be set aside by the other spouse upon an application to the court unless the person holding the interest or encumbrance acquired it for valuable consideration, in good faith and without notice that the property was a matrimonial home.

The protections at section 8 of the *Matrimonial Property Act* are particularly important to protect the interests of a non-titled spouse who is no longer residing in the matrimonial home. There may be several years of separation before a couple decides to apply for a final division of property. The protections at section 8 ensure that the titled spouse does not dispose of or encumber the matrimonial home, potentially depriving the untitled spouse of their possessory interest in the home, as well as any potential proprietary interest in the home, or the ability to realize upon the value of the home in order to effect a division of property claim.

We have heard from lawyers that the requirement of an affidavit of spousal status can cause difficulty in the context of substitute decision-makers acting for incapacitated persons. A person who is unable to understand and appreciate the nature and effect of the affidavit cannot make one. The person may have a substitute decision-maker - a guardian or attorney acting pursuant to an enduring power of attorney - who can convey the property on behalf of the person, but who cannot sign the affidavit of status.⁵⁵⁹ Only if the person making the disposition or encumbrance-

⁵⁵⁸ *Ibid*, s 8(3).

⁵⁵⁹ Deputy Judge Ferry held in *Clauss v Pir*, [1987] 2 All ER 752, quoting first from *Halsbury's Laws of England* that the swearing of information in an affidavit which entails matters which are or should be within the knowledge of the donor is not a matter that can be undertaken by an agent on behalf of the principle:

There are, however, two exceptions to the general rule that a person may do by means of an agent whatever he has power to do himself, and these are ...'

that is, the property owner - swears the affidavit will it be deemed to be sufficient proof that the property is not a matrimonial home.

There is apparently no generally accepted practice among Nova Scotia real estate lawyers to deal with the issue.⁵⁶⁰ In lieu of the affidavit under section 8(3) of the *Matrimonial Property Act*, an attorney may make an affidavit in her own name, to the best of the attorney's information and belief. It would be up to the purchaser to decide whether to accept it, since it would not be deemed to be sufficient proof of the home's matrimonial property status. And, the attorney cannot testify with certainty as to the donor's spousal status. As one example, a trust company may act for a donor who separated from a spouse decades before but never obtained a divorce. This in mind the affidavit might include testimony as to the attorney's due diligence (checking marriage records, etc.).

Legislation in other provinces provides that a personal representative may make a statement as to the marital status of the donor where the donor wishes to dispose of property. The *Family Law*

and then there is an exception where statute requires the evidence of a signature of the principal. The second exception is:

'where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority, or duty of a personal nature and requiring skill or discretion for its exercise ... '

and then the paragraph goes on with an example which is not material.

It appears from that passage that a party cannot do by an attorney some act the competency to do which arises by virtue of some duty of a personal nature requiring skill or discretion for its exercise.

It might be thought that the obligation to swear a verifying affidavit which requires the deposing party to apply his mind to matters which are or should be within his own knowledge (and, amongst other things, to make the very important statement on oath that there are not and have not been in his possession, custody or power any documents relevant to the action apart from those which are disclosed) is a clear example of a duty of a personal nature requiring skill or discretion for its exercise.

⁵⁶⁰ C W MacIntosh, QC, *Nova Scotia Real Property Practice Manual* (Markham, ON: LexisNexis Canada, 1988) (loose-leaf issue 85, January 2015) ch 5 at 58: "When acting under a power of attorney, some solicitors proceed to execute the affidavit of marital status. This does not appear to comply with the precise requirements of the section. Others obtain an affidavit of status and append it to their power of attorney. This may be dated days or months prior to the closing. Because it is made before the deed or mortgage, such an affidavit cannot comply with the requirement that it state that 'the person is not a spouse *at the time of making* the disposition of encumbrance.'"

*Act*⁵⁶¹ in Ontario, for example, requires a “statement” (not an affidavit) attesting to similar facts as to those required by section 8(3) of Nova Scotia’s *Matrimonial Property Act*. However, the Ontario provision specifically addresses an attorney’s ability to make such a statement:

(3) For the purpose of subsection (2), a statement by the person making the disposition or encumbrance,

(a) verifying that he or she is not, or was not, a spouse at the time of the disposition or encumbrance;

(b) verifying that the person is a spouse who is not separated from his or her spouse and that the property is not ordinarily occupied by the spouses as their family residence;

(c) verifying that the person is a spouse who is separated from his or her spouse and that the property was not ordinarily occupied by the spouses, at the time of their separation, as their family residence;

(d) where the property is not designated by both spouses as a matrimonial home, verifying that a designation of another property as a matrimonial home, made by both spouses, is registered and not cancelled; or

(e) verifying that the other spouse has released all rights under this Part by a separation agreement,

shall, unless the person to whom the disposition or encumbrance is made had notice to the contrary, be deemed to be sufficient proof that the property is not a matrimonial home.

(4) The statement shall be deemed to be sufficient proof that the property is not a matrimonial home if it is made by the attorney of the person making the disposition or encumbrance, on the basis of the attorney’s personal knowledge.⁵⁶²

Section 21(4) thereby protects a third party who does not have notice to the contrary. The purchaser may rely on the statement regardless of the accuracy of the attorney’s personal knowledge. But it may also place an untitled spouse’s rights at risk. A substitute decision maker such as a professional attorney or trustee may not have adequate personal knowledge of a represented adult’s relationship history.

Nevertheless, the legislation must provide for the situation where the person who makes a disposition or encumbrance of property is incapable of making the accompanying affidavit of status. We recommend that new family property legislation should include a provision such as

⁵⁶¹ RSO 1990, c F.3, s 21(4).

⁵⁶² *Family Law Act*, RSO 1990, c F.3, s 21(3), 21(4).

section 21(4) of the Ontario *Family Law Act*, applicable to attorneys and guardians. The attorney or guardian may be liable to the spouse, and/or the third party, for any negligent misrepresentation in the affidavit.

Recommendation:

Family property legislation should provide that an affidavit of status which deems a property not to be a family home may be made by a spouse's or partner's substitute decision maker for property, to the best of their knowledge and belief.

6.1.5. Setting Aside an Encumbrance or Disposition

Section 10 of the *Matrimonial Property Act* provides a number of court powers relating to spousal possessory rights:

10 (1) The court may by order, on the application of a spouse or any other person having an interest in property,

- (a) determine if all or part of the property is a matrimonial home;
- (b) authorize the disposition or encumbrance of a matrimonial home where the spouse whose consent is necessary
 - (i) cannot be found or is not available,
 - (ii) is not capable of giving consent, or
 - (iii) is unreasonably withholding consent,subject to such terms and conditions as the court considers appropriate;
- (c) dispense with the giving of a notice to a spouse required by this Act;
- (d) direct the setting aside of any disposition or encumbrance of an interest in a matrimonial home and the revesting of the interest or any part of the interest upon such terms and subject to such conditions as the court considers appropriate.

The remedial powers of section 10 are most relevant to section 8 of the Act, although the powers provided therein are not confined to that section.⁵⁶³ For example, section 10(1)(d) allows a judge to set aside a mortgage encumbering a matrimonial home where a spouse had not in fact released

⁵⁶³ See for example, *Hurst v Gill*, 2011 NSCA 100, 309 NSR (2d) 86 at para 73.

her rights to the matrimonial home and the affidavit of spousal status was not sufficient deemed proof of her release pursuant to section 8(2).⁵⁶⁴

Section 8(1) clearly contemplates a mortgage or sale of the matrimonial home, but there are charges and encumbrances which courts have said are not covered. For example, it has been held that the registration of an order for unpaid legal fees, incurred in the course of litigating a family law dispute against the very spouse whose interest was ultimately encumbered, was not an encumbrance pursuant to section 8(1) of the Act. In *Hurst v. Gill* the majority of the Court of Appeal held that section 8(1) referred rather to encumbrances which require “some positive act by an owner that grants an interest to a third party”⁵⁶⁵ and did not capture “the acts of a third party who records a judgment under the LRA [*Land Registration Act*].”⁵⁶⁶ The majority cited important principles of separation of property which ensure that third party creditors may deal with a married spouse without concern for the potential interest of the spouse.⁵⁶⁷

In *Hurst* the majority acknowledged that only the interest of the debtor spouse is subject to a registered judgment, leaving the non-debtor spouse’s interest unaffected. The problem at issue arose because the wife was entitled to an equalization payment from the husband’s portion of the proceeds from the sale of the home. Absent judicial intervention the law firm’s registered judgment would have priority over the wife’s right to the husband’s share of the sale proceeds. The trial judge decided that the judgment should be postponed in favour of the wife. The Court of Appeal reversed, finding that the wife’s right to make a claim under the *Matrimonial Property Act* was not the same as a pre-existing property right of which the law firm could have had prior notice.⁵⁶⁸ The majority further commented that knowledge of the pending matrimonial property claim should not interfere with a creditor’s registered charge, since in that case a spouse could freeze the other spouse’s credit simply by informing creditors of the matrimonial dispute.⁵⁶⁹

The majority acknowledged that the court’s power to set aside an encumbrance pursuant to section 10(1)(d) was not necessarily limited to encumbrances in breach of section 8 (that is, without consent, release or court order) but held it did not apply in the circumstances:

⁵⁶⁴ *Bank of Nova Scotia v Halef*, 2003 NSCA 70, 216 NSR (2d) 89 para 15

⁵⁶⁵ *Hurst*, *supra* note 563 at para 65.

⁵⁶⁶ *Ibid* at para 66.

⁵⁶⁷ *Ibid* at paras 50-51.

⁵⁶⁸ *Ibid* at para 63.

⁵⁶⁹ *Ibid* at para 78.

Although s. 10(1)(d) captures more than a breach of s. 8 of the MPA, it is not a license to rearrange the property interests of third parties, absent a breach of the Act, inequitable conduct or other wrongdoing. That would be inconsistent with the policy reasons that give priority to third party creditors over spouse creditors.⁵⁷⁰

The problem is that with no ability under the *Act* to set aside a charge for unpaid legal fees, the spouse may end up effectively financing the litigation against him or herself. In Ontario the opposite result was reached in *Boyd v. Boyd*:

The potential mischief in permitting such encumbrances is obvious. Unscrupulous litigants could agree to an encumbrance by a non arm's length nominee. Inflated accounts for legal services to which the spouse has no access could shield assets from equalization or anticipate fees to provide a "war chest" for litigation to the disadvantage of the untitled spouse in the litigation about the very subject matter of the encumbered property. The scope of the illegitimate use of this mechanism to defeat spousal claims is curtailed here only by my lack of nefarious imagination.⁵⁷¹

One could imagine debts for unpaid bills of all sorts incurred after separation and registered as a charge upon the matrimonial home, thereby potentially depriving the other spouse of their share of an unequal division financed by its sale. The case of unpaid legal fees incurred to litigate a family law dispute against the other spouse is particularly egregious as it is so far outside the scope of what might be considered a matrimonial debt.⁵⁷²

Justice Fichaud dissented from the majority in *Hurst*. He disagreed that an encumbrance subject to section 10(1)(d) must be by the spouse's active conduct or authorship.⁵⁷³ He found that in the circumstances, permitting the husband's debt to his law firm to effectively deprive the wife of the division of assets to which she was found to be entitled was contrary to the purpose and intent of

⁵⁷⁰ *Ibid* at para 73.

⁵⁷¹ *Boyd v Boyd* (2008), 54 RFL (6th) 460, 163 ACWS (3d) 843 (Ont SCJ) at para 19. In *Hurst v Gill*, *ibid*, the majority distinguished *Boyd* on the basis that in *Hurst* the husband actively opposed the law firm's action, and so could not be said to have colluded with the law firm to encumber his interest in the property.

⁵⁷² To this the majority in *Hurst*, *ibid* at paras 79 and 81, said that lawyers should not be in a different position than others providing services to the spouse.

⁵⁷³ *Ibid* at para 109.

the *Act* as a whole.⁵⁷⁴ He found that the judgment was not valid according to any of the qualifying conditions for a valid encumbrance pursuant to section 8(1). Further, it was not shielded by the saving provision of section 8(2) which allows for an encumbrance by a third party “for valuable consideration, in good faith and without knowledge that the property was a matrimonial home”.⁵⁷⁵ Rather, he found that the law firm had specific knowledge of the facts that would lead to the trial judge’s decision to allocate the sale proceeds from the home unequally in favour of the wife. This is what distinguished the husband’s law firm from a creditor which simply had knowledge of the matrimonial claim, justifying the court’s exercise of discretion under section 10(1)(d). Given the breach of section 8(1) and fact that section 8(2) was not applicable, Fichaud J.A. would have upheld the trial judge’s decision to set aside the judgment to the extent it encumbered the portion of the sale proceeds that were owed to the wife.⁵⁷⁶

For our purposes the question is whether family property legislation should expressly include encumbrances that are not affirmatively granted by a spouse as encumbrances subject to section 8(1), liable to be set aside pursuant to section 10. The problem is that creditors may be prevented from collecting upon registrable debts (e.g., judgments and liens) by charging the family home – often a person’s largest asset.

In our view the legislation should expressly confirm that registered liens and judgments are included as encumbrances subject to the court’s remedial authority in appropriate cases. It should be kept in mind that the provision only applies to the matrimonial home and therefore its consequence for third party creditors will be limited to that asset. The problem of arm’s length creditors will be addressed by ensuring the court’s discretion is exercised only in appropriate cases, as Fichaud J.A. recognized in *Hurst*.

Section 10(1)(d) provides a potentially broad power to set aside any disposition or encumbrance and revest it upon “such terms and subject to such conditions as the court considers appropriate.” We recommend that new family property legislation should expressly confirm the court’s authority to impose less sweeping remedies, including a determination of the extent of one or both spouses’ interest in the home which the charge may encumber, and priority as between the charge and a spouse’s interest.

This will permit the court to limit an involuntary encumbrance in appropriate cases, such as where the creditor represented one spouse in a legal proceeding which concerned the spouses’ respective

⁵⁷⁴ *Ibid* at para 116.

⁵⁷⁵ *Ibid* at paras 119-122.

⁵⁷⁶ *Ibid* at para 126.

interests. Legal counsel in such a case should be on notice that execution against the family home will be limited to the extent of the client's interest, once that interest is determined.

The power at section 10(1)(d) does not assist a spouse where an encumbrance has been registered after an order for division has been made but before the division of property has been effected. At this point, the judge hearing the application for division of property is no longer seized of the matter. This is what occurred in *Lockerby v. Lockerby*,⁵⁷⁷ where the wife's legal counsel registered a judgment for unpaid legal fees after the court had given its decision.

For this reason, we repeat our recommendation in the 2014 *Final Report on Enforcement of Civil Judgments*⁵⁷⁸ that a debtor's residence of reasonable value should be exempt from seizure from a third party creditor. Third party creditors should only be able to realize upon the value that exceeds what is reasonable for the spouses and any dependents.⁵⁷⁹ This may not secure the full value of a spouse, registered domestic partner, or common law partner's family property division, but it would go some way in that direction while minimally impairing the rights of third party creditors.

Recommendations:

Family property legislation should expressly confirm that liens and judgments are encumbrances subject to the court's remedial power to set them aside, in whole or in part, in appropriate cases.

⁵⁷⁷ 2011 NSSC 103, 3 RFL (7th) 190.

⁵⁷⁸ Law Reform Commission of Nova Scotia, *Final Report on Enforcement of Civil Judgments* (Halifax: Law Reform Commission of Nova Scotia, 2014) at pages 55-56 the Commission recommended:

Judgment enforcement legislation should provide an exemption for the debtor's principal residence of reasonable value. A creditor should be permitted to apply to court for an order of seizure and sale, where the value of the debtor's principal residence significantly exceeds what is reasonable for the needs of the debtor and his or her family.

⁵⁷⁹ Pursuant to *Schreyer v Schreyer*, *supra* note 213a spouse who receives a division of property as opposed to an equalization payment is not a creditor. Alternatively, the definition of third party creditor with respect to the principal residence which qualifies as a matrimonial home (or family home) under the Act should explicitly preclude spouses or common law partners of the debtor.

Family property legislation should provide for the court's authority to set aside any disposition or encumbrance and revest it upon "such terms and subject to such conditions as the court considers appropriate."

Family property legislation should expressly confirm the court's authority to impose less sweeping remedies, including a determination of the extent of one or both spouses' or partners' interest in the home which the charge may encumber, and priority as between the charge and a spouse or partner's interest.

6.2. Interim Orders for Exclusive Possession

An interim order for exclusive possession of the matrimonial home is available under section 11(1)(a) of the *Act*. Whether title is in the name of one spouse only, or both spouses, the court may award exclusive possession of the home to one spouse for life, or "for such as lesser period as the court directs".

The *Act* limits when a judge can make an interim order for exclusive possession:

11(4) The court may only make an order for possession of the matrimonial home under subsection (1) or (3) where, in the opinion of the court,

- (a) other provision for shelter is not adequate in the circumstances; or
- (b) it is in the best interests of a child to make such an order.

For example, in the case of *LeBlanc v. LeBlanc*,⁵⁸⁰ the court ordered interim exclusive possession of the matrimonial home on the basis that the applicant was disabled and no suitable alternative accommodation was available. However, judges will generally make exclusive possession orders in the best interests of the child, in order to help ensure continuity and stability in the child's life.

This means that spouses who do not have children may have difficulty obtaining an exclusive possession order. An older spouse, for example, who has spent years in a family home and is unlikely to be able to find alternate accommodation may technically be eligible for an order; however, it is unlikely she will receive one.⁵⁸¹ As well, some judges have found that even in

⁵⁸⁰ 2012 NSSC 385.

⁵⁸¹ As reported by members of the Family Law Section of the Canadian Bar Association - Nova Scotia Branch, who attended a presentation by Commission staff on April 27, 2013. It is noteworthy that the *Parenting and Support Act*, s 7(3) now allows the court to make an order for use of the family residence where there

situations where there is conflict in the home, they are nevertheless unable to make an order for exclusive possession under the *Matrimonial Property Act*.⁵⁸²

Across Canada there are a variety of approaches to exclusive possession orders. The Ontario *Family Law Act* provides a list of factors for the court to consider:

- (a) the best interests of the children affected;
- (b) any existing orders under Part I (Family Property) and any existing support orders;
- (c) the financial position of both spouses;
- (d) any written agreement between the parties;
- (e) the availability of other suitable and affordable accommodation; and
- (f) any violence committed by a spouse against the other spouse or the children.⁵⁸³

Saskatchewan's *Family Property Act* has a similar list of factors, but also includes "any other relevant fact or circumstance."⁵⁸⁴

British Columbia's *Family Law Act* does not enumerate the factors to be taken into consideration in awarding exclusive possession, leaving it to the court's discretion.⁵⁸⁵

The ordering of interim exclusive possession may have significant consequences for the parties going forward, especially where there are children involved. Interim orders for exclusive possession may serve to establish a status quo that cannot be easily altered down the road. For this reason it is important that there are strong reasons for making an order for interim exclusive possession.

are no children of the spouses considering the financial circumstances of each spouse, the needs of a spouse with a disability, the availability of alternative adequate housing and whether there has been a finding of domestic violence.

⁵⁸² See *Smith v Smith* 2012 NSSC 432, 325 NSR (2d) 12.

⁵⁸³ *Family Law Act*, RSO 1990, c F.3, s 24(3).

⁵⁸⁴ *Family Property Act*, SS 1997, c F-6.3, s 7.

⁵⁸⁵ *Family Law Act*, SBC 2011, c 25, s 90.

This does not mean, however, that judicial discretion to order exclusive possession should be constrained to a limited number of scenarios. This has the effect of limiting a judge's ability to do justice in an intolerable situation - for instance by allowing a more aggressive or domineering party to remain in the home. As one court has noted, for parties embroiled in an acrimonious litigation the inability to order exclusive possession to one spouse may have the effect of raising tensions in the home and encouraging further litigation.⁵⁸⁶

In our view the court's discretion to order exclusive possession should be relatively wide. Where cohabitation between spouses or common law partners has become intolerable the court should be able to make an interim order for exclusive possession, where the parties cannot agree to possession themselves. The order should also be available where it is in the best interests of the children involved.

We recommend that the *Act* should include a broad list of relevant factors, such as that in Ontario's *Family Law Act*. These would be illustrative, and the list should expressly include any other relevant fact or circumstance.⁵⁸⁷

Recommendations:

Family property legislation should provide that where the parties cannot agree a judge may make an order for exclusive possession in favour of one spouse, registered domestic partner, or common law partner where:

- (a) it is in the best interests of the children affected; or
- (b) cohabitation between the spouses or partners has become intolerable.

⁵⁸⁶ *Korolchuk v Korolchuk* (1982), 16 Sask R 56, 28 RFL (2d) 216 at para 10:

Given the hostility that exists between these parties it is futile to expect them to agree on interim possession of the house or to live together pending trial; they will contest possession until that issue is resolved by court order. The failure to make an order on the first application not only intensified the struggle but led, predictably, to the further applications. It seems to me that where, as here, the parties are separated, warring and engaged in litigation, an order ought to be made - irrespective of which of them makes the application - giving one or the other exclusive possession of the home pending trial.

⁵⁸⁷ See for example, *The Family Property Act*, SS 1997, c F-6.3, s 7(g).

The legislation should provide that in making an order for exclusive possession the court shall consider:

- (a) any existing support orders or orders for division;
- (b) the financial position of both spouses or partners;
- (c) any agreement between the parties;
- (d) the availability other suitable and affordable accommodation;
- (e) any violence committed by a spouse or partner against the other spouse or partner or the children; or
- (f) any other relevant fact or circumstance.

6.3. Occupation Rent

Section 11(1)(b) of the *Matrimonial Property Act* provides where a spouse has been awarded exclusive possession of the matrimonial home, they may be ordered to pay the other spouse what is commonly called ‘occupation rent’:

Notwithstanding the ownership of a matrimonial home and its contents, the court may by order, on the application of a spouse,
...

(b) direct the spouse to whom exclusive possession is given under clause (a) to pay such periodic or other payments to the other spouse as is prescribed in the order.

Occupation rent can provide an incentive to settle matrimonial property disputes. A spouse residing in a mortgage-free matrimonial home may have little incentive to reach final settlement of the matrimonial property proceeding. In this case an order for occupation rent can encourage a resolution.

In *Andrews v. Andrews*,⁵⁸⁸ Dellapinna J. clarified that the remedy is premised on the common law principle that "all joint tenants have an equal right to the occupation of the whole of the

⁵⁸⁸ 2006 NSSC 120, 147 ACWS (3d) 257.

premises, and neither has the right to exclude the other. In limited circumstances the courts would recognize a right to occupation rent in favour of the joint tenant who was out of possession."⁵⁸⁹ Justice Dellapinna warned that caution must be used when deciding an application for occupation rent in the context of a family law dispute, because of the mutual obligations of support that are not necessarily present in other joint tenancy situations.⁵⁹⁰

Similarly, the Court of Appeal for Saskatchewan held that while the remedy “may be utilized to obtain justice and equity in appropriate circumstances” it was also discretionary and “exceptional and should be used cautiously.”⁵⁹¹ The Court went on to provide a comprehensive list of the factors that have been considered on an application for occupation rent:

- The conduct of both spouses, including failure to pay support, the circumstances under which the non-occupying spouse left the home, and if and when the non-occupying spouse moved for a sale of the home;
- Where the children are residing and who is supporting them;
- If and when a demand for occupational rent was made;
- Financial difficulty experienced by the non-occupying spouse caused by being deprived of the equity in the home;
- Who is paying for the expenses associated with the home. This includes who is paying the mortgage and other upkeep expenses (maintenance, insurance, taxes, etc.). If there is no mortgage, occupational rent may be needed to equalize accommodation expenses;
- Whether the occupying spouse has increased or decreased the selling value of the property;
- Any other competing claims in the litigation that may offset an award of occupational rent;⁵⁹²

In Ontario, courts have followed a similar list of factors in deciding whether or not to make an order for occupation rent.⁵⁹³ But the Court of Appeal for Ontario noted that five factors have been consistently taken into account:

⁵⁸⁹ *Ibid* at para 41 per Dellapinna J quoting *Kazmierczak v Kazmierczak* 2001 ABQB 610, 292 AR 233 at para 88.

⁵⁹⁰ *Ibid*.

⁵⁹¹ *Casey v Casey*, 2013 SKCA 58, 11 WWR 54 at para 48.

⁵⁹² *Ibid*.

⁵⁹³ See for example, *Higgins v Higgins* (2001), 19 RFL (5th) 300, 106 ACWS (3d) 1071.

- The timing of the claim for occupation rent;
- The duration of the occupancy;
- The inability of the non-resident spouse to realize on her equity in the property;
- Any reasonable credits to be set off against occupation rent;
- Any other competing claims in the litigation.⁵⁹⁴

The court commented that “The weight to be given to these and other relevant factors is a matter for the trial judge to determine.”⁵⁹⁵

No family property legislation in Canada sets out a list of such factors. Most statutes simply provide that where the court makes an order for exclusive possession to one spouse the court may also “direct a spouse to whom exclusive possession of the family home is given to make periodic payments to the other spouse”.⁵⁹⁶

In our view the remedy of occupation rent should be clearly set out in the legislation. The legislation should provide that the court may order occupation rent when a spouse, registered domestic partner, or common law partner will have or has had exclusive possession of the home. It should not be limited to cases where an order for exclusive possession has been made. The provision for occupation rent in the legislation should supersede the common law remedy of occupation rent in respect of the family home.

The legislation should also set out a non-exhaustive list of relevant factors, such as those described by the Court of Appeal for Ontario in *Griffiths*.

Recommendations:

Family property legislation should provide that where one spouse or partner has occupied or will occupy the family home to the exclusion of the other spouse or

⁵⁹⁴ *Griffiths v Zambosco et al* (2001), 54 OR (3d) 397 at para 49.

⁵⁹⁵ *Ibid* at 50.

⁵⁹⁶ See for example, *Family Law Act*, RSPEI 1988, c F-2.1, s 25(1)(c).

partner, the court may order the occupying spouse or partner to pay to the other such periodic or other payments as the court shall decide.

Provision for occupation rent should not depend on whether an order for exclusive possession has been made.

The legislation should confirm that the common law remedy of occupation rent does not apply in respect of a family home.

The legislation should provide that in deciding an application for occupation rent, the judge may consider the following:

- (a) the timing of notice of a claim for occupation rent;
- (b) the duration of the spouse, registered domestic partner, or common law partner's occupancy of the home;
- (c) inability of the non-resident spouse or partner to realize on the equity in the property during the exclusive possession of the other spouse or partner;
- (d) any reasonable credits to be set off against the occupation rent;
- (e) any other competing claims in the litigation; and,
- (f) any other relevant fact or circumstance.

6.4. Leased Premises

The definition of the matrimonial home in the *Matrimonial Property Act* excludes leased premises:

3 (1) In this Act, "matrimonial home" means the dwelling and real property occupied by a person and that person's spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest.

Therefore, a spouse living in a rented apartment is not able to take advantage of the *Matrimonial Property Act's* provisions in respect of equal possessory rights in the matrimonial home. This is a significant exclusion.

In Ontario, where there is no such limitation on what constitutes a matrimonial home, "[L]easehold and mobile homes, trailers, cottages and even boats have been held to be

“matrimonial homes” if the appropriate user is present.”⁵⁹⁷

In Nova Scotia, other legislation permits an exclusive possession order even in a leasehold premises. The federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* does not exclude structures in which a spouse, registered domestic partner, or common law partner has only a leasehold interest from the definition of a “family home”.⁵⁹⁸ The *Domestic Violence Intervention Act* does not exclude leasehold interests from the definition of “residence” for the purposes of making an emergency protection order.⁵⁹⁹ And the *Parenting and Support Act* provides that a judge may make an order respecting use of the family residence that is “owned or leased by at least one parent or guardian of a child or at least one spouse”.⁶⁰⁰

There may be situations in which it is in the best interests of children to make an exclusive possession order with respect to a leasehold premises. There may be good reason to order exclusive possession of a leasehold premises where cohabitation between the parties has become intolerable, although not to the extent required to make an emergency protection order under the *Domestic Violence Intervention Act*.⁶⁰¹

In Alberta, the *Matrimonial Property Act* provides that the court may make an order for exclusive possession for a leased premises, effectively altering the parties to the lease:

24 If a matrimonial home is leased by one or both of the spouses under an oral or written lease and the Court makes an order giving possession of the matrimonial home to one spouse, that spouse is deemed to be the tenant for the purposes of the lease.

Such a provision is useful in order to clarify that the spouse who obtains an exclusive possession order retains all rights and protections of a tenant provided under the *Residential Tenancies Act*.⁶⁰²

⁵⁹⁷ MacLeod & Mamo, *supra* note 211 at O-159.

⁵⁹⁸ Section 2(1): “family home”.

⁵⁹⁹ See SNS 2001, c 29, s 2(e): “residence” includes a residence that a victim shares with a respondent or has vacated due to domestic violence [DVIA].

⁶⁰⁰ RSNS 1989, c 160, s 7(1).

⁶⁰¹ DVIA, s 6.

⁶⁰² RSNS 1989, c 401.

Recommendations:

Family property legislation should not exclude a leasehold interest from the definition of a family home.

The legislation should provide that if a family home is leased by one or both of the spouses, registered domestic partners, or common law partners under an oral or written lease and the court makes an order giving possession of the family home to one spouse, registered domestic partner, or common law partner, that spouse or partner is deemed to be the tenant for the purposes of the lease.

7. FAMILY DEBTS AND LIABILITIES

The *Matrimonial Property Act* does not provide for the division of family debt. Section 13 of the *Matrimonial Property Act* provides that the court must consider the parties' debts and liabilities and the circumstances in which they were incurred in determining whether to order an unequal division or a division of non-matrimonial assets. This is the only section in the *Matrimonial Property Act* that provides any guidance on how to deal with family debt. Case law has developed to fill the vacuum.

Reformed family property legislation should clearly define what is a family debt or liability which will be shared by the spouses, and provide for the just division of such debts. Overall levels of household indebtedness are increasing. The problem is particularly acute in Nova Scotia, which has some of the highest rates of bankruptcy and insolvency in Canada.⁶⁰³ Separation and divorce can propel a couple into financial difficulty, and financial trouble can aggravate relationship problems. It is therefore likely that a substantial number of separating couples in Nova Scotia will have incurred higher than average debt levels. For the sake of helping such couples resolve their disputes with a minimum of cost, delay and emotional strife, family property legislation must deal with debt in the most clear, predictable and just way possible.

7.1. Defining Family Debt

Nova Scotia case law has developed a definition of matrimonial debt and set out rules for its division. In the often cited decision of *Bailey v. Bailey*, Roscoe J. explained matrimonial debt as follows:

In determining which of all the debts listed by the parties of the action should be allowed as matrimonial debts, I must consider whether they were incurred for the benefit of the family unit, whether they are ordinary household debts and if they were incurred after the separation, whether they were necessary to meet the basic living expenses or preserve matrimonial assets and the overall consideration is whether the debts were reasonably incurred.⁶⁰⁴

In *Larue v. Larue*,⁶⁰⁵ Campbell J. summarized the courts' approach this way:

⁶⁰³ Office of the Superintendent of Bankruptcy Canada, *Annual Consumer Insolvency Rates by Province and Economic Region, 2010-2015*, online: <<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/bro1820.html>>.

⁶⁰⁴ *Bailey v Bailey* (1990), 98 NSR (2d) 9 (SCJ) at 14.

⁶⁰⁵ 2001 NSSF 23, 195 NSR (2d) 336.

[D]ebt incurred for the benefit of the family unit, during the marriage, for ordinary household family matters reasonably incurred and, if incurred after separation, necessary for basic living expenses or to preserve matrimonial assets. The debt must be capable of legal enforcement. To that definition I would add the obvious comment that debts which are incurred for the purpose of acquiring a non-matrimonial asset or for non-family purposes would not be matrimonial in nature.⁶⁰⁶

The burden of proof is on the individual claiming that the debt in question is a matrimonial debt, and that the debt is capable of enforcement.⁶⁰⁷

New Brunswick's *Marital Property Act* defines marital debt as follows:

"Marital debts" means the indebtedness of either or both spouses to another person

- (a) For the purpose of facilitating, during cohabitation, the support, education or recreation of the spouses or one or more of their children; or
- (b) In relation to the acquisition, management, maintenance, operation or improvement of marital property.⁶⁰⁸

British Columbia's *Family Law Act*, in contrast, eliminates the "family purpose" element of family debt and creates a presumption that all debt incurred by either or both spouses during the relationship will be considered family debt:

Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and

⁶⁰⁶ *Ibid* at para 40.

⁶⁰⁷ See Lloyd I Berliner and Jennifer Hamilton, "All Debts are not Created Equal: The Matrimonial Property Act does not include a statutory presumption of equal division of matrimonial debts, but have the Courts created such a presumption?" (Halifax, CBA Annual Professional Development Conference, 2007); *Abbott v Abbott* 2002 NSSF 39, 208 NSR (2d) 79; *Rossiter-Forrest v Forrest* (1994), 129 NSR (2d) 130, 45 ACWS (3d) 1251.

⁶⁰⁸ *Marital Property Act*, SNB 2012, c 107, s 1, "marital debts".

(b) after the date of separation, if incurred for the purpose of maintaining family property.⁶⁰⁹

The *Family Law Act* thereby largely eliminates the ‘family purpose’ test as a ground for dispute and potential litigation.

The necessary result, however, is to potentially burden the pool of family property with debts that a spouse or partner may have incurred recklessly, or for their own benefit entirely. The British Columbia *Family Law Act* permits an unequal division of family property and family debt, where an equal division would be “significantly unfair”, and the factors that guide the unfairness inquiry take note of the manner in which the debt was incurred.⁶¹⁰ But a threshold of significant unfairness is distinct from excluding such debts from the outset.

In our view, any debt existing at separation in the name of one or both spouses, used to acquire, maintain or preserve family assets should be presumptively included as family debt. Any debt incurred after separation that is likewise used to maintain or preserve family assets should be included. The burden to show that debt is not family debt will be on the the party claiming the exclusion of this debt from a division of family property.

Some respondents to the Commission’s Discussion Paper questioned whether debt in the name of both spouses could, in all cases, be said to be incurred for a family purpose. We are of the view that with the classification of business assets as family assets there will be few instances where debt in the names of both spouses or partners will not be for a family purpose.

Debt in the name of one spouse only that is not directly attributable to acquiring, maintaining or preserving family assets should nonetheless be included if it was incurred for a family purpose. The notion of use for a family purpose is intuitive to Nova Scotians. The definition of family debt in *Bailey* and the element of family use (also in use in the context of gifts, trusts, settlements and inheritances) is now widely adhered to and understood.

The alternative is to require both parties to share the burden of debt which one spouse or partner incurred for their own purposes. Aside from being unfair, in our view, this is certain to result in litigation as parties attempt to make unequal division claims to exclude debt they feel they should not have to bear.

⁶⁰⁹ *Family Law Act*, SBC 2011 c 25, s 86.

⁶¹⁰ *Family Law Act*, SBC 2011 c 25, s 95(2).

We are also concerned that in practice, allocating debt to the family will typically have a differential impact on the lower-income spouse or partner. The lower-income spouse or partner will be less able to finance a claim for unequal division and may be saddled with debt that they are unable to maintain. This is all the more disturbing where the debt was incurred by the other spouse or partner for a purely personal purpose and the spouse or partner did not agree to, and may not have even known of, the debt.

We would not include a ‘reasonableness’ standard, as indicated in *Bailey*. It should not necessarily matter whether debt was incurred reasonably within the context of a relationship marked by economic interdependence, as long as the debt can be shown to be connected to a family purpose. Arguments about reasonableness should occur if at all in the course of an unequal division claim. Likewise, debt incurred in the name of both spouses should be presumed to be family debt regardless of whether it was incurred to maintain, acquire or improve family assets or otherwise incurred in connection with a family purpose.

Recommendations:

Family property legislation should provide that family debt means debt which:

(a) exists at the date of separation, was incurred during the couple’s cohabitation, and was:

(i) incurred in the names of both spouses, registered domestic partners or common law partners; or,

(ii) incurred in the name of one spouse or partner for a family purpose; or,

(b) was incurred after the date of separation for the purpose of preserving or maintaining family assets.

The legislation should provide that the party claiming that a debt incurred during cohabitation is a non-family debt bears the burden of showing that the debt was not a family debt.

7.2. Dividing Family Debt

There is no presumption in the *Matrimonial Property Act* that matrimonial debts will be divided equally. For a time, there was some confusion as to which approach should be used to divide matrimonial debt: a net matrimonial asset approach or a gross matrimonial asset approach.⁶¹¹ The net matrimonial asset approach has been explained as follows:

This approach involves a determination whether the debts are matrimonial debts in which event they are subtracted from the total matrimonial assets to calculate net matrimonial assets. The appropriate percentage division (presumptively 50% but sometimes a different percentage reflecting section 13 factors) is made in respect of that net valuation.⁶¹²

In contrast, the gross matrimonial asset approach assigns assets on a presumptively equal basis, but assigns debts to either spouse without necessarily subjecting them to an equal division.⁶¹³

As the law has developed, “the bulk of the case law in Nova Scotia suggests that a presumption of equal division has been created.”⁶¹⁴

In our view, family debt should be shared on a presumptively equal basis. This is in keeping with both a presumption of equal sharing of matrimonial assets and the net matrimonial asset approach utilized in the case law to deal with matrimonial assets and debt. As with the presumption of equal sharing of matrimonial assets, where it would be unconscionable or unfair to divide family debts equally, the court should be permitted to order an unequal division. And the court should be permitted to order a division of non-family debt where it would be unconscionable or unfair not to do so.⁶¹⁵

⁶¹¹ See *Larue v Larue*, 2001 NSSF 23, 195 NSR (2d) 336.

⁶¹² *Ibid* at para 17.

⁶¹³ *Ibid* at para 18.

⁶¹⁴ Berliner & Hamilton, *supra* note 607 at 10.

⁶¹⁵ In *Larue*, Campbell J gave three examples when matrimonial debt could be apportioned unequally: 1. Where net debts exceed assets and one spouse has no practical ability to pay; 2. Where one spouse incurs debt inappropriately such as in unsuccessful gambling activities; and 3. In extreme cases of undisclosed or unilaterally incurred debts unless the other spouse carelessly remained uninformed or failed without justification to assertively object. See para 37.

In many cases after separation one spouse or partner may service family debts to a greater extent than the other spouse or partner. In order to ensure that the final division of family debt is equal, a spouse or partner should be credited with amounts spent in the service of debt after separation, if they can show with clear and cogent evidence that they have serviced a greater part of the debt than the other party, and that this is not already reflected in a spousal support order or agreement.

In order to prevent the need for an after-the-fact compensation order or agreement, the *Act* should provide that the parties may apply for an interim order dividing responsibility for servicing family debt after separation.

Finally, one respondent to the Discussion Paper questioned whether spouses or partners should get credit for the debt they helped their partners to pay down during the relationship. For example, if one spouse entered the relationship with no debt and the other spouse entered the relationship with \$100,000 in debt and at separation the couple has no debt, should the spouse who entered the relationship with no debt be credited \$50,000 for helping the other pay down debt?

Nova Scotia's matrimonial property regime is a deferred sharing regime that provides for an equal division of matrimonial assets at the end of the relationship. This regime does not rely upon a parsing of contribution during the relationship but rather recognizes that "childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets." While one spouse may have assisted the other to pay down debt during the relationship, the other may have contributed in non-financial ways to the relationship. The matrimonial property regime deems these contributions to be equal and divides matrimonial assets and debts equally between the parties. We would therefore not recommend that one spouse or partner be credited for debt they helped the other pay down during the relationship.

Recommendations:

Family property legislation should provide that family debt is to be divided on a presumptively equal basis.

The legislation should provide that the court may order an unequal division of family debt, or the division of non-family debt, where it would be unfair or unconscionable to divide family debt in equal shares

The legislation should provide that where the parties cannot agree the court may make an interim order dividing responsibility for servicing family debt after separation.

The legislation should provide that the court may give credit to a spouse or partner for unequal amounts spent in the service of debt after separation, if it is shown that the spouse or partner has serviced a greater part of the debt than the other spouse or partner, and that this is not reflected in a spousal support order or agreement.

7.3. Unequal Division when Debts Exceed Assets

In cases where the family's assets will not cover its debts, the parties will walk away from the division each bearing a debt load that must be serviced from future income. But the parties may not be in an equal earning position going forward. In our view family property legislation should expressly identify that circumstance as a relevant consideration for the unequal division of family debt.

In *Larue v. Larue*,⁶¹⁶ Campbell J. ordered an unequal division of net matrimonial assets, and consequently, matrimonial debts after considering the income earning power of the spouses going forward. He found on the facts that the wife “worked in a number of low paying jobs such as a counter server at McDonald's Restaurant. She had been assisted by having the opportunity to reside with relatives from time to time. She was never truly self-sufficient.”⁶¹⁷ He therefore found that she could not carry the debt load based upon her earning potential. In making his order for unequal division Campbell J. commented:

Suffice it to say that Ms. Larue is in no position to assume responsibility for any portion of the net matrimonial debt. Her income is very low as is her borrowing capacity if any. I conclude that an equal division of net matrimonial assets would be unfair and indeed unconscionable from the point of view of Ms. Larue.⁶¹⁸

In the Commission's 1997 Report, released before *Larue*, the Commission recommended that “where the value of the shareable assets of the parties is approximately zero after deducting all relevant debts, the court may apportion responsibility for payment of the debts in unequal shares in accordance with their respective abilities to pay.”⁶¹⁹ But the Commission recommended that

⁶¹⁶ 2001 NSSF 23, 195 NSR (2d) 336.

⁶¹⁷ *Ibid* at para 4.

⁶¹⁸ *Ibid* at para 43.

⁶¹⁹ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at

“any unequal division of debts in cases where the couple has a positive net worth should be done only in light of the factors enumerated in s 13 and not pursuant to some more open-ended discretion on the part of the court.”⁶²⁰

Similarly, the American Law Institute (“ALI”) recommended that where “marital debts exceed marital assets, and it is just and equitable to assign the excess debt unequally, because of a significant disparity in the spouses’ financial capacity, their participation in the decision to incur the debt, or their consumption of the goods or services that the debt was incurred to acquire,”⁶²¹ the presumption of equal sharing could be rebutted. The ALI explained:

When one spouse earns more than the other during the marriage, they necessarily rely disproportionately on the income of the higher earner to sustain them financially. When they incur debt, the spouses (as well as their creditor) normally rely disproportionately on the income of the higher earner to service it. Where the debt has not been repaid at the time of divorce, and exceeds the marital assets, the parties’ disparate earning remain the only source for retiring it, and are appropriately considered on allocation.⁶²²

We recommend that the Act should explicitly provide that where the value of family debts exceeds family assets, the family debt should be apportioned unequally in consideration of each parties’ respective ability to pay.

Recommendation:

Family property legislation should provide that where family debt exceeds family assets, the court may make an order for unequal division of debt, considering each party’s respective ability to pay for the debt.

29-30.

⁶²⁰ *Ibid* at 29.

⁶²¹ *Principles of the Law of Family Dissolution: Analysis and Recommendations*, *supra* note 88 at §4.09(2)(c).

⁶²² *Ibid* at 823.

7.4. Dividing Contingent Liabilities

Courts have also grappled with the treatment of contingent liabilities – liabilities that are contingent upon the happening of a future event. In *Stein v. Stein*,⁶²³ the Supreme Court Canada ordered that spouses share a future tax liability that could not be valued at trial. The Supreme Court allowed an appeal from a British Columbia Court of Appeal decision that held that the *Family Relations Act* did not allow for the creation of a “freestanding obligation between parties for a debt” and therefore ordered the husband to bear all the liability.⁶²⁴ The Supreme Court of Canada held that there was precedent for allowing a spouse to claim an interest in an asset regardless of the fact that the asset is “inchoate, contingent, immature or not vested.”⁶²⁵ The court held that it was in the interests of fairness that – although the extent of the liability could not be valued at trial – the liability be shared by both spouses, since both had benefited from the tax shelter scheme in which the husband had participated.⁶²⁶

Nova Scotia courts have also considered the issue. In *Webb v. Webb*⁶²⁷ the court considered Mr. Webb’s deferred tax liability under section 13. Justice Goodfellow held that the family had benefited from the additional income allowed by the deferral and therefore the “parties must share the obligation of the deferred taxes equally.”⁶²⁸ Although the amount of the debt was known, as one family law expert has pointed out, “There is nothing in the judgment to indicate any difficulties with the *Matrimonial Property Act* in dealing with contingent liabilities”.⁶²⁹

In *S.L.K. v. M.M.H.*,⁶³⁰ the court held that a debt owing to Canada Revenue Agency as a result of the husband’s participation in a tax saving scheme was a matrimonial debt to be shared between the spouses. The wife was ordered to share the debt and to reimburse the husband if he ever had to pay.

⁶²³ 2008 SCC 35, 2 SCR 263.

⁶²⁴ 2006 BCCA 391, 56 BCLR (4th) 245 at para 23.

⁶²⁵ 2008 SCC 35, 2 SCR 263, Bastarache J at para 11.

⁶²⁶ *Ibid.*

⁶²⁷ (1994), 135 NSR (2d) 161, Can LII 4248 (SC).

⁶²⁸ *Ibid* at para 47.

⁶²⁹ Paul Thomas, *Financial Consequences of Marriage Breakdown: Cases and Materials* (Halifax: Schulich School of Law, 2011).

⁶³⁰ 2009 NSSC 319.

Assigning matrimonial obligations on an “if and when” basis, in cases where values are not available at trial, raises some serious issues for concern. Such an order undermines the principle of finality in making matrimonial property awards. While maintenance awards are subject to variation where there is a change in circumstances after the order, finality has often been regarded as a central principle in matrimonial property divisions.⁶³¹ Indeed, the preamble to the *Matrimonial Property Act* provides that “it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship.”

Further, failing to provide the parties with a reasonable expectation as to what their respective obligations will ultimately look like may hinder their ability to come to settlements on their own.

Also troubling is the fact that the court is not able to anticipate the extent to which either spouse may be able to handle an unspecified liability at some point in the future. As Abella J. noted in her dissent in *Stein*:

This is a case where the imposition of the equal responsibility for the tax liability, if and when it materializes, fails to recognize and accommodate the financial repercussions of the division of labour in the Stein household, unfairly disturbs the ability of the wife to plan and arrange her economic future, poses a significant threat to her ability to maintain her economic viability, and makes it far more likely that her and the children’s standard of living will be substantially lower than that of Mr. Stein.⁶³²

A spouse whose income is only a fraction of what the other spouse is making may see their actual, and relative, position change drastically when called upon to equally share a contingent liability. In traditional opposite-sex marriages, women who have taken on home and childcare responsibilities to the detriment of their careers may find that they are much less able, relative to the other spouse, to absorb such a liability. In many cases, these same women will have primary responsibility for children. Failing to take into consideration the actual effects of a contingent liability on their future financial situation may have significant consequences for the children.⁶³³

⁶³¹ See, for example, *Clarke v Clarke* [1990] 2 SCR 795, 73 DLR (4th) 1 at para 28, (per Wilson J citing Cameron JA, in *Tataryn v Tataryn* (1984), 38 RFL (2d) 272 (Sask CA)).

⁶³² 2008 SCC 35, 2 SCR 263 at para 37.

⁶³³ See *ibid*; Robert Leckey, “Developments in Family Law: The 2008-2009 Term – Just Divisions?” (2009) 48 SCLR (2d) 181.

As Bastarache J. held in the majority decision in *Stein*, however, the sharing of contingent liabilities ensures that spouses that both benefitted from tax shelters likewise share the liabilities occasioned by such shelters. Contingent liabilities may be so substantial in some cases as to significantly alter the contours of a spouse's future net worth. It is a central premise of the legislation that the value of spousal property be equally shared.

Ontario's Act specifically addresses contingent liabilities. The Ontario *Family Law Act* requires that contingent tax liabilities must be included as liabilities for purposes of calculating the value of net family property.⁶³⁴ Ontario courts have held that a present value calculation must be imputed in order to divide debt.⁶³⁵

In the interests of clarity, especially for self-represented parties, we recommend that the *Act* should confirm that family debts may include contingent liabilities even where values are not available at the date of division. The *Act* should confirm that a contingent liability may be divided on an "if and when" basis. The *Act* should also permit the court to order an unequal division of a contingent liability, considering the parties' respective financial capacity.

Recommendations:

Family property legislation should provide that family debt may include a liability contingent on the happening of a future event.

The legislation should provide that the court may order a contingent liability to be divided on an "if and when" basis.

The legislation should permit the court to order an unequal division of a contingent liability, considering each party's current and prospective ability to pay.

⁶³⁴ *Family Law Act*, RSO 1990, c F.3, s 4(1.1).

⁶³⁵ See *Sengmueller v Sengmueller*, (1994) 17 OR (3d) 208 (CA).

8. UNEQUAL DIVISION

8.1. Threshold for Unequal Division

Under section 13 of the *Matrimonial Property Act* the court may divide matrimonial assets unequally, and may divide non-matrimonial assets, if an equal division of matrimonial assets would be unfair or unconscionable.⁶³⁶ The court must consider a number of factors listed in section 13 in order to determine whether this threshold has been reached.

Among Canadian jurisdictions, the standard of unfairness is at the lower end of the spectrum for an unequal division.⁶³⁷ The standard of unconscionability tends toward the higher end. For instance, in Ontario the unconscionability standard significantly limits judicial discretion in ordering an unequal division.⁶³⁸

Nova Scotia courts have taken a fairly constrained view of their discretion under section 13. In *Morash v. Morash*, Bateman J.A. warned that when deciding an unequal division claim: “the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair.”⁶³⁹ In *Young v. Young*, she remarked:

The inquiry under s. 13 is broader than a straight forward measuring of contribution. The predominant concept under the Act is the recognition of marriage as a partnership with each party contributing in different ways. A weighing of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the Act, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or

⁶³⁶ *Matrimonial Property Act*, s 13.

⁶³⁷ Per Deschamps J in *Hartshorne v Hartshorne*, 2004 SCC 22, 1 SCR 550 at para 73: “In *Miglin v Miglin*, [2003] 1 SCR 303, SCC 24, while discussing spousal support and the level of deference applicable to separation agreements under the *Divorce Act*, RSC 1985, c 3 (2nd Supp), this Court recognized that “inequitable” ought not to be equated with “unconscionable” (para 73). Similarly, in the case of the *FRA*, there is no apparent reason why “unfairness” should be assimilated to “unconscionability”. Rather, it constitutes a less deferential standard.”

⁶³⁸ *Family Law Act*, RSO 1990, c F.3, s 4(6). Section 4(6) provides: “The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to”...

⁶³⁹ 2004 NSCA 20, 221 NSR (2d) 115 at para 23.

unconscionable. MacKeigan, C.J.N.S. wrote, for the court, in *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414; N.S.J. No. 6 (Q.L.) (A.D.), one of the first cases in which the *Matrimonial Property Act* was considered:

7 Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the *Act* and prescribed by s. 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made.⁶⁴⁰

Despite the fact that the plain wording of section 13 provides for an unequal division of matrimonial assets where an equal division would be “unfair or unconscionable,” the cases have tended to favour the higher standard of unconscionability, rather than mere unfairness.⁶⁴¹

A higher standard for judicial intervention in making an unequal division arguably creates more certainty and predictability in result. As we have emphasized throughout this report, greater predictability in family law statutes can facilitate consensual decision making and settlement, and discourage protracted and expensive litigation. The April 2013 Report of the Family Justice Working Group highlighted the need to provide greater certainty in family law statutes, as a component of access to justice.⁶⁴² The unequal division provisions in the British Columbia *Family Law Act*, for example, are premised on the idea that under the former *Family Relations Act* “the broad flexibility and discretion in [property division] created uncertainty and promoted litigation.”⁶⁴³ The *Family Law Act* instead provides that the court may unequally divide family

⁶⁴⁰ 2003 NSCA 63, 216 NSR (2d) 94 at para 15.

⁶⁴¹ See *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 32.

⁶⁴² *Meaningful Change for Family Justice*, *supra* note 12 at 58-59. The writers of the report noted that there was some call for less individualized judicial discretion in family law statutes in order to promote certainty.

⁶⁴³ British Columbia, Ministry of Justice, *Family Law Act Explained: Part 5 – Property*, at 1, online: <<http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part5.pdf>>.

property or family debt if an equal division would be “significantly unfair”.⁶⁴⁴ On the other hand, too high a standard may prevent the court from making an unequal division even where it is necessary to do justice between the parties.

In our view the current threshold at section 13 of the *Matrimonial Property Act* is well understood, and is the appropriate threshold for judicial intervention. The threshold is high enough that it maintains consistency and predictability in unequal division applications. Judicial interpretation has tended to recognize that the standard requires more than mere unfairness and that the threshold is closer to one of unconscionability. However, the presence of the threshold of unfairness also assures that the threshold is not set too high. In our review of the cases we have not seen the threshold at section 13 interpreted so as to prevent judges from doing justice in ‘hard cases’ that might fall outside a strict standard of unconscionability.

Recommendation:

Family property legislation should provide that a court may order a division of family assets and family debts that is not equal, or a division of property that is not a family asset, or debt that is not a family debt, where the court is satisfied that the division of family assets and family debts in equal shares would be unfair or unconscionable.

8.2. Factors Relevant to Unequal Division

The *Matrimonial Property Act* identifies thirteen factors that the court is to consider in determining whether an equal division of matrimonial assets would be unfair or unconscionable:

- (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
- (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
- (c) a marriage contract or separation agreement between the spouses;⁶⁴⁵
- (d) the length of time that the spouses have cohabited with each other during their marriage;

⁶⁴⁴ *Family Law Act*, s 95(1).

⁶⁴⁵ See for example, *Stailing v Stailing*, 2011 NSSC 501, 312 NSR (2d) 27 at para 21, where even though the cohabitation agreement was set aside, Gass J said that its existence could be taken into consideration in making an unequal division.

- (e) the date and manner of acquisition of the assets;
- (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
- (g) the contribution by one spouse to the education or career potential of the other spouse;
- (h) the needs of a child who has not attained the age of majority;
- (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- (j) whether the value of the assets substantially appreciated during the marriage;
- (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
- (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
- (m) all taxation consequences of the division of matrimonial assets.

On its face, then, the *Matrimonial Property Act* grants a fairly broad set of factors guiding judicial discretion. Case law, however, has narrowed this discretion considerably. Some family law experts have reported that there are now really only a handful of situations which may give rise to an unequal division: dissipation of assets cases, short term marriages, and the injection of non-matrimonial assets into the pool of matrimonial assets (ie., where inheritances or insurance settlements have been used to purchase matrimonial assets).⁶⁴⁶

It may be important for the legislation to reflect the more narrow range of cases warranting an unequal division. Especially for unrepresented parties, the legislation should reflect the reception they can realistically expect to encounter at court. Narrowing the list of factors may also provide greater consistency in terms of outcome for the parties involved.

On the other hand, section 13 permits judges to interpret and apply the *Act* in such a way that does justice in the parties' particular circumstances. It is difficult to apply a single rule to the myriad of family situations that will be subject to the *Act*. In cases that warrant it, section 13 provides the opportunity to examine how the history of the marriage and the conduct of the parties has led to the current state of property ownership and indebtedness.

⁶⁴⁶ Forgeron J, Beeler & Elliott, *supra* note 360 at 13.

There is considerable variation amongst the jurisdictions in Canada as to what factors are considered on an application for unequal division. There are several commonalities, however. For example, all jurisdictions, including the provisional rules in the *Family Homes on Reserves and Matrimonial Interests or Rights Act*,⁶⁴⁷ tend to include the duration of the marriage or cohabitation, dissipation or waste of assets and the presence of an agreement between the parties as considerations in ordering an unequal division.⁶⁴⁸ These may be considered the “core considerations”.

Jurisdictions such as Nova Scotia and Saskatchewan include a number of other contextual factors; e.g., debts and liabilities of each spouse,⁶⁴⁹ contribution to the career of the other spouse,⁶⁵⁰ and extent to which financial means and earning capacity of one spouse has been affected by the spouse’s responsibilities in the relationship.⁶⁵¹ However, as noted previously, the cases have tended to narrow these down to some core considerations: duration of marriage and dissipation or waste of assets.⁶⁵² As well, because of the *Matrimonial Property Act*’s “family purpose” test, the injection of a large number of otherwise non-matrimonial assets into the matrimonial pool of assets may give rise to an unequal division.

Provinces with a higher threshold for intervention, such as Ontario, tend to focus the inquiry on a narrower range of factors, including the bad faith of one of the spouses, the fact that part of the spouse’s property consists of gifts from the other spouse, the duration of the relationship, and a written agreement. Ontario’s unequal division section also provides for a consideration of “any other circumstance”.⁶⁵³

In the interests of clarity and predictability we recommend that those factors which are no longer in use, or which can be accommodated with reference to other factors on the list, should be

⁶⁴⁷ See section 29.

⁶⁴⁸ *The Family Property Act*, SS 1997, c F-6.3, s 21(3); *Family Law Act*, SBC 2011, c 25, s 95(2); *Matrimonial Property Act*, RSA 2000, c M-8, s 16; *Marital Property Act*, SNB 2012 c 107, s 7; *Family Property Act*, CCSM c F25, s 14(2); *Family Law Act*, RSO 1990, c F.3, s 5(6); *Family Law Act*, RSNL 1990, c F-2, s 22; *Family Property and Support Act*, RSY 2002, c 83, s 13; *Family Law Act*, SNWT 1997, c 18, s 36(6).

⁶⁴⁹ *The Family Property Act*, s 21(3)(o); *Matrimonial Property Act*, s 13(b).

⁶⁵⁰ *The Family Property Act*, s 21(3)(f); *Matrimonial Property Act*, s 13(g).

⁶⁵¹ *The Family Property Act*, s 21(3)(g); *Matrimonial Property Act*, s 13(f).

⁶⁵² Forgeron J, Beeler & Elliott, *supra* note 360.

⁶⁵³ *Family Law Act*, RSO 1990, c F.3, s 5(6).

eliminated. In our view the list can be simplified without missing crucial considerations. It should include:

- a) the unreasonable impoverishment by either spouse or partner of the family assets;
- b) the value of family debts and the circumstances in which they were incurred, particularly in circumstances where family debts exceed family assets;
- c) a domestic contract between the spouses or partners;
- d) the length of time that the spouses or partners have cohabited with each other;
- e) the date and manner of acquisition of assets;
- f) the contribution by one spouse or partner to the education or career potential of the other;
- g) the needs of a dependent child including a dependent adult child;
- h) the contribution made by each spouse or partner to the relationship and to the welfare of the family, including any contribution made as a homemaker or parent;
- i) all taxation consequences of the division of family assets.

We would not include the present subsection (f): “the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset.” As we have recommended, business assets should be presumptively included in an equal division, and there is no need to reach them through section 13.

The current section 13(h) - “the needs of a child who has not attained the current majority” should be amended to provide that a judge may consider the needs of an adult child who is nevertheless dependent for reasons of illness or disability, for example.

The current section 13(i) – “the contribution made by each spouse or partner to the relationship and to the welfare of the family, including any contribution made as a homemaker or parent” should be rewritten to avoid gendered terminology. This section should read, “the contribution made by each spouse or partner to the relationship and to the care and welfare of the family.”

The current sections 13(j) to 13(l) are rarely drawn upon as stand-alone factors in making an order for unequal division. In our view they have become obsolete (pensions are now presumptively included as matrimonial assets) or can be accommodated by the other factors at section 13. Indeed, they may have the effect of raising expectations for non-represented parties that they can re-argue for the equal division of non-matrimonial assets such as gifts, inheritances, insurance policy proceeds and settlement awards for personal injury, for example. We would not include them in a revised unequal division provision.

The Commission received feedback on its proposals for discussion that subsection (d) “the length of time that the spouses or partners have cohabited with each other”, should clarify that this includes long-term relationships. Because the Commission is recommending the presumptive exclusion of the value of pre-cohabitation property it is likely that this subsection may be used by parties in long-term relationships to argue for the sharing of the full value of property acquired before cohabitation. The Commission agrees that this is an important clarification to be made in light of the recommendations regarding pre-cohabitation property.

Recommendations:

Family property legislation should provide that in deciding whether an equal division of family assets and family debts is unfair or unconscionable, the court shall take into account the following factors:

- (a) the unreasonable impoverishment by either spouse or partner of the family assets;
- (b) the value of family debts and the circumstances in which they were incurred, particularly in circumstances where family debts exceed family assets;
- (c) a domestic contract between the spouses or partners;
- (d) the length of time that the spouses or partners have cohabited with each other, including where the parties have cohabited for a long period of time;
- (e) the date and manner of acquisition of assets;
- (f) the contribution by one spouse or partner to the education or career potential of the other;
- (g) the needs of a dependent child including a dependent adult child;
- (h) the contribution made by each spouse or partner to the relationship and to the care and welfare of the family;
- (i) all taxation consequences of the division of family assets.

9. DOMESTIC CONTRACTS

9.1. Terminology

The *Matrimonial Property Act* provides that a man and woman may enter into a marriage contract before or during their marriage (while cohabiting), pursuant to which they agree on their respective rights and obligations under the marriage, upon separation, upon the annulment or dissolution of the marriage, or upon the death of either spouse.⁶⁵⁴ The Act also provides for the validity of separation agreements. To be valid pursuant to the *Matrimonial Property Act*, a marriage contract or separation agreement must be in writing, signed by the parties and witnessed.⁶⁵⁵ The court may disregard any provision affecting a child where it is in the best interests of a child to do so.⁶⁵⁶

Of course, the heteronormative references to “man and woman” as contained in the *Act* are not appropriate. The terminology of the new legislation will need to be amended to this extent. Similarly, the term “marriage contract” does not reflect agreements between registered domestic partners or common law partners. Provision should be expressly made for cohabitation agreements.

The British Columbia *Family Law Act* provides generally for agreements in respect of family law disputes.⁶⁵⁷ Agreements may be in relation to the resolution of an existing dispute, or provide for the resolution of a dispute which may occur in the future. Legislation in Ontario,⁶⁵⁸ Prince Edward

⁶⁵⁴ *Matrimonial Property Act*, s 23.

⁶⁵⁵ *Ibid*, s 24. In *MacLean v MacLean*, 2009 NSSC 216, 280 NSR (2d) 329 at para 8, MacDonald J set out the factors that have been set out in the jurisprudence to establish the validity of a domestic contract based on *Miglin v Miglin*, 2003 SCC 24 and *Rick v Brandsema*, 2009 SCC 10.

⁶⁵⁶ *Ibid*, s 26.

⁶⁵⁷ *Family Law Act*, SBC 2011, c 25, s 6.

⁶⁵⁸ *Family Law Act*, RSO 1990, c F.3, s 51: these contracts refer not only to marriage and separation agreements but to cohabitation agreements, paternity agreements, or family arbitration agreements. Marriage agreements and separation agreements continue to be referred to, however, they are all categorized under the heading of domestic contracts

Island,⁶⁵⁹ Yukon⁶⁶⁰ and Newfoundland and Labrador⁶⁶¹ refers to domestic contracts, defined as either cohabitation, marriage or separation agreements. Similarly, in 1997 this Commission recommended that family property legislation in Nova Scotia should refer to such agreements as domestic contracts.⁶⁶²

We recommend that the *Act* should generally refer to domestic contracts, with separate definitions for marriage contracts, cohabitation agreements, and separation agreements. This will help to promote consistency among the Canadian jurisdictions, and encourage awareness that married spouses, registered domestic partners and common law partners may enter into domestic contracts to order their affairs, prior to, during and after the relationship.

Recommendations:

Family property legislation should refer generally to domestic contracts, including marriage contracts, cohabitation agreements, and separation agreements.

Marriage contracts, cohabitation agreements and separation agreements should be defined separately in the legislation.

9.2. Varying and Setting Aside Agreements

The common law rules that a contract can be set aside for fraud, duress, mistake, misrepresentation and unconscionability also apply to domestic contracts under the *Matrimonial Property Act*. The Supreme Court of Canada has set out further circumstances which may void a domestic contract, including oppression or pressure of the other party, emotional vulnerabilities of one party, and lack of adequate legal advice.⁶⁶³ In *Rick v. Brandsema* the court held that “a duty to make full and honest disclosure of all relevant financial information is required to protect the

⁶⁵⁹ *Family Law Act*, RSPEI 1988, c F-2.1, s 50.

⁶⁶⁰ *Family Property and Support Act*, RSY 2002, c 83, s 61.

⁶⁶¹ *Family Law Act*, RSNL 1990, c F-2, s 2(1)(c).

⁶⁶² *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 57.

⁶⁶³ *Miglin v Miglin*, 2003 SCC 24, 1 SCR 303.

integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances.”⁶⁶⁴ A contract can be found invalid if material financial information is withheld, or the other party’s vulnerabilities are knowingly taken advantage of.⁶⁶⁵

The *Matrimonial Property Act* provides that a court may vary a marriage contract or separation agreement if a term of the contract is unconscionable, unduly harsh on one party, or fraudulent.⁶⁶⁶ This provision adds the concept of undue harshness to the common law principles of unconscionability and fraud. As pointed out by Jollimore J. in *Smith v. Smith*, “[a]n agreement that is merely unbalanced or unfair is not unduly harsh or unconscionable”.⁶⁶⁷ On the other hand, the criteria of undue harshness is arguably less onerous than unconscionability and therefore adds flexibility to the common law test.

Saskatchewan’s *Family Property Act* provides:

24(2) If at the time the interspousal contract was entered into it was, in the opinion of the court, unconscionable or grossly unfair, the court shall distribute the property or its value

⁶⁶⁴ *Rick v Brandsema*, 2009 SCC 10, 1 SCR 295 at para 47.

⁶⁶⁵ In *MacLean v MacLean*, 2009 NSSC 216, 280 NSR (2d) 329 at para 8, MacDonald J explained that the validity of the agreement must be determined on a consideration of a number of factors such as:

- (1) the capacity or mental competence of the parties;
- (2) whether there has been complete disclosure of material information;
- (3) whether the parties have been provided with independent legal or other independent advice and if so whether the party receiving the advice suffered from any particular vulnerability that might negate the usefulness of that advice;
- (4) whether each party understood the agreement and its effect;
- (5) whether the agreement meets the objectives of the legislation with which it purports to deal; (in this case the spousal support provisions of the *Divorce Act* and the requirements of the *Matrimonial Property Act*);
- (6) whether the terms of the contract were unclear or uncertain;
- (7) whether a party signed the contract under duress or undue influence or was a vulnerable party under other influence or stress that may lead an individual to sign a document against his or her interest;
- (8) whether the agreement was signed under mistake or as a result of fraud or misrepresentation of a material fact.

⁶⁶⁶ *Matrimonial Property Act*, s 29.

⁶⁶⁷ 2011 NSSC 269, 8 RFL (7th) 476 at para 102. Justice Jollimore quoted Davison J in *Zimmer v Zimmer* (1989) 90 NSR (2d) 243, 15 ACWS (3d) 138 at page 250: “Obviously an agreement which could only be characterized as unbalanced or unfair should not be set aside as being unduly harsh. I would suggest the agreement should be found severely unjust as to show on its face a disregard for the rights of one party.” [emphasis added] See also *Andrews v. Andrews*, (1992) 116 NSR (2d) 361, 42 RFL (3d) 454.

in accordance with this Act as though there were no interspousal contract, but the court may take the interspousal contract into consideration and give it whatever weight it considers reasonable.⁶⁶⁸

The British Columbia *Family Law Act* provides that a judge may set aside an agreement if the substantive content of the agreement is “significantly unfair” taking into consideration the following factors:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.⁶⁶⁹

Competing principles of substantive equality and contractual liberty are at stake in any discussion about whether and to what extent courts should have jurisdiction to set aside contracts on grounds of unfairness. Cases such as *Rick v. Brandsema*⁶⁷⁰ have seen the Supreme Court of Canada willing to intervene in the interests of contextualizing fairness between the parties with regard to power imbalances, including unequal access to financial information. Cases such as *Hartshorne*,⁶⁷¹ on

⁶⁶⁸ *The Family Property Act*, SS 1997, c F-6.3, s 24(2).

⁶⁶⁹ *Family Law Act*, SBC 2011, c 25, s 93(5).

⁶⁷⁰ *Rick v Brandsema*, *supra* note 664 (separation agreement held unconscionable where the husband had taken advantage of his wife’s vulnerable mental state and had failed to disclose assets).

⁶⁷¹ *Hartshorne v Hartshorne*, 2004 SCC 22, 1 SCR 550. In *Hartshorne*, the Supreme Court overturned the decision of the trial judge to set aside the parties’ marriage agreement. The trial judge found the marriage agreement – which stipulated that the parties were separate as to property with the wife receiving a 3% interest per year in the matrimonial home – was unfair. A majority of the Supreme Court disagreed. The court looked to whether the circumstances of the parties on separation were within the reasonable contemplation of the parties at the time the marriage agreement was signed. In this case the wife had received independent legal advice and was aware of the harsh nature of the agreement. During the relationship, the parties maintained a separation as to property just as was contemplated in the agreement. Furthermore, although the parties were married for nine years, the husband had acquired most of his property before the marriage.

There has been criticism of the *Hartshorne* decision, more notably from women’s advocates who argue that the Supreme Court did not pay sufficient attention to the contextual or systemic factors that might have led Ms. Hartshorne to sign the contract, short of overt oppression and vulnerability. Such contextual factors may distinguish agreements made in the context of a family, as opposed to in a commercial setting. See Susan B Boyd, “Review: Robert Leckey, Contextual Subjects: Family, State, and Relational Theory” (2008) 34.1 *Queen’s LJ* 484; Robert Leckey, “Developments in Family Law: The 2008-2009 Term – Just

the other hand, evidence the court's continuing commitment to upholding spouses' legal agreements. Promoting consensual decision-making requires that agreements be reliably binding and enforceable.

In our view family law should promote agreements that are arrived at through fair processes and that represent a fair account of the parties' mutual, informed intent. That in turn should ensure less litigation to avoid, vary or set aside such agreements.

We recommend that the current threshold for varying a domestic contract as provided at section 29 of the *Matrimonial Property Act* should be maintained. The grounds of undue harshness, unconscionability or fraud are sufficiently high to ensure that parties can expect their contracts to be upheld, but not so high as to prevent judges from recognizing an injustice. We would not include failure to disclose financial information as a separate ground, but the evidence of non-disclosure would certainly be relevant in the assessment of an agreement for undue harshness or unconscionability.

Recommendation:

Family property legislation should provide that the court may vary a domestic contract where any term of the contract is unconscionable, unduly harsh on one party or fraudulent.

9.3. Independent Legal Advice

Independent legal advice can be a requirement for a valid domestic contract. Alternatively, lack of effective legal advice can be one factor that the court may consider in deciding whether to set a domestic contract aside. In Nova Scotia, the absence of independent legal advice can indicate whether or not the terms of the contract are unconscionable or unduly harsh,⁶⁷² but it is not a requirement for a valid agreement.

In Saskatchewan the *Family Property Act* provides that an interspousal contract dealing with family property is binding as long as it is in writing, signed by both spouses in the presence of a witness, and in which each spouse has acknowledged the nature of the contract and the potential

Divisions?" (2009) 48 SCLR (2d) 181 at 182.

⁶⁷² E.g., *Rogerson v Rogerson*, 2004 NSSF 37, 222 NSR (2d) 324.

claims being given up.⁶⁷³ The acknowledgement is required to be made apart from the other spouse, before a lawyer who is independent of the other spouse.⁶⁷⁴

The provision does not require a party to obtain legal advice, but certainly encourages it to the extent that the lawyer is present and available as the party signs the agreement. The provision highlights the seriousness of entering into a domestic contract, and may prevent litigation down the road to the extent the parties fully appreciate their rights, and the rights they will forego, as they enter into the agreement. As well, it ensures that the effect of not consulting a lawyer is certain, rather than an opportunity for litigation to the extent it is left to the discretion of the court.

A number of respondents to the Commission's Discussion Paper indicated that they were in favour of a requirement of independent legal advice in order to make a valid domestic contract. They indicated that without legal advice the parties may not be aware of the significance of the bargain they are making and this may place their interests in jeopardy.

The Commission is sympathetic to concerns that parties will enter into agreements unaware of their legal entitlements. The Commission is of the view that there should be greater access to legal advice for couples wishing to enter into domestic contracts in order to prevent such a situation.

The Commission is concerned, however, that persons who cannot afford independent legal advice should not be prevented from making domestic contracts where they are satisfied they know of their legal entitlements. As we indicated in the Discussion Paper, should independent legal advice become a requirement for proper execution of a domestic contract, unless some form of financial assistance (e.g., legal aid) or *pro bono* service is available, some parties may be prevented from making such agreements.

The issue of access to legal representation in the context of domestic contracts is complex. We have heard that lawyers are reticent to provide summary advice for the purposes of assisting clients draft such contracts since the stakes are so high. Access to justice requires that all persons who wish to enter into a domestic contract have access to appropriate legal advice to do so safely and effectively.

In this report we make recommendations with regard to promoting access to justice and access to alternative dispute resolution processes. Effective access to independent legal advice is key to accessing these processes, as well as in the context of making a domestic contract. Without it,

⁶⁷³ *Family Property Act*, s 38(1).

⁶⁷⁴ *Ibid*, s 38(2).

parties will be left to “go it alone”, potentially opening themselves up to abuse and an increased likelihood of litigation down the road.

Recommendation:

Family property legislation should not require independent legal advice as a condition for a valid domestic contract.

10. INTERACTION WITH OTHER AREAS OF LAW

10.1. Pensions

It is now established in Nova Scotia that pensions are matrimonial assets and are therefore subject to a presumptive equal division upon marriage breakdown.⁶⁷⁵ But the relationship between the *Matrimonial Property Act* and the pension division provisions of the various statutes and regulations that govern different types of pensions in Nova Scotia has presented continuing difficulty.

Broadly speaking, there are three types of pension plans: defined contribution plans, defined benefit plans and hybrid plans which are administered on both a defined benefit and defined contribution basis. A defined contribution plan provides a pension based on the value of contributions made to the plan by the employee or the employer or both. The employee's and employer's contributions to the plan are known during the employee's service; the pension that is eventually paid depends on the performance of the fund derived from those contributions. In a defined benefit pension plan the value of the pension is dependent upon a formula, typically based on years of service and earnings. Often the employee will pay a defined percentage of earnings into the plan, and the employer's contribution is periodically adjusted to ensure that the pension fund will support the defined benefits it will eventually pay. A plan may be matured (ie., the pension is currently being paid to a retired member) or unmatured (ie., not yet being paid).

There are a number of statutes that regulate pensions, depending on whether or not the employer is a public or private body and whether or not it is subject to federal or provincial jurisdiction. The *Pension Benefits Act*⁶⁷⁶ governs the pensions of employees employed by private employers and municipal government employees in Nova Scotia. The *Public Service Superannuation Act* and the *Teachers' Pension Act*⁶⁷⁷ regulate the division of pensions of provincial civil servants and teachers, respectively. The *Members' Retiring Allowances Act*⁶⁷⁸ applies to members of the House of Assembly in Nova Scotia. Federally, the *Pension Benefits Standards Act, 1985*⁶⁷⁹ governs the

⁶⁷⁵ *Clarke v Clarke*, 1990 2 SCR 795.

⁶⁷⁶ SNS 2011, c 41.

⁶⁷⁷ SNS 2012, c 4, Sch B; SNS 1998, c 26.

⁶⁷⁸ RSNS 1989, c 282.

⁶⁷⁹ RSC 1985, c 32 (2nd Supp).

division of pensions of federal private sector employees and the *Pension Benefits Division Act*⁶⁸⁰ regulates the division of pensions of federal public servants. Finally, the *Canada Pension Plan Act* regulates the division of CPP benefits.

There is apparent inconsistency between the terms of provincial pension legislation and the *Matrimonial Property Act*. The *Matrimonial Property Act* only applies to married spouses, it includes pre-matrimonial assets in a presumptive equal division, and it permits an unequal division of matrimonial property, including pensions. By contrast, the *Pension Benefits Act* and *Pension Benefits Division Act*, which both apply to common law partners, only provide for the division of pension benefits earned during the course of the marriage or cohabitation,⁶⁸¹ and do not permit a non-member spouse to receive more than 50% of the member's pension.⁶⁸²

In *Morash v. Morash*⁶⁸³ the Nova Scotia Court of Appeal clarified that there is no actual conflict between the terms of the *Pension Benefits Act* and *Matrimonial Property Act*.⁶⁸⁴ The court found the *Pension Benefits Act* “provides no more than a mechanism for division of pension credits at source, with a limit on source division to fifty percent of the pension benefits earned during the marriage. It is obvious from the wording of the *Pension Benefits Act* that it does not purport to govern entitlement.”⁶⁸⁵

Therefore, although the *Pension Benefits Act* provides that common law partners may apply for a division of a pension, they are not entitled to such a division on a presumptively equal basis as is the case for married spouses pursuant to the *Matrimonial Property Act*. A division of a member's pension may be made on application by a non-member common law partner, if the non-member is otherwise entitled to a share of the pension, for example, pursuant a domestic contract or by way of a successful unjust enrichment claim.

Further, although the *Pension Benefits Act* does not permit a division of a pension benefit corresponding to pre-relationship service, or allow a non-member spouse to receive a share

⁶⁸⁰ SC 1992, c 46, Sch II.

⁶⁸¹ *Pension Benefits Act*, s 74(1); *Pension Benefits Division Act*, s 4.

⁶⁸² *Pension Benefits Act*, s 74(2); *Pension Benefits Division Act*, s 8(1)(a).

⁶⁸³ 2004 NSCA 20, 221 NSR (2d) 115.

⁶⁸⁴ Per Bateman JA at para 27. The same point was clarified with respect to the *Pension Benefits Division Act* by the Court of Appeal in *Croiter v Croiter*, 2001 NSCA 37.

⁶⁸⁵ 2004 NSCA 20, 221 NSR (2d) 115, at para 28.

greater than 50% of the pension earned during the relationship, it does not eliminate a spouse's entitlements under the *Matrimonial Property Act*. Rather, it does not permit those entitlements to be realized through the mechanisms for pension division under the Regulations and instead requires the parties to compensate in some other way, such as an asset trade-off.⁶⁸⁶

This presents a problem in terms of how the non-member spouse may realize their pension entitlement where the judge awards an unequal division in their favour under section 13 of the *Matrimonial Property Act*.

The problem is particularly acute where there are not sufficient assets to effect this unequal division. As Legere Sers J. pointed out in *Verdun v. Dorrance*: “potentially you would be arguing entitlement without a remedy.”⁶⁸⁷ In these cases a continuing equalization payment, by court order or the parties' agreement, may be the only option. The continuing equalization payment has its drawbacks, including a lack of finality and potential problems of enforcement into the future.

The practical difficulties were most recently addressed by Legere Sers J. in *McKearney-Morgan v. Morgan*.⁶⁸⁸ In that case, the respondent's only substantial matrimonial asset was his pension. The court granted the petitioner spouse an order for 35% of the respondent's total pension benefit, however, the plan administrator refused to give effect to the order. Instead, the plan administrator issued the applicant a cheque for \$2,822, representing 50% of the respondent's pension benefit earned during the marriage. The value of the pension benefit to which the petitioner spouse was entitled pursuant to the court's order was calculated to be \$44,818.90. Justice Legere Sers ordered the respondent to act as trustee for the petitioner in respect of amounts owing to her from his future pension benefits. She commented that such relief was unsatisfactory since it relied on the respondent to act in accordance with the order despite the breakup of the marriage.⁶⁸⁹ She further noted that, “The discord between statutes...continues to exist and effectively sabotages enforcement of the Court's order under the *Matrimonial Property Act*,”⁶⁹⁰ and called on the legislature to remedy the conflict.⁶⁹¹

⁶⁸⁶ See *McKearney-Morgan v Morgan*, 2016 NSSC 79.

⁶⁸⁷ 2006 NSSC 305, 249 NSR (2d) 67.

⁶⁸⁸ *Supra* note 686.

⁶⁸⁹ *Ibid* at para 129.

⁶⁹⁰ *Ibid* at para 88.

⁶⁹¹ *Ibid* at paras 89, 108, 145.

Providing for an unequal division of pensions at source raises an important social policy concern because pensions have a significant social impact. As discussed above, pensions are a unique asset in that they provide security in the form of income replacement once the member leaves the workforce. As Thomas G. Anderson puts it, “A pension provides a valuable community function: it ensures that members of our society, when no longer able to work, have retirement income.”⁶⁹²

Private pensions may play a significant role in ensuring financial security in an era of increasing privatization of government services and decreasing government expenditures. During their working lives, spouses to some extent are planning their future with the expectation of realizing at least a one half share in their pension at retirement. Providing for unequal divisions of the pension itself, as opposed to merely an asset trade off to effect an unequal division, may significantly compromise these expectations. If necessary the member may have to work longer or will see a reduced standard of living in retirement.

In the course of consultation on the issue, the Commission received feedback from several experts who were not in favour of removing the 50% cap on the division of pensions in provincial pension legislation. These experts argued that this cap provides an important protection for the member spouse into retirement. This is especially the case as the Commission is recommending the inclusion of common law partners in the matrimonial property regime which will increase the likelihood of multiple divisions over a member’s lifetime. Furthermore, these experts argued that providing for an unequal division of the pension at source will not provide for the non-member spouse or partner to become economically self-sufficient at separation as they will most likely not realize their entitlement until some time into the future.

As discussed in the Discussion Paper, there is some concern that an unequal division of the pension – particularly a defined benefit pension – may serve to overcompensate the non-member spouse. This is because a defined benefit pension is valued using a retirement method of valuation that sees the non-member spouse benefit from promotions and pay increases earned by the member spouse post-separation. While overcompensation may be a concern regarding the division of pensions valued using a retirement method in general, the problem is compounded when the non-member spouse receives an unequal division of this pension.

Finally, respondents who urged the Commission not to recommend that provincial pension legislation allow for an unequal division of pensions at source pointed to the fact that such a provision may unduly interfere with the employer-employee relationship. In providing for employment pensions, employers have made a promise to employees to assist them to become

⁶⁹² Thomas G Anderson QC, “Pension Basics for Family Lawyers Part II: Canadian Models for Dividing Pensions When a Relationship Ends” (2007) 26 CFLQ 91 at 98.

financially secure into retirement. Eliminating the 50% cap on pension division would interfere with and potentially compromise this bargain.

On the other hand, the Commission heard from a number of respondents who were in favour of provincial pension legislation allowing for an unequal division of pensions at source. These respondents were concerned that in cases where spouses have few other assets (for example, in cases where the member spouse dissipated the assets), allowing pension administrators to divide pension benefits earned unequally in favour of non-member spouses may be the only way for non-member spouses to realize entitlements. A number of respondents were concerned that failing to allow judges to make unequal division orders that will be carried out by pension administrators leaves administrators to determine matrimonial property entitlements rather than the courts.

Some respondents objected to the differential treatment of pension benefits and other assets that might be used as retirement vehicles such as RRSPs and business assets which, pursuant to the Commission's recommendations could be divided unequally. Finally, some respondents were of the view that by eliminating the cap on pension division at source, family property legislation will promote settlement and reduce the need for litigation.

The Commission is concerned that in preventing pension administrators from abiding by court orders, provincial pension legislation may be putting matrimonial property entitlements in the hands of administrators as opposed to the courts and may be preventing spouses and partners from realizing their property entitlements. This will be the case especially where there are no other assets with which the spouse or partner can realize their matrimonial property entitlement.

Given the concerns expressed to the Commission about the special nature of pensions and the need to protect these assets to respect the bargain between employers and employees, the Commission recommends that an unequal division of the pension benefit by pension administrators should only be allowed where a judge makes an order for an unequal division of the pension under family property legislation. This will ensure that an order will be made only where it is unfair or unconscionable to divide the pension benefit equally. It is likely that an order for unequal division will only be made where the member spouse or partner has dissipated the assets and there is no other property with which to effect an appropriate matrimonial property division and/or where the relationship in question was a long-term relationship and there is pre-cohabitation contributions to the pension.

In recommending that provincial pension legislation be amended to provide for an unequal division of the pension benefit, we are referring to the whole of the pension and not just the portion of the pension earned during the relationship. As we see with the facts in *McKearney-Morgan* simply allowing for a more than 50% division of the pension earned during the relationship may not effect a fair matrimonial property division especially where the marriage or partnership is of a short duration and there are no other assets to effect a division. Pension

legislation will have to be reformed to provide that the whole of the pension may be divided with more than 50% provided to the non-member spouse or partner where there is a court order. In this way, pre-cohabitation pension contributions will be treated the same as other assets acquired before the parties cohabited. The cohabitation date value of the pension will be presumptively excluded from division subject to an order for an unequal division.

While it may be argued that not allowing spouses or partners to agree to a more than 50% division of the pension in favour of the non-member spouse is paternalistic and fails to promote alternative dispute resolution, the requirement of a judgement means that there is some court oversight over the division of this important asset. The requirement that spouses or partners obtain a court order before a pension administrator may divide the pension benefit unequally may address employer concerns as the unequal division of the asset will only be ordered as an exception to the rule. Furthermore, this provision may allay fears that self-represented litigants, for example, may be pressed to bargain away pension assets without some court oversight.

Recommendation:

Provincial pension legislation should be amended to permit a non-member spouse or partner to receive greater than fifty per cent of the member's pension earned during the relationship where the court makes an order for an unequal division of the pension.

10.2. Family Property on Reserve

Section 88 of the federal *Indian Act* provides that provincial laws of general application apply on reserve except to the extent that they are inconsistent with the *Indian Act*. Real property on reserve is covered by the *Indian Act*, and therefore provincial and territorial laws do not apply to possession and ownership of real property on reserve.⁶⁹³ Provincial and territorial matrimonial property legislation does apply to personal property on reserve, such as bank accounts, cars, etc., subject to enforcement limitations in the *Indian Act*.⁶⁹⁴

⁶⁹³ *Derrickson v Derrickson*, [1986] 1 SCR 285, 26 DLR (4th) 175, aff'd (1984) 51 BCLR 429 (CA), 9 DLR (4th) 204, 38 RFL (2d) 1.

⁶⁹⁴ Section 89 of the *Indian Act* exempts real and personal property on reserve from seizure, attachment, etc.

In *Derrickson v. Derrickson*, the Supreme Court of Canada held that a compensation order could be made to ensure that the spouse not in possession of the matrimonial home on reserve receives a fair share of property accumulated during the marriage. The court commented:

If the court may make an order for compensation because division is not possible where property has been disposed of, surely it must be empowered to make such an order "for the purpose of adjusting the division", where property exists but cannot be divided because no division can be made of reserve lands.⁶⁹⁵

A compensation order, however, leaves the spouse without access to the home and possibly without access to accommodation on reserve. Even if spouses are entitled to remain on reserve by virtue of band membership, they may have to leave for lack of a place to stay. This can be an extremely disruptive experience, particularly where a person's life revolves around the reserve community.

The problem created by the *Indian Act* is particularly felt by aboriginal women. Some statistics have shown that the majority of certificates of possession for on-reserve property are issued to and held by men.⁶⁹⁶ Most provincial family property statutes provide for the primary caregiver to be granted exclusive possession of the matrimonial home, particularly where the best interests of the children are at stake, but until recently there was no such statutory protection with respect to on-reserve property. This meant that a woman might have to leave the reserve or move in with family on reserve. She might have had difficulty gaining custody of the children if she was unable to find acceptable accommodation. As noted by the Nishnawbi-Aski Nation Legal Services in Ontario, the situation "compounds other problems found on reserves, such as housing shortages, the problem of limited resources to find housing and support children, as well as overcrowding."⁶⁹⁷

Compensating a spouse for lack of access to the matrimonial home on reserve is complicated by the difficulty of valuing the property interest in the home.⁶⁹⁸ In the case of *Hepworth v Hepworth*,

⁶⁹⁵ *Derrickson*, *supra* note 693 para 86.

⁶⁹⁶ Claudia C Belda, "Addressing Matrimonial Property On-Reserve" (2006) Nishnabi-Aski Nation Legal Services, online: <<http://www.nanlegal.on.ca/upload/documents/legal-articles/addressing-matrimonial-property-on-reserve.pdf>>; Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, (1997) Vol 4, Chapter 2, RCAP CD ROM, Seven Generations, Record 26161.

⁶⁹⁷ Belda, *ibid* at 1.

⁶⁹⁸ According to *George v George* (1996), 24 RFL (4th) 155, 139 DLR (4th) 53 (BCCA), cited with approval by the Nova Scotia Court of Appeal in *Hepworth v Hepworth*, 2012 NSCA 117, 323 NSR (2d) 116, a spouse need not be in possession of a certificate of possession respect of the matrimonial home on reserve in order

the trial judge had minimal evidence as to the actual market value of the home. The evidence that was presented indicated a market value very much below the appraised value - \$40,000 versus \$127,000 – since the market for the home was limited to other band members on a small reserve. The non-possessory spouse was ultimately awarded \$20,000 as compensation for the house by the Court of Appeal, representing half of the market value of the home.⁶⁹⁹ She had argued that the replacement cost of approximately \$123,000 –ie, the cost of buying a similar property elsewhere – should be the appropriate method of valuation. The court rejected this approach in favour of the actual market value approach. The court commented that because property on reserve cannot be mortgaged, awarding compensation on the basis of replacement cost may place the possessory spouse in a very difficult situation.⁷⁰⁰

On June 10th, 2013, Parliament passed the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. As of December 16, 2014, the provisional federal rules in the *Act* apply on reserve. Unless a band has made its own matrimonial real property law, is subject to a self-government agreement, or the governing First Nation is on the schedule to the First Nations Land Management Framework,⁷⁰¹ or had signed onto the Framework before the *Act* received royal assent, the provisional federal rules will apply. Since December 2014, 6 bands in Nova Scotia have passed their own matrimonial real property law.⁷⁰²

The provisional federal rules in the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the “provisional federal rules”) apply to both married spouses and common law partners as long as one partner is a First Nation member or Indian.⁷⁰³ The provisional federal

for the court to make a compensation order.

⁶⁹⁹ In *Hepworth* there was no certificate of possession but the possessory spouse was still found to have a possessory interest in the home. The Court considered the possessory interest as a matrimonial asset under the *Matrimonial Property Act*, even though it didn’t qualify as the matrimonial home.

⁷⁰⁰ *Hepworth*, *ibid* at para 46.

⁷⁰¹ *The First Nations Land Management Act*, SC 1999, c 24, is a 1999 federal statute which provides First Nation signatories with legislative authority to deal with land management, including the authority to deal with on-reserve matrimonial interests and rights.

⁷⁰² These include Pictou Landing (16 December 2014), Millbrook (1 December 2014), Bear River (16 December 2014), Paqtnkek Mi’Kmaq Nation (18 December 2014), and Sipekne’katik First Nation (25 September 2015). On April 30, 2016, Membertou Chief and Council passed the *Membertou Family Homes Law, 2016*, online: Maupeltu Ta’n Telsutekek, Membertou Governance <<http://maupeltutantsutekek.webs.com/Family%20Law/MembertouFamilyHomesLaw.pdf>>

⁷⁰³ Section 6.

rules guide occupation, valuation, division of value and transfer of the interest in the family home on reserve both at relationship breakdown and on death of one spouse or common law partner. The *Act* provides that a spouse, registered domestic partner, or common law partner may occupy the family home whether or not he or she is a First Nation member or status Indian.⁷⁰⁴ The provisional federal rules also provide that a spouse or common law partner who holds an interest or right to the family home must not dispose of or encumber their interest without the consent of the other spouse.⁷⁰⁵

The provisional federal rules provide that the court may make an emergency protection order in cases of family violence.⁷⁰⁶ The court may also make orders for exclusive occupation of the family home and reasonable access to the home for any period the court specifies, based upon a number of considerations.⁷⁰⁷ These considerations include the best interests of the children, including any child who is a First Nation member to maintain a connection with that First Nation, the collective interests of First Nation members in their reserve lands, family violence, and the availability of other suitable accommodation on reserve, among others.⁷⁰⁸ The court can also make an exclusive occupation order where the applicant's spouse or common law partner has died.⁷⁰⁹

The provisional federal rules also provide guidance to the courts on how to value the family's interest in the family home on the breakdown of the relationship, and how to divide that value. The *Act* provides that the value of the interest in the matrimonial home will either be determined by agreement between the parties, or by way of valuation according to a method provided in the rules.⁷¹⁰ The value of the interest or right in the family home is to be determined by subtracting the amount of any outstanding debts or liabilities assumed for acquiring, improving or

⁷⁰⁴ Section 13.

⁷⁰⁵ Section 15(1).

⁷⁰⁶ Section 16. An Emergency Protection Order may include, *inter alia*, provisions for exclusive occupation and reasonable access to the family home, provisions requiring a spouse or someone else to vacate the family home, and provisions directing a peace officer to remove a spouse or someone else from the family home.

⁷⁰⁷ Section 20.

⁷⁰⁸ Section 20(3).

⁷⁰⁹ Section 21.

⁷¹⁰ Section 27(3).

maintaining the interest in the home and lands from “the amount the buyer would reasonably be expected to pay for interests or rights that are comparable to the interests or rights in question”.⁷¹¹

While a First Nation member may have an interest in the land on which the structure of the house is built by way of a certificate of possession, a non-member may only have an interest in the structure itself.⁷¹² Therefore, the provisional federal rules distinguish between the entitlement of a First Nation member and a non-member.⁷¹³ A First Nation member is entitled to one half of the value of the interest held by the other spouse in both the structure of the house and the land,⁷¹⁴ and the greater of one half of the appreciation in value during the conjugal relationship of both the structure and land,⁷¹⁵ and a return of the payments they made to improve both the land and structures in which the other spouse or partner has an interest, if the property appreciated during the relationship.⁷¹⁶ A non-member spouse, by contrast, is only entitled to one half of the value of the structure on the land,⁷¹⁷ and the greater of either one half the appreciation in value, on one hand, and the difference between payments made towards improvements and outstanding debts incurred in order to make those payments on the other.⁷¹⁸ A non-member spouse is also entitled to the return of money they spent to improve the structure or lands held by the other spouse.⁷¹⁹

The provisional federal rules also provide that a spouse or common law partner may make an application for a valuation and division of the value of the structure and/or land (depending on

⁷¹¹ Section 28(4).

⁷¹² *Indian Act*, RSC 1985, c I-5, s 28(1); *Family Homes on Reserve and Matrimonial Interests or Rights Act*, SC 2013, c 20, s 28(3).

⁷¹³ Section 28.

⁷¹⁴ Section 28(2)(a).

⁷¹⁵ Section 28(2)(b). To be exact, the provisional rules provide that the First Nation member is entitled to the greater of either one half the appreciation in value, on one hand, and the difference between payments made towards improvements and outstanding debts incurred in order to make those payments on the other.

⁷¹⁶ Section 28(2)(c). The First Nation member is entitled to the difference between payments to improve lands and buildings, and outstanding debts incurred in order to make those payments.

⁷¹⁷ Section 28(3)(a).

⁷¹⁸ Section 28(3)(b).

⁷¹⁹ Section 28(3)(c). The non-member is entitled to the difference between payments made to improve lands and structures, and outstanding debts incurred in order to make those payments.

whether they are a First Nation member) on the death of the other spouse or common law partner.⁷²⁰

The provisional federal rules provide that the court may make an order for the transfer of interests or rights in any structure or land on reserve, upon relationship breakdown. However, the order may only be made if the spouses have agreed to the transfer in writing, or the applicant had previously held the interest being transferred before cessation of cohabitation, or the spouses or common law partners hold more than one such interest or right in structures or land on a reserve of their First Nation.⁷²¹

The impetus for the rules was the concern that without family property legislation spouses and common law partners are left with few rights to property and housing on separation. The Native Women's Association of Canada explains:

Couples who agree on how to deal with their matrimonial real property do not have a comprehensive legal framework within which they can give effect to their intentions. Where couples do not agree, there is no mechanism for resolving their disputes. Without legal protection, women experiencing the breakdown of their marital relationship, experiencing violence at home, or dealing with the death of their partner often lose their homes on reserve. Women and children who have to move away from the reserve lose the support and assistance of their families, friends, and community. They also lose their access to benefits and programs that are only available to people living on reserve. The reserve also loses the valuable contributions of these women and their children to the well-being of their community, now and in the future.⁷²²

Furthermore, where there is domestic violence this may place a woman and her children at risk.⁷²³

⁷²⁰ Section 34.

⁷²¹ Section 31. Section 31(2) also confines the types of reserves to which this section applies.

⁷²² Native Women's Association of Canada, *Matrimonial Real Property: An Issues Paper* (Prepared for the National Aboriginal Women's Summit, Corner Brook, NL, 20-22 June 2007), online, NWAC <http://www.nwac.ca/wp-content/uploads/2015/05/2007_NWAC_Matrimonial_Real_Property_A_Issue_Paper.pdf>.

⁷²³ See for example, British Columbia, Representative for Children and Youth, Mary Ellen Turpel-Lafond, "Representative's Statement on Coming into Force of Federal First Nations Legislation" (18 December 2013), online: RCYBC <<https://www.rcybc.ca/reports-and-publications/statements/representative%E2%80%99s-statement-coming-force-federal-first-nations>>.

While some applaud the provisional federal rules for providing important protections - especially for women and children on reserve - some worry that the rules may exacerbate other problems.⁷²⁴ For example, some worry that exclusive occupation orders for the family home in favour of non-status Indian or non-First Nation member spouses or common law partners may exacerbate housing shortages on reserve.⁷²⁵ The *Act* abrogates important protections against execution on property on reserve and it allows a non-Indian person to benefit financially from improvements made on property on reserve.⁷²⁶ This may erode the special protections that First Nations people have to property on reserve. Further, the provisional rules provide for new costs to be assumed by the provinces and a greater role for provincial courts in deciding real property matters on reserve.⁷²⁷ These incursions by provincial authority may be seen as counter to the conferral of federal authority over Indians and lands reserved for Indians under section 91(24) of the Constitution.⁷²⁸ Furthermore, the Assembly of First Nations has expressed concern that some

⁷²⁴ Letter from Assembly of First Nations, Office of the National Chief to Honourable Peter McKay, Minister of Justice and Attorney General of Canada (30 October 2014) online: <http://www.afn.ca/uploads/files/mrp/14-10-30-ag_of_canada_-_minsiter_of_justice_-_peter_mackay_-_mrp_act.pdf>.

⁷²⁵ Krista Brookes, Atlantic Policy Congress of First Nations Chiefs Secretariat, “An Overview of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*” (Delivered at the 2014 NSBC Annual Meeting, 14 June 2014).

⁷²⁶ Section 52(1) and ss 28(3) & 34(3).

⁷²⁷ Atlantic Policy Congress of First Nations Chiefs Secretariat, *supra* note 725.

⁷²⁸ Section 91(24) of the Constitution Act, 1867; The *Family Homes on Reserves and Matrimonial Interests or Rights Act* has met with criticism from Native women’s organizations in Canada, however. In particular, organizations such as the Native Women’s Association of Canada (NWAC), have been critical of the government’s introduction of the legislation as a way to provide justice for aboriginal women on reserve. NWAC highlighted “the need for more time for community engagement, community resources, training and capacity-building, along with the development of tools required so First Nations could implement appropriate measures where families can resolve disputes safely, and in a culturally-appropriate way.” NWAC criticized the Bill’s failure to substantively support Indigenous legal systems, and the government’s failure to support First Nations governments in the implementation of the legislation. NWAC’s broadest criticism of the bill was that the government was attempting to solve a complex problem by merely addressing a “legislative gap”. Instead, NWAC advocated for more resources for First Nations to implement solutions to help families dealing with disputes, and in order to “address the real issues in communities.” See Native Women’s Association of Canada, “Bill S-2: Family Homes on Reserves & Matrimonial Interests or Rights Act” (Ottawa: 21 November 2011).

provinces have chosen not to designate judges to grant emergency protection orders even though these orders will require a careful balancing of individual and collective rights.⁷²⁹

Finally, there remains the issue of how property on reserve will be valued. Land tenure on reserve is complicated. The Auditor General has described on-reserve and off-reserve housing as fundamentally different:

On-reserve housing is fundamentally different and more complex than off-reserve housing. It is governed by the legal framework defined by the *Indian Act*. Many practices and approaches related to off-reserve housing do not apply on reserves. For example, taking out a mortgage to buy a house or renting an apartment, and all the infrastructure, rules, and regulations that surround these activities, are taken for granted off-reserve. However, they do not exist to the same extent—or at all—for on-reserve housing.⁷³⁰

Some estimates show that in the Atlantic region, the majority of homes on reserve are social housing units where the mortgages are held by the band and secured by federal Ministerial loan guarantees.⁷³¹ Lawyers and individuals negotiating separation agreements, for example, must be aware of some of the unique features of land tenure on reserve, including the fact that besides certificates of possession there is no legal home ownership by individual band members on reserve. This leads to difficult valuation and enforcement issues as houses cannot be sold on the open real estate market.

Federal legislation is not within our mandate. But the interaction between the *Matrimonial Property Act* and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, and comparable rules which may be adopted by Nova Scotia First Nations require specific attention

⁷²⁹ Letter from Assembly of First Nations, *supra* note 724.

⁷³⁰ Auditor General of Canada, “Chapter 6: Federal Government Support to First Nations – Housing on Reserves” in *2003 Report of the Auditor General of Canada to the House of Commons*, online: Office of the Auditor General <<http://www.oag-bvg.gc.ca/internet/docs/20030406ce.pdf>>.

⁷³¹ Atlantic Policy Congress of First Nations Chiefs Secretariat, *supra* note 725; The Auditor General’s report, *ibid*, indicates that:

According to CMHC, about 470 First Nations have used its programs. Under its section 95 program, CMHC subsidizes the operating costs (including the repayment of outstanding loans) of 22,000 of the total 89,000 houses on reserves. In 2001 CMHC spent about \$75 million under this program. However, the program is very sensitive to changing interest rates. A CMHC analysis indicated that a one-percent increase in interest rates in 2003 would result in a need to increase subsidies by about \$14 million over the next five years.

in the context of this report. It is important to highlight that where provincial law conflicts with federal law, the federal law will prevail.

Furthermore, practitioners who do not have much experience with laws on reserve may now be called upon to represent a client making a claim under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. It is important to raise awareness of the *Act* in Nova Scotia and to pinpoint the ways in which it differs from the family property regime off reserve. For example, the *Matrimonial Property Act* does not apply to common law couples, but the *Family Homes on Reserves and Matrimonial Interests or Rights Act* does. This means that common law partners may apply for a division of the value of property on reserve, but may not be entitled to a division of any off reserve property other than by making an equitable claim.

There are a number of differences between the provisional federal rules in the *Family Homes on Reserves and Matrimonial Interests or Rights Act* and the *Matrimonial Property Act* that should be highlighted in public legal education material. While the *Matrimonial Property Act* includes pre-matrimonial assets in a presumptive equal division, and includes gifts, inheritances, trusts and settlements where they meet the family purpose test,⁷³² the provisional federal rules in the *Family Homes on Reserves and Matrimonial Interests or Rights Act* treats these as excluded property not subject to division.⁷³³ The provisional federal rules do not specifically exclude business assets from division. Finally, the provisional federal rules include a number of “unequal division” factors⁷³⁴ and factors to be considered in making exclusive possession orders.⁷³⁵

The interaction between both the federal provisional rules and other matrimonial property laws on reserve, and provincial family property legislation is a developing area and attention should be paid to the problems that may arise from this interaction in the future.

⁷³² *Matrimonial Property Act*, s 4(1).

⁷³³ Section 2(1) “matrimonial interests or rights” means interests or rights, other than interests or rights in or to the family home, held by at least one of the spouses or common-law partners (a) that were acquired during the conjugal relationship; (b) that were acquired before the conjugal relationship but in specific contemplation of the relationship; or (c) that were acquired before the conjugal relationship but not in specific contemplation of the relationship and that appreciated during the relationship. It excludes interests or rights that were received from a person as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights.

⁷³⁴ Section 29.

⁷³⁵ Section 20(3).

Recommendations:

New family property legislation should confirm that it does not apply to real property on reserve in Nova Scotia.

Public legal education materials should raise awareness about the differences between the *Family Homes on Reserves and Matrimonial Interests or Rights Act* and the family property regime off reserve.

10.3. Family Property and Bankruptcy: Equalization Payments

Bankruptcy presents a problem for equalization payments to effect a division of property, by agreement or court order. In contrast to orders for support payments,⁷³⁶ orders for equalization payments may be discharged through bankruptcy.⁷³⁷ In *Schreyer*,⁷³⁸ the Supreme Court of Canada

⁷³⁶ *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3, s 178(1), an order for maintenance is not discharged in bankruptcy. A judge may secure a spouse's claim as a charge on property. For example, in *Re Mattes*, 5 CBR (4th) 212, 1998 CarswellNS 273, the registrar allowed a spouse's secured claim filed in her husband's bankruptcy proceeding. The Court had issued an order regarding payment of the arrears of lump sum maintenance and child support and ordered that if amounts awarded were not paid they would be secured and paid out of the husband's share of the matrimonial properties. The husband subsequently filed for bankruptcy and the trustee insisted that 1/2 of the proceeds from the sale of 3 matrimonial properties had to be paid to the estate as a result. The wife filed a secured claim in the bankruptcy proceeding based on the secured order. The trustee disallowed the secured claim. The registrar, however, overruled the trustee's decision, holding that the order intended that proceeds from sale were meant to be security for payment of support. He held at para 30 that the "Order of Justice Stewart did create a security interest over the proceeds of the sale of each of the three properties in question. That security consisted of what might be described as a Court ordered assignment of those proceeds." The Registrar referred to the Supreme Court case of *Marzetti v Marzetti*, [1994] 7 WWR 623, 116 DLR (4th) 577, 2 SCR 765 at 169-70 and held that his decision was bolstered by the public policy considerations set out in that case. At para 28 he stated, "public policy reasons a statutory interpretation which was directed towards the achievement of a related public policy goal was to be preferred over one which would not assist in the achievement of the goal. Justice Iacobucci particularly referred to previous comments of the Court recognizing that divorce and its economic effects play a role in the "feminization of poverty". Justice Iacobucci also recognized that, at least in relation to s 68 of the *B.I.A.*, Parliament had demonstrated an overriding concern for the support of families."

⁷³⁷ See *Schreyer v Schreyer*, 2011 SCC 35, 2 SCR 605.

⁷³⁸ *Ibid.*

held that orders for equalization payments will be released upon the discharge of a bankrupt spouse from bankruptcy. Because an equalization payment confers a personal and not a proprietary right on the recipient spouse, the spouse's claim ranks with those of other unsecured creditors.⁷³⁹

Pursuant to Nova Scotia's division of property regime, the solvent spouse can gain a property interest in matrimonial property by way of an order for division. This interest does not form part of the estate of the insolvent spouse once an order or agreement to such effect is made, and is not subject to distribution among the insolvent spouse's creditors.

There are situations in Nova Scotia where a spouse will agree to, or a judge may order, an equalization payment as opposed to a division of property, however. The equalization payment is a debt and may be discharged on bankruptcy of the debtor spouse. Judges, lawyers and self-represented litigants must be aware of the potential consequences of ordering or agreeing to an equalization payment, and in particular the vulnerability of such payments in bankruptcy proceedings.

Recommendation:

Public legal education materials should advise that equalization payments to effect a division of property are liable to discharge through bankruptcy.

⁷³⁹ *Ibid* at para 29.

11. FAMILY PROPERTY AND SUCCESSION

The Supreme Court of Canada has been clear that spouses' matrimonial property obligations must be met upon death.⁷⁴⁰ Spouses also have obligations to their dependants.⁷⁴¹ In this section we examine how a surviving spouse, registered domestic partner, or common law partner's rights to a family property division should interact with what they might receive by will, intestacy, or otherwise upon the death of the other spouse or partner, such as by survivorship or beneficiary designation.

11.1. Who Can Bring an Application Upon the Death of a Spouse?

The *Matrimonial Property Act* provides that a spouse is entitled to a presumptively equal division of all matrimonial assets upon the death of the other spouse, even if the marriage was still intact at the point of death. This at least ensures, "that a spouse who sticks with an unhappy marriage should not be worse off than if the remedy of divorce had been pursued while the partner was alive."⁷⁴² It is also consistent with the principle that the spouse's interest in matrimonial assets arises from their deemed contribution to the economic partnership of the marriage, although the interest is deferred and only vests by an order or agreement for division at the end of the relationship.

The relevant provision of the *Matrimonial Property Act* is as follows:

12 (1) Where

...

(d) one of the spouses has died,

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

Pursuant to ss. 12(2) and (3) of the *Matrimonial Property Act*, a surviving spouse has six months from probate or administration of the estate of the deceased spouse to bring an application for division of matrimonial assets. This limitation period may be extended where the court is satisfied that the surviving spouse did not know of the grant of probate or administration or did not have

⁷⁴⁰ See *Tataryn v Tataryn Estate*, [1994] 2 SCR 807.

⁷⁴¹ *Ibid.*

⁷⁴² Per Hallett J in *Levy v Levy Estate* (1981), 50 NSR (2d) 14, 98 APR 14 at para 61.

adequate opportunity to make such an application. Section 12(3) limits the extension of time “only to matrimonial assets remaining undistributed at the date of the application.”

The *Matrimonial Property Act* does not indicate whether the estate of a deceased spouse can initiate or continue an action begun pursuant to the *Matrimonial Property Act* after the death of the spouse. In *Sagar v. Bradley Estate*⁷⁴³ it was held that the estate of a spouse cannot initiate an application pursuant to the *Matrimonial Property Act*. In *Sagar*, the plaintiffs – children of Mrs. Bradley from a first marriage – attempted to initiate an action for a division of the matrimonial home even though no action for a *Matrimonial Property Act* division had been initiated during Mrs. Bradley’s lifetime. The Bradley home was in the name of Mr. Bradley only. Mrs. Bradley’s children wanted her one-half matrimonial interest in the home included as part of her estate, of which the children were beneficiaries.

In the trial decision, Glube C.J.T.D. refused to allow Mrs. Bradley’s children to initiate the application. She held that “the rights of heirs, executors or administrators cannot exceed the rights Mrs. Bradley had while living. I find no right of action was vested under s. 12[(1)](d)” as Mrs. Bradley herself had not initiated the application before death and had no grounds to do so.⁷⁴⁴

Chief Justice Glube distinguished the case at hand from one in which a spouse, anticipating her own death, commenced an application for a matrimonial property division in British Columbia. She noted that in *Fong v. Fong*, “That death occurred and her administrator carried on the application. That is a far different situation from the present facts and is, therefore, distinguished.”⁷⁴⁵

The Court of Appeal upheld Glube C.J.T.D.’s decision, noting, “the new rights conferred by the [*Matrimonial Property Act*] are confined to the spouses and are dependent on the conditions contained at s 12(1) of the Act.”⁷⁴⁶

Similarly, in the Newfoundland and Labrador case of *Morgan Estate v. Morgan Estate*, the Court of Appeal held, after referring to *Sagar v. Bradley*, that the estate of a spouse could not initiate an application for division. The court gave the following reasons:

⁷⁴³ (1984) 63 NSR (2d) 386, 10 DLR (4th) 565 (CA). The Court of Appeal affirmed the decision of Chief Justice Glube that since Mrs. Bradley could not have commenced an application pursuant to the *Matrimonial Property Act* during her lifetime the action was not vested and therefore not provided for by the *Survival of Actions Act*.

⁷⁴⁴ (1984) 62 NSR (2d) 120 (TD), 6 DLR (4th) 470 at para 28.

⁷⁴⁵ *Ibid* at para 18.

⁷⁴⁶ (1984) 63 NSR (2d) 386, 10 DLR (4th) 565 (CA) at para 18.

In a reformatory statute such as the *Matrimonial Property Act* whose obvious objective is to strengthen the institution of marriage through reduction of potential internal inequalities and recognition of each spouse's personal contribution, very clear words would be needed to ascribe an intent that third parties could intrude into the couple's arrangement of their own marital affairs upon the death of one of them. The separate property arrangement may have been perfectly satisfactory to the deceased spouse in his or her lifetime and he or she may well wish the property ownership to continue after his or her death in the manner in which it was held in their joint lifetimes. In my view, it was not the intent of the Act to so intervene in harmonious relationships except where a surviving spouse, at the termination of the marriage by death or otherwise, wished an equitable division of material assets.⁷⁴⁷

We agree that the beneficiaries of the estate of a deceased spouse should not be entitled to commence an application for division of family assets, to the detriment of the living spouse or partner, where no grounds for bringing a matrimonial property application (e.g., separation, petition for divorce, death of the other spouse) existed while the spouse, registered domestic partner, or common law partner was still alive. The remedial purpose of the *Matrimonial Property Act* is to promote the settlement of financial affairs between the spouses and to ensure the financial stability of spouses upon relationship breakdown. Child maintenance, dependants' relief legislation and provision for a distributive share in intestate legislation are the appropriate places to consider the needs and claims of third parties, such as children of the deceased spouse.

In our view, however, where an application for a division of family property has been initiated before the death of the deceased spouse, registered domestic partner, or common law partner, the estate of the deceased should be able to continue the application. It may be necessary to confirm this in the legislation, given comments by the Court of Appeal in *Sagar v. Bradley* which seem to indicate that the estate of the deceased should be precluded from not just initiating an application, but continuing an application, as well:

In my view the new rights conferred by the statute are confined to spouses and are dependent on the conditions contained in s. 12(1) of the Act. *The rights require the making of an order in the lifetime of a spouse*, provided the conditions in s. 12 exist. In the result neither the heirs nor the estate of the deceased spouse can *maintain* an action to have the matrimonial home declared an asset of the estate unless some interest vested in the

⁷⁴⁷ Per Marshall JA, *Morgan Estate v Morgan Estate* (1992), 97 Nfld & PEIR 106, 90 DLR (4th) 419 at para 34.

deceased before his or her death.⁷⁴⁸ [emphasis added]

The court's comments were in *obiter*, and no reported case in Nova Scotia has held that an estate may not continue an action already started by a spouse under the *Survival of Actions Act*.⁷⁴⁹ Section 2(1) of that *Act* provides as follows:

Except as provided in subsection (2), where a person dies, all causes of action subsisting against or vested in him survive against or, as the case may be, for the benefit of his estate.

It is not clear why, if (unlike in *Sagar*) the spouse brought an application for division under section 12 while she was alive, the resulting, vested "right of action", as Glube C.J.T.D. terms it,⁷⁵⁰ should not survive her death.⁷⁵¹ But the Court of Appeal's comments have been regarded as authoritative. For example, Howlett writes:

In Nova Scotia, it is not enough that one spouse commence an action against the other spouse in his lifetime. Unless the action has been concluded and the order granted before the applicant dies, the applicant's rights die with him.⁷⁵²

⁷⁴⁸ (1984) 63 NSR (2d) 386, 10 DLR (4th) 565 (CA) per Jones JA at para 18.

⁷⁴⁹ RSNS 1989, c 453.

⁷⁵⁰ *Sagar v Bradley*, (1984) 62 NSR (2d) 120, 6 DLR (4th) 470 at para 22.

⁷⁵¹ Unlike matrimonial property legislation in New Brunswick, for example, Nova Scotia's *Matrimonial Property Act* does not explicitly set out when the *Survival of Actions Act* applies. Section 5 of the *Marital Property Act*, SNB 2012, c 107 provides:

5(1) Subject to subsections (2) and (3), the *Survival of Actions Act* does not apply to a right to a division of property under section 3 or 4.

5(2) If a spouse dies after an application has been made for a division under section 3, the application may be continued by or against the estate of the deceased spouse, and, if the application is one that has been brought by the surviving spouse, subsections 4(6), (7) and (10) apply with the necessary modifications.

5(3) If a spouse dies after an application has been made for a division under section 4, the application may be continued by the estate of the second deceased spouse against the estate of the first deceased spouse.

⁷⁵² David A Howlett, *Estate Matters in Atlantic Canada* (Toronto: Carswell, 1999) at 154-155; see also Ray Adlington, "3.3 – Marital Property Legislation" in *Atlantic Canada – Estate Administration Manual* (Carswell, WestlawNext) (accessed on 09 October 2014) at 3.

The legislation in a number of jurisdictions in Canada expressly provides that, where an action for division has been commenced by a spouse and that spouse subsequently dies, the action may be continued by the estate of the deceased.⁷⁵³

In 1992, Alberta's *Matrimonial Property Act* was amended to repeal a provision⁷⁵⁴ which expressly extinguished the right of the deceased spouse's estate to continue an action commenced prior to death. A note by the Alberta Department of Justice indicates that the provision was repealed, "to prevent the defending spouse from delaying the proceedings until the other spouse died in order to extinguish the action (sometimes called 'morbid delay')." ⁷⁵⁵

We agree that the estate of the deceased spouse, registered domestic partner, or common law partner should be able to continue an application for a division of matrimonial property begun while the deceased was still alive. We acknowledge that the purpose of matrimonial property legislation is not to benefit the beneficiaries of the estate of the deceased spouse, but where a spouse has indicated an intention to end the relationship, and by implication sever their financial affairs, the deceased spouse's beneficiaries should be entitled to benefit from the spouse's deemed contribution to the marital assets.

In our view the legislation should permit an application to be brought by the deceased spouse or partner's estate where there were grounds to bring an application (e.g., separation, petition for divorce, death of the other spouse) before their death, but the application was not initiated. Though it is not true in all cases, we may reasonably presume that the deceased spouse or partner would have intended to initiate a division of family assets at some point after separation, in recognition of their contributions through the course of the relationship, rather than leaving those assets not in their name, and assets held jointly, to succeed entirely to the surviving spouse.

⁷⁵³ *Matrimonial Property Act*, RSA 2000, c M-8, s 16; *Marital Property Act*, SNB 2012 c 107, s 5; *Family Property Act*, CCSM c F25, s 28(2); *The Family Property Act*, SS 1997, c F-6.3, s 30(1); *Family Law Act*, RSO 1990, c F.3, s 7(2).

⁷⁵⁴ *Matrimonial Property Act*, RSA 2000, c M-8, s 16.

⁷⁵⁵ Jodi Hierlmeier, "Matrimonial Property on Death: What's New, What's Changed," Government of Alberta, Justice and Attorney General, online: <https://www.justice.alberta.ca/programs_services/wills/Documents/Matrimonial-Property-on-Death-Jodie-Hierlmeier.pdf> at 4.

Recommendations:

Family property legislation should provide that the estate of a deceased spouse, registered domestic partner, or common law partner may not initiate an application for division of family property where there were no grounds for an application (e.g., separation, petition for divorce, death of the other spouse) prior to the spouse or partner's death.

The legislation should permit the estate of a deceased spouse or partner to continue an application made by the deceased spouse or partner before their death.

The legislation should permit the estate of a deceased spouse or partner to bring an application for a division where there were grounds for an application while the spouse or partner was still alive.

11.2. Dividing Family Property Upon the Death of a Spouse

On its face, section 12(4) of Nova Scotia's *Matrimonial Property Act* appears to provide for a cumulative approach to matrimonial property and succession rights. It provides that the right to an equal division of property "is in addition to rights that the surviving spouse has as a result of the death of the other spouse, whether these rights arise on intestacy or by will."⁷⁵⁶

There is little case law interpreting section 12(4). In practice, surviving spouses will generally only make applications under the *Matrimonial Property Act* if they think they have not received a fair share of property either from the will, pursuant to the *Intestate Succession Act*, or otherwise by reason of the death of the deceased spouse. A testator may include a clause requiring the spouse to elect between a *Matrimonial Property Act* division and distribution of the deceased's estate.

Two early cases decided under the *Matrimonial Property Act* – *Fraser v. Vincent*⁷⁵⁷ and *Levy v. Levy Estate*⁷⁵⁸ – came to different conclusions on how to apply section 12(4). In *Fraser*, Morrison J. divided the matrimonial assets – primarily the matrimonial home – equally, and then turned to the provisions of the deceased's will. The terms of the will provided the plaintiff with the use and occupation of the matrimonial home for her life. In the event that the plaintiff did not wish to

⁷⁵⁶ *Ibid*, s 12(4).

⁷⁵⁷ (1981), 50 NSR (2d) 55, 98 APR 55 (SC (TD)) (*Fraser*).

⁷⁵⁸ (1981) 50 NSR (2d) 14, 98 APR 14 (SC (TD)) (*Levy*).

reside in the home, the will provided that the home would be sold or rented and the income or proceeds would be paid to the plaintiff for her lifetime with the remainder passing to the testator's daughter. Justice Morrison ordered the total income from the sale of the home to be paid over to the plaintiff less executrix fees and the payment of the testator's debts.⁷⁵⁹

In coming to this result, Morrison J. held that the proper way to determine a claim under section 12(4) of the *Matrimonial Property Act* was to first undertake a division of property under the *Matrimonial Property Act* and then to apply the provisions of the will to the remaining estate of the deceased.⁷⁶⁰ Justice Morrison reasoned that only by applying the *Matrimonial Property Act* first would one know what the testator has left to dispose of: "If the widow is awarded one-half of the matrimonial assets then the testator has only one-half of the assets to dispose of by will."⁷⁶¹ Justice Morrison found there was no reason not to first order an equal division of the matrimonial assets. At no point did he consider the death of the spouse or the contents of his will as factors to consider in making a determination under section 13 of the *Matrimonial Property Act* - which provides for an unequal division of matrimonial property.

Levy v. Levy Estate,⁷⁶² released shortly after *Fraser*, proceeded in more or less the opposite direction. Justice Hallett first examined the plaintiff's entitlement under the deceased's will, and then considered whether she was entitled to an equal division of matrimonial assets.

The bulk of the *Levy* decision was concerned with determining whether or not the plaintiff, Mrs. Levy, had rebutted the presumption of a resulting trust with respect to monies held in a joint bank account. Mrs. Levy testified that several days before her husband died, he told her to obtain the necessary bank documents to transfer the funds in two of his bank accounts into a joint account with her as joint account holder. Mrs. Levy obtained the necessary documents, they were signed by Mr. Levy, and \$32,524.56 was transferred into a joint bank account. On her husband's death, her sons argued that there was a resulting trust for half that amount and this amount should therefore form part of Mr. Levy's estate. Justice Hallett found that the death of Mr. Levy did not serve as a severance of the joint tenancy and that Mrs. Levy had rebutted the presumption of resulting trust by showing that her husband wanted her to have the money in the account. Justice Hallett therefore held that she was entitled to the beneficial interest in the entire account.⁷⁶³

⁷⁵⁹ *Ibid* at paras 37-8.

⁷⁶⁰ *Ibid* at para 33.

⁷⁶¹ *Ibid*.

⁷⁶² *Ibid*.

⁷⁶³ *Ibid* at paras 36-44.

Justice Hallett then went on to decide Mrs. Levy's entitlement pursuant to the *Matrimonial Property Act*. He held that "In an application for equal division under the *Matrimonial Property Act*, the court must look at the matrimonial assets of both spouses and assess whether something other than an equal division would be fair."⁷⁶⁴ He held that an unequal division pursuant to section 13 would be appropriate in this case, making reference to Mr. Levy's will: "the provisions of his Will do not support a conclusion that Mr. Levy would consider an equal division of the matrimonial assets to be fair nor do I."⁷⁶⁵ But Hallett J. acknowledged that the provisions of a will are not a relevant consideration under section 13.⁷⁶⁶ In coming to the conclusion that Mrs. Levy was not entitled to an equal division of the matrimonial assets Hallett J. looked primarily to another ground for unequal division - the manner of acquisition of the assets, under section 13(e). He held that Mr. Levy had acquired most of his assets before marrying Mrs. Levy. Justice Hallett held that, "Coincidentally," the distribution effected by Mr. Levy's will was the appropriate unequal division of matrimonial assets, and therefore declined to order a transfer of assets from either party.⁷⁶⁷

In concluding his decision, Hallett J. commented on the difficulty he perceived was caused by section 12(4) of the *Matrimonial Property Act*:

I feel something should be said about the provisions in the *Matrimonial Property Act* that allow a surviving spouse to apply for equal division in addition to the right taken by will or on intestacy. The Legislature has, in effect, authorized a court to remake a testator's will upon an application made by a surviving spouse for equal division. Prior to its enactment, a surviving spouse could apply under the *Testators' Family Maintenance Act* for proper maintenance if her husband had not made adequate provision in his will for her and the court could order that proper maintenance be paid to the dependent out of the estate.

The Legislature has now extended the court's right to interfere beyond just the need for maintenance in such a way as to drastically interfere with a testator's intention as to the disposition of his property following his death as evidenced by his will. In my opinion, a court will be very reluctant to order an equal division of matrimonial assets if a testator has made adequate provision in his will for his surviving spouse. However, the fact that a testator has made adequate provision for his surviving spouse is not a factor the court can

⁷⁶⁴ *Ibid* at para 69.

⁷⁶⁵ *Ibid* at para 51.

⁷⁶⁶ *Ibid* at para 52.

⁷⁶⁷ *Ibid* at para 56.

consider on an application for equal division as it is not a factor mentioned in Section 13 of the Act that justifies the court in making other than an equal division. However, I venture to say that it may well be a factor judges will consider but not give expression to on the written page.⁷⁶⁸

Several years after Hallett J.'s decision in *Levy*, the Supreme Court of Canada released its decision in *Donkin v. Bugoy*.⁷⁶⁹ The court affirmed that at a minimum a surviving spouse is entitled to a presumptively equal division of matrimonial property, and should not be deprived of an equal division by the death of the other spouse or the contents of their will. The court did not address whether a court can make an unequal division of matrimonial property where the surviving spouse has already received the equivalent of an equal share of matrimonial property, or more, by way of benefits received or receivable on the death of the spouse.

In *obiter*, the Supreme Court addressed the purpose and function of section 21(3)(l) of the Saskatchewan's *Matrimonial Property Act* of that time. Unlike in Nova Scotia, Saskatchewan's section 21(3)(l) allows the court to consider, in deciding whether to order an unequal division, "any benefit received or receivable" by the surviving spouse as a result of the death of the other spouse. The court said the following:

[W]hile such a right ensures that a spouse who remains in an unhappy marriage is not worse off than if separation had been sought while the other party was alive, neither should the surviving spouse necessarily benefit twice by receiving property under both the will and the *Matrimonial Property Act* if his or her application would have the effect of defeating testamentary intentions beyond that necessary to fulfill the policy of the Saskatchewan Act. The result may be different in those provinces which do not expressly allow for the consideration of such benefits.⁷⁷⁰

The *Donkin* decision signals a need for caution in enacting a provision providing for unequal division with regard to benefits received or receivable on the death of the other spouse. The provision must not disentitle a spouse to the share of matrimonial property they would receive on a division, simply because of the fact of the other spouse's death.

⁷⁶⁸ *Ibid* at paras 59-60.

⁷⁶⁹ [1985] 2 SCR 85.

⁷⁷⁰ *Bugoy Estate v Bugoy*, [1985] 2 SCR 85 at para 17.

In a decision interpreting section 12(4) of the Nova Scotia *Matrimonial Property Act* – *Pulley v. Pulley Estate*⁷⁷¹ – there was only a short discussion of section 13. The benefit received upon the death of the other spouse was addressed only after the surviving spouse’s *Matrimonial Property Act* entitlement had been established.⁷⁷² Whether that is because *Pulley* was an intestacy case – where the court is not concerned with interfering with the intention of the testator – and *Levy* and *Driscoll* involved wills is unclear. In any event, Haliburton J. ordered an equal division of matrimonial assets, and then applied the terms of the *Intestate Succession Act* to the remaining estate of the deceased. As he held:

Before consideration may be given to the application under the *Intestate Succession Act* and whether or not it has any impact in the circumstances, it must be determined what the effect of the equal division will be on the Estate of Mr. Pulley. A failure to apply the provisions of the *Matrimonial Property Act* before considering intestate succession would ignore the rights of the Plaintiff, Mrs. Pulley, in having the value of her own property established. Once the value of her own property is established and by inference, the value of Mr. Pulley’s estate established, we can then move to a consideration of her rights under the *Intestate Succession Act*.⁷⁷³ [emphasis added]

Justice Haliburton found that the Pulleys had \$102,758.11 in matrimonial assets. Mrs. Pulley was awarded 50% of these assets, totalling \$51,379.06, and Mr. Pulley’s estate was left with \$51,379.06. Justice Haliburton deducted \$5714 for funeral expenses, leaving \$45,665.06 to be distributed under the *Intestate Succession Act*.⁷⁷⁴ Under that *Act*, the surviving spouse is entitled to the first \$50,000 of the intestate’s estate. Thereafter, if the “intestate dies leaving a surviving spouse and more than one child, one third shall go to the surviving spouse.”⁷⁷⁵ Mrs. Pulley was therefore entitled to the \$45,665.06 in Mr. Pulley’s estate, on top of her matrimonial property share of \$51,379.06.

⁷⁷¹ (1996), 153 NSR (2d) 143 (SC), 65 ACWS (3d) 100.

⁷⁷² *Ibid* at para 7:

In this case, the Plaintiff seeks only an equal division as provided by the Act. The onus, then, is on the Defendants to establish on the appropriate civil standard of proof that such a division would be unfair in the circumstances. The factors to be considered are enumerated in s. 13 of the Act. Having considered the evidence and the argument made by the Defendants, I am not satisfied that that onus has been fulfilled. Accordingly, an equal division of the assets is mandated by the Act.

⁷⁷³ *Ibid* at para 8.

⁷⁷⁴ RSNS 1989, c 236.

⁷⁷⁵ *Ibid*, s 4(5)(b).

In summary, it is clear that a surviving spouse is entitled to a matrimonial property division, and that this must be done ahead of any distribution of the remaining estate.⁷⁷⁶ But there may remain questions, following *Levy*, as to whether the court will order an unequal division having regard to the benefits which may have been received upon the death of the other spouse.⁷⁷⁷ This is despite the absence of any reference to death benefits as a ground for unequal division in section 13 of the *Matrimonial Property Act*, and the seemingly clear provision in section 12(4) that a spouse's rights under the *Matrimonial Property Act* are "in addition to" any rights the surviving spouse has as a result of the death of the other spouse. The matter seems settled in *Pulley* for cases involving intestacies, but in cases where there is a will the question may be open.

11.2.1. Other Jurisdictions

Family property and succession rights are handled in various ways across the jurisdictions in Canada. Nova Scotia, Saskatchewan, New Brunswick, Quebec and Newfoundland & Labrador extend cumulative matrimonial property and succession rights to the surviving spouse.⁷⁷⁸

Other jurisdictions in Canada either do not allow for matrimonial property applications on death (unless the application is being continued),⁷⁷⁹ or expressly prevent a spouse from receiving both

⁷⁷⁶ *Casavechia v Casavechia Estate*, 2015 NSSC 119 at paras 11-13.

⁷⁷⁷ See *ibid* at paras 30-38, raising questions particularly in the circumstance where the spouses were not separated prior to the death of one of them.

⁷⁷⁸ *Civil Code of Québec*, LRQ, c C-1991; *Family Law Act*, RSNL 1990, c F-2, s 21(2). Saskatchewan's *The Family Property Act*, SS 1997, c F-6.3, s 30(3) extends cumulative rights in cases of intestacy, but the courts will dismiss the matrimonial property application if the spouse has already received the value of his or her matrimonial property division on the death of the other spouse. And, the court may consider benefits received or receivable by reason of the death of the other spouse in ordering an unequal division. See *Edward v Edward Estate and Skolrood*, (1987) 57 Sask R 67, 39 DLR (4th) 654. New Brunswick's *Marital Property Act* extends both matrimonial and succession rights, see s 22(2) of the *Devolution of Estates Act*, RSNB 1973, c D-9, but some courts have interpreted section 4(4) of the *Marital Property Act* to require the surviving spouse to choose between a marital property division and gifts under the will: as per the result in *Burden v Burden Estate* (1994), 145 NBR (2d) 233, 372 APR 233 (QB) re *Marital Property Act*, SNB 1980, c M-1.1.

⁷⁷⁹ *Matrimonial Property Act*, RSA 2000, c M-8, s 11(1); *Family Law Act*, RSPEI 1988, c F-2.1, s 7(2); and *Family Property and Support Act*, RSY 2002, c 83, s 18. Alberta also allows a surviving spouse to bring an application if the application could have been commenced immediately before the death of the spouse: see s 11(2).

a gift by will or intestacy and a division of family property.⁷⁸⁰ In Manitoba, for example, if the surviving spouse applies for a family property division the value of the testamentary gift or entitlement by way of intestate succession legislation will be deducted from the equalization payment.⁷⁸¹ In Ontario, the surviving spouse must elect whether to receive an equalization payment under the *Family Law Act* or take an inheritance under the will or by intestate legislation.

Broadly, these various methods can either be referred to as a “cumulative” approach or a “top-up” approach. In top up jurisdictions, whether the legislation provides for a deduction or requires an election, in practical terms the result is the same: the spouse will receive their entitlement pursuant to a matrimonial property division at a minimum, and more if the will or intestate succession legislation provides for it.

Saskatchewan adopts a hybrid cumulative/ top-up model. Where family assets in a surviving spouse’s name, in conjunction with property received outside of the estate of the deceased – whether by rights of survivorship or as a designated beneficiary on life insurance, pension plans or retirement savings vehicles – are sufficient to satisfy the value of a family property calculation (calculated the moment before death as if the deceased had not died), the family property application will be dismissed.⁷⁸² This approach ensures that, at a minimum, the surviving spouse will be entitled to their share of family property, as well as what is left by will⁷⁸³ or by intestacy. But the cumulative approach does not extend to property received outside of the deceased’s estate; rather, the family property claim can be satisfied, in whole or in part, by such benefits.

Even in those provinces that do not provide for a family property division for the surviving spouse, registered domestic partner, or common law partner, the courts have held that on an application under the relevant dependants’ relief legislation, the surviving spouse or partner is at minimum entitled to their legal rights to maintenance and a family property division.⁷⁸⁴

⁷⁸⁰ *Family Law Act*, RSO 1990, c F.3, s 6; *Family Law Act*, SNWT (Nu) 1997, c 18, s 37; *Family Homes on Reserves and Matrimonial Interests or Rights Act*, s 37.

⁷⁸¹ *Family Property Act*, CCSM c F25, ss 38 and 39.

⁷⁸² *Edward Estate and Skolrood*, *supra* note 778.

⁷⁸³ Subject to an unequal division: see *The Family Property Act*, SS 1997, c F-6.3, s 21(3)(l).

⁷⁸⁴ See *Tataryn v Tataryn Estate*, [1994] 2 SCR 807.

11.2.2. Cumulative or “Top-Up” Approach

In its 1997 Report, the Commission was in favour of cumulative matrimonial and succession rights where the deceased spouse has made a will.⁷⁸⁵ Reasoning that a testator should be presumed to be aware of the spouse’s rights under the *Matrimonial Property Act*, the Commission recommended that a spouse should be entitled to apply for a *Matrimonial Property Act* division, and also to take under the will. The testator should be permitted, on the other hand, to require the surviving spouse to make an election between a division and taking under the will.⁷⁸⁶ If the *Matrimonial Property Act* division and any entitlement under the will or otherwise by virtue of the spouse’s death do not adequately provide for the spouse’s proper support, the Commission considered that an application under the *Testators’ Family Maintenance Act*⁷⁸⁷ should still be possible.⁷⁸⁸

We have heard from some practitioners that the problem of the interaction between section 12(4) of the *Matrimonial Property Act* and succession rights rarely arises. Most often a spouse will leave the whole of their estate to the surviving spouse. The matrimonial property will be largely taken by the surviving spouse by virtue of rights of survivorship and beneficiary designations. Where a testator does not want a spouse to take both a gift under the will and a matrimonial property division, the testator may include a forfeiture clause in the will.

But the law remains unclear, and the legislation should clarify how a matrimonial property division should interact with one’s entitlement under a will or by way of intestate succession legislation. As well, it appears that problems arising from the interaction between matrimonial and succession rights are more likely to arise in cases of second or third, rather than first marriages,⁷⁸⁹ and multiple marriages are on the rise.⁷⁹⁰ The legislation should address an issue that is likely to arise with greater frequency.

⁷⁸⁵ *Ibid* at 51.

⁷⁸⁶ *Ibid* at 51.

⁷⁸⁷ RSNS 1989, c 465.

⁷⁸⁸ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 52.

⁷⁸⁹ For example, see *Pulley v Pulley Estate* (1996), 153 NSR (2d) 143, 65 ACWS (3d) 100.

⁷⁹⁰ *Portrait of Families and Living Arrangements in Canada*, *supra* note 108 at 11; Warren Clark and Susan Crompton, “Till death do us part? The risk of first and second marriage dissolution”, Canadian Social Trends, no 81, Statistics Canada, online: <<http://www.statcan.gc.ca/pub/11-008-x/2006001/pdf/9198-eng.pdf>>.

The purpose of matrimonial property law is to provide for the entitlement of spouses to a presumptively equal share of matrimonial assets. During the marriage, spouses continue to be subject to a regime of separate property, but upon marriage breakdown they may apply for a division of matrimonial assets.⁷⁹¹ The Preamble to the *Matrimonial Property Act* recognizes:

... it is desirable to recognize that childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets.

The most basic argument in favour of the cumulative approach is that it accords conceptually with the principles underlying matrimonial property legislation. By contributing to the family, the surviving spouse has developed the basis for the family property claim over the course of the relationship, and the claim ought therefore to be conceptually prior to any disposition of the estate remaining to the heirs of the deceased spouse. Before the deceased spouse's estate is distributed, it must be determined what actually belonged to them, considering the surviving spouse's family property entitlement built up during the relationship.

In 2000, the Alberta Law Reform Institute recommended a cumulative approach where a deceased spouse had made a will, in recognition of the fact that a matrimonial property division is a pre-existing entitlement of the surviving spouse. To require that a matrimonial property division should be reduced by what is in the will, or *vice versa*, assumes that the testator has not recognized any matrimonial property entitlement separate and apart from the spouse's inheritance. In its final report the ALRI observed:

First, [the cumulative approach] recognizes the fact that the matrimonial property claim is the realization of an entitlement and is not merely a benefit being received from the estate. Second, it does not impute an intention to the deceased spouse that may or may not be true. We are not prepared to assume that the testator did not wish the surviving spouse to have his or her fair share of the matrimonial property plus the devise or bequest made in the will by the testator. It must be left to the testator to express his or her intention on this point.⁷⁹²

⁷⁹¹ See definition of matrimonial assets at *Matrimonial Property Act*, s 4(1). The court may also order a division of non-matrimonial assets under s 13 of the *Matrimonial Property Act*, where it would be unfair or unconscionable not to do so.

⁷⁹² Alberta Law Reform Institute, *Division of Matrimonial Property on Death*, Final Report No 83 (Edmonton: Alberta Law Reform Institute, 2000) at 128-9.

The most prominent critique of a cumulative approach to matrimonial and succession rights is that it may serve to defeat testamentary intention, where the interaction of matrimonial and succession rights is not addressed in the will. This was Justice Hallett's concern in *Levy Estate*.⁷⁹³ Where the deceased spouse has not anticipated a claim for family property division, the cumulative approach may overcompensate the surviving spouse from the deceased spouse's estate and frustrate the deceased's spouse's bequests to others. A cumulative approach will be particularly problematic in cases where there are children from a previous relationship who will not necessarily inherit from the surviving spouse.

The debate was examined in Alberta. Following the ALRI's report, amendments to the Alberta *Matrimonial Property Act* were introduced that would have seen that province adopt a cumulative approach. After consultations, however, the amendments were repealed.

As Alberta's *Matrimonial Property Act* currently reads, a surviving spouse can only apply for a matrimonial property division if the application was started before the other spouse died.⁷⁹⁴ The amendments, introduced as part of Alberta's *Wills and Succession Act*,⁷⁹⁵ would have provided for an application to be made by a surviving spouse on the death of their partner, even if it was not possible to bring the application before the deceased spouse's death (ie., the marriage was intact at death). The amendments also provided that the surviving spouse would have been entitled make an application for a matrimonial property division in addition to any inheritance from the deceased spouse's estate.

Alberta's *Wills and Succession Act* came into effect on February 1, 2012. The amendments were not proclaimed into force, however, to allow for consultation with estate practitioners. Following the consultations, the government decided not to proceed with the changes, and the amendments were repealed.⁷⁹⁶

In the Alberta government's consultations, practitioners echoed some of the concerns highlighted above, including the risk of double dipping and of frustrating the testator's intentions.⁷⁹⁷

⁷⁹³ (1981) 50 NSR (2d) 14, 98 APR 14 at paras 59-60.

⁷⁹⁴ *Matrimonial Property Act*, RSA 2000, c M-8, s 11(2).

⁷⁹⁵ SA 2010, c W-12.2.

⁷⁹⁶ *Statutes Repeal Act*, SA 2013, c S-19.3, s 28.

⁷⁹⁷ Alberta Justice and Solicitor General, *Division of Matrimonial Property on Death: Views and Perspectives* (May 2012) online: <http://justice.alberta.ca/programs_services/wills/Documents/MatrimonialPropertyDivisionOnDeath-WhatWeHeard.pdf> at 9.

Practitioners were concerned that forfeiture clauses may not be effective to allow testators to bar their spouse from taking both matrimonial property and gifts under the will - specifically, there was concern that allowing spouses to contract out of the matrimonial property division might be found to be against public policy.⁷⁹⁸ Practitioners were also concerned that the amendments “might create an adversarial situation where none previously existed. The surviving spouse, even though happily married until the deceased’s passing makes a claim against the deceased’s estate.”⁷⁹⁹

Practitioners in Alberta were also concerned that there might be conflicts of interest where the surviving spouse was also the executor of the estate.⁸⁰⁰ Finally, there were concerns as to the consequences for unrepresented persons drafting wills on their own.⁸⁰¹

Participants recommended a top-up approach, citing Manitoba’s legislation in particular. In Manitoba, the gift by will or intestacy is subtracted from the matrimonial property claim and the surviving spouse receives the balance, along with the gift.⁸⁰² Alternatively, participants expressed support for an either/or election - the legislation could require the surviving spouse to choose between a matrimonial property claim or the gift under will.⁸⁰³

In our view, the Nova Scotia *Matrimonial Property Act* should expressly provide for a top-up approach, rather than a cumulative approach. We agree that the *Act* should not authorize an interference with testamentary intention more than is necessary to ensure that the surviving spouse receives, at a minimum, their family property division entitlement. Indeed, we have heard that testators in Nova Scotia rarely make wills in anticipation of a matrimonial property claim.

⁷⁹⁸ *Ibid*, at 4-5.

⁷⁹⁹ *Ibid*, at 6.

⁸⁰⁰ *Ibid*, at 9.

⁸⁰¹ *Ibid*, at 9.

⁸⁰² *The Family Property Act*, CCSM c F25, ss 38, 39.

⁸⁰³ *Division of Matrimonial Property on Death*, *supra* note 797 at 11-12.

Recommendation:

Family property legislation should provide that, subject to any express direction in a will, on the death of a spouse, registered domestic partner, or common law partner the surviving spouse or partner should be entitled to either a division of family property or entitlements under the deceased spouse or partner's will, but not both.

11.2.2.1. Intestacy

We recommend that the legislation should apply a top up approach in cases of intestacy as well.

In its 1997 Report, despite its recommendation to adopt a cumulative approach to wills, this Commission was not in favour of doing so in the context of an intestacy. In particular, the Commission recommended that where a spouse has died intestate, a division of matrimonial property should preclude the surviving spouse from taking their preferential share under the *Intestate Succession Act*.⁸⁰⁴ The Commission distinguished intestacy from cases involving a will, where the testator could be presumed to have known of the spouse's matrimonial property rights. The Commission said:

It should be recalled that the *Intestate Succession Act* was passed in 1966, long before the *Matrimonial Property Act*. The preferential share was added to the Act at that time. It was meant to address the perceived injustice of requiring widows to share their husbands' estates with the children even where there were few assets, with the result that a widow might be left in poverty unnecessarily. The policy of the preferential share was to ensure that in the case of small estates the surviving spouse would have a first claim, up to an amount thought to be sufficient to ensure a decent standard of living. As noted above, however, in the case of estates under \$50,000, or where the matrimonial home is the only real asset, the *Matrimonial Property Act* is essentially irrelevant on death, for the *Intestate Succession Act* will allow the survivor to claim the entire estate. The question, then, is how should the two Acts be harmonized where the deceased has shareable assets worth more than the preferential share?

...

The *Matrimonial Property Act* and the preferential share under the *Intestate Succession Act* have different policy goals. One aims to recognize contribution to the marital

⁸⁰⁴ *Intestate Succession Act*, RSNS 1989, c 236, s 4(1).

relationship, the other to prevent poverty among widows and widowers. In the case of small estates, however, these goals tend to overlap, and for that reason the Commission believes an election is appropriate. In the case of larger estates, the policies underlying both Acts can and should be carried out, in the Commission's view. A surviving spouse should be able to apply under the *Matrimonial Property Act* and still receive a distributive share under the *Intestate Succession Act* if the deceased has left children.⁸⁰⁵

The Saskatchewan Law Reform Commission⁸⁰⁶ and the Manitoba Law Reform Commission⁸⁰⁷ have also rejected the cumulative approach in the context of an intestacy. The Manitoba Commission explained:

We believe that, in substance, this approach provides a potential for over-compensation and fails to recognize the intended purpose of the law of intestate succession. The distribution under "The Devolution of Estates Act" already contains, in our view, a primitive means of allocating marital property. By primitive we mean that intestate succession law acknowledges the surviving spouse's contribution to the marriage by way of a preferential and distributive share of the deceased's estate but in computing these shares it does not take into account the source of property, and the separate property accumulations of the survivor. To permit both of these applications by the survivor would, in some instances, effect a form of double recovery by entitling the spouse to two separate divisions of the deceased's estate.⁸⁰⁸

In contrast, the ALRI was of the view that a surviving spouse should take both the matrimonial property entitlement and the spousal share under intestate succession legislation. The institute's concern was that a matrimonial property entitlement is a true entitlement and it should not be reduced by consideration of succession rights.⁸⁰⁹ The ALRI disagreed that taking both would

⁸⁰⁵ *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, *supra* note 69 at 52-53.

⁸⁰⁶ See Law Reform Commission of Saskatchewan, *Proposals Relating to Matrimonial Property Legislation* (Saskatoon, Law Reform Commission of Saskatchewan, 1985) at 19, online: <http://lawreformcommission.sk.ca/Matrimonial_Property_Proposals.pdf>. The Commission also rejected a cumulative approach in the context of wills.

⁸⁰⁷ Manitoba Law Reform Commission, *An Examination of the Dower Act* (1984), online: <http://www.manitobalawreform.ca/pubs/pdf/archives/60-full_report.pdf>

⁸⁰⁸ *Ibid* at 75-76.

⁸⁰⁹ *Division of Matrimonial Property on Death*, *supra* note 797 at 119-20.

overcompensate the surviving spouse. It noted that intestate legislation in place in Alberta at the time inadequately compensated spouses.⁸¹⁰

Likewise, the problem of overcompensation may not be as great a concern in Nova Scotia as it is in other provinces in cases of intestacy. Nova Scotia's *Intestate Succession Act* was enacted in 1966. The *Act* has not been amended substantially since 1966, besides the elimination of discrimination against "illegitimate children"⁸¹¹ and the doubling of the preferential share to \$50,000 in 1975.⁸¹² Adjusting for inflation, \$50,000 in 1975 is equivalent to \$223,287.67 in 2017.⁸¹³ The \$50,000 preferential share is quite low when compared to the other provinces and territories in Canada. The preferential share in the Uniform Law Conference of Canada's *Uniform Intestate Succession Act* is \$100,000.⁸¹⁴ Ontario's preferential share is \$200,000.⁸¹⁵ The preferential share in British Columbia was raised to \$300,000 where all children of the intestate are children of the surviving spouse,⁸¹⁶ or \$150,000 where there are children from a previous relationship.⁸¹⁷ Spouses in Nova Scotia may elect to take the principal residence of the intestate, including any land appurtenant and all household goods and furnishings in lieu of the \$50,000 preferential share,⁸¹⁸ but only where the deceased spouse has such a property.

Nevertheless we are of the view that a top up approach should apply in cases of intestacy. The spouse's share under the *Intestate Succession Act* is a protectionist measure for surviving spouses. This purpose is met where the spouse receives a share of family property which is greater than that share. Therefore the legislation should permit the spouse to receive either, but not both, of the spousal share under the *Intestate Succession Act* or a family property division.

⁸¹⁰ *Ibid* at 119-20.

⁸¹¹ SNS 1999 (2d Sess), c 8, s 7.

⁸¹² SNS 1975, c 61, s 1.

⁸¹³ Bank of Canada, Inflation Calculator, online: <<http://www.bankofcanada.ca/rates/related/inflation-calculator/>>.

⁸¹⁴ Uniform Law Conference of Canada, *Uniform Intestate Succession Act*, April 1986, section 3(1)(B)(i), online: ULCC <<http://ulcc.ca/en/home-en-gb-1/479-josetta-1-en-gb/uniform-actsa/intestate-succession-act/304-intestate-succession-act-1986>>.

⁸¹⁵ Preferential Share, O Reg 54/95, s 1.

⁸¹⁶ *Wills, Estates and Succession Act*, SBC 2009, c 13, s 21(3).

⁸¹⁷ *Ibid*, s 21(4).

⁸¹⁸ Section 4(4).

We recognize the need for a review of the *Intestate Succession Act*, in order to ensure that it is fulfilling the purpose of financially providing for the surviving spouse upon the death of the intestate. We are currently examining that issue, among others, in a separate project on the *Intestate Succession Act*.

Common law partners who have not registered as domestic partners are not eligible to make an application under the Nova Scotia *Intestate Succession Act*. They would be confined to a presumptive equal division of family assets under our recommended family property legislation. Common law partners' exclusion from the *Intestate Succession Act* is also a subject under examination in our separate review of that *Act*.

Recommendations:

Family property legislation should provide that on the death of a spouse or registered domestic partner, the surviving spouse or partner should be entitled to either a division of family property or entitlements pursuant to the *Intestate Succession Act*, but not both.

The *Intestate Succession Act* should be reviewed, to ensure that it is fulfilling the purpose of financially providing for the surviving spouse upon the death of the intestate.

11.2.3. Effecting a Top-Up Approach

There are effectively three ways to provide for a top-up approach in legislation:

1. Requiring a dependants' relief application;
2. Reducing the family property award by the value of the inheritance or intestate succession award (the "deduction" approach);
3. Putting the spouse or partner to an election.

11.2.3.1. Dependants' Relief

A kind of top-up approach can be accomplished by preventing a spouse or registered domestic partner from initiating a family property application on the death of the other spouse or partner,

leaving any claim to dependants' relief legislation.⁸¹⁹ In Alberta, for example, family property legislation does not permit a surviving spouse to make an application for division, unless "an application for a matrimonial property order could have been commenced immediately before the death of the other spouse."⁸²⁰ The spouse may also continue an application already begun while the deceased was still alive.⁸²¹ Otherwise, the surviving spouse will be entitled only to property which succeeds to him or her upon the death of the other spouse; e.g., by will or intestacy, survivorship, or beneficiary designation. The surviving spouse's alternative in that case is to seek an order under dependants' relief legislation.

Leaving surviving spouses to apply for the equivalent of their matrimonial property entitlement under dependants' relief legislation has the benefit of flexibility, since it relies on the court's estimation of what is just and equitable in the circumstances. It allows the court to craft an order that does justice to the particular family in each case.⁸²² It may streamline the process somewhat, since it eliminates the need for both a matrimonial property and a *Testators' Family Maintenance Act* application.

On the other hand, leaving a surviving spouse's family property claim to a dependants' relief application may introduce uncertainty and prevent settlement between the surviving spouse, registered domestic partner, or common law partner and the estate of the deceased.

In our view, an application under family property legislation is the appropriate place to determine a spouse's entitlement to a deferred sharing of family assets. Family law judges and practitioners are familiar with the intricacies of family property legislation, the case law, and rules of procedure including disclosure requirements. This allows for efficiency, certainty and consistency in result.

⁸¹⁹ The Nova Scotia *Testators' Family Maintenance Act* does not currently allow common law partners to bring an application. This would have to be amended to permit common law partners to obtain a family property top up in this way.

⁸²⁰ *Matrimonial Property Act*, RSA 2000, c M-8, s 11(2).

⁸²¹ *Ibid.* British Columbia's *Family Law Act* for example, provides for family property division upon separation, but does not include death as an instance of separation. Surviving spouses are likely to be required to apply for any family property entitlement under Division 6 (Variation of Wills) of the *Wills, Estates and Succession Act*, SBC 2009, c 13, s 60.

⁸²² *Division of Matrimonial Property on Death*, *supra* note 797 at 24.

Recommendation:

Family property legislation should expressly provide for the division of family property upon the death of one spouse or partner, rather than leaving family property claims to be decided under the *Testators' Family Maintenance Act*.

11.2.3.2. Deduction

Manitoba's *Family Property Act*⁸²³ effects a top-up approach to family property and succession rights by reducing the surviving spouse or common law partner's equalization payment by the amount they are entitled to whether by will or by intestacy.⁸²⁴ The court is statute-barred from making an order that provides less than a 50% equalization. The relevant provisions are as follows:

38 Where a surviving spouse or common-law partner is entitled to a share of the estate of the deceased spouse or common-law partner under *The Intestate Succession Act*, the amount of an equalization payment payable to the surviving spouse or common-law partner from the estate under this Act shall be reduced by the amount of the entitlement of the surviving spouse or common-law partner under *The Intestate Succession Act*.

39 Subject to section 43, the value of a bequest, gift or devise to which a surviving spouse or common-law partner is entitled under the will of the deceased spouse or common-law partner, including any bequest, gift or devise renounced by the surviving spouse or common-law partner, and any gift mortis causa made to the surviving spouse or common-law partner by the deceased spouse or common-law partner, shall be deducted from any amount payable to the surviving spouse or common-law partner from the estate of the deceased spouse or common-law partner under this Act.

⁸²³ CCSM c F25.

⁸²⁴ Section 3 of Manitoba's *The Intestate Succession Act*, CCSM c I85, provides that if, at the time of the intestate's death, the surviving spouse or common law partner was living separate and apart from the intestate and either made a *Family Property Act* application and/or had divided property in a manner intended by them, then the surviving spouse or common law partner is treated as if he or she predeceased the intestate.

40 An amount shown by an accounting to be payable under this Part shall not be altered by the court under section 14 or otherwise.

The *Manitoba Act* does not provide that a testator may indicate that the surviving spouse is entitled to receive both an equalization payment and any bequest under the will. It does not require a reduction of the surviving spouse or common law partner's equalization for property taken outside the estate of the deceased, such as by right of survivorship or beneficiary designation.⁸²⁵

The *Manitoba Act* does provide for the priority of an equalization payment over other dispositions:

41(1) Where a surviving spouse or common-law partner is entitled under this Act to an equalization payment from the estate of a deceased spouse or common-law partner, the equalization payment is deemed to be a debt of the deceased spouse or common-law partner, is payable after the other liabilities of the estate, and has priority over

(a) a bequest, gift or devise contained in a will of the deceased spouse or common-law partner;

(b) an obligation to pay maintenance under a maintenance agreement or an order of a court binding the estate of the deceased spouse or common-law partner; and

(c) an order of a court under *The Dependents Relief Act*.

41(2) An equalization payment under this Part shall be paid from the interests of the persons, other than the surviving spouse or common-law partner, who are beneficiaries of the estate, in proportion to the value of their respective interests in the estate, unless the will of the deceased spouse or common-law partner specifically provides for the manner in which the interests of the beneficiaries are to be used to satisfy an equalization payment, in which case the provisions of the will apply.

11.2.3.3. Election

Rather than deducting the amount of a surviving spouse's gifts under the will or entitlement under intestate succession legislation, section 6 of the Ontario *Family Law Act* provides that a surviving spouse must elect either to take from the deceased spouse's estate, or to make an application for an equalization of net family property:

⁸²⁵ CCSM c F25, s 37.

(1) When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.⁸²⁶

(2) When a spouse dies intestate, the surviving spouse shall elect to receive the entitlement under Part II of the *Succession Law Reform Act* or to receive the entitlement under section 5.⁸²⁷

(3) When a spouse dies testate as to some property and intestate as to other property, the surviving spouse shall elect to take under the will and to receive the entitlement under Part II of the *Succession Law Reform Act*, or to receive the entitlement under section 5.

...

(5) The surviving spouse shall receive the gifts made to him or her in the deceased spouse's will in addition to the entitlement under section 5 if the will expressly provides for that result.

...

(8) When a surviving spouse elects to receive the entitlement under section 5, the gifts made to him or her in the deceased spouse's will are revoked and the will shall be interpreted as if the surviving spouse had died before the other, unless the will expressly provides that the gifts are in addition to the entitlement under section 5.

(9) When a surviving spouse elects to receive the entitlement under section 5, the spouse shall be deemed to have disclaimed the entitlement under Part II of the *Succession Law Reform Act*.

(10) The surviving spouse's election shall be in the form prescribed by the regulations made under this Act and shall be filed in the office of the Estate Registrar for Ontario within six months after the first spouse's death.⁸²⁸

Property received by the surviving spouse outside the estate of the deceased spouse is dealt with by deducting the value of such property from any family property equalization payment owing to

⁸²⁶ Section 5 [Equalization of net family properties] of the *Family Law Act*, RSO 1990, c F 3.

⁸²⁷ Part II of the *Succession Law Reform Act* provides for a distribution on intestacy.

⁸²⁸ RSO 1990, c F 3, s 6.

the surviving spouse.⁸²⁹ We examine these provisions in a later section on property passing by survivorship or beneficiary designation.

An election provision ensures that the surviving spouse's entitlement will not fall below the minimum afforded by matrimonial property legislation. It allows the surviving spouse to choose whether they wish to take property by way of the deceased's estate plan or by way of a matrimonial property entitlement, in case there are advantages either way. On the other hand, the election also requires the surviving spouse to choose between their entitlement to an equalization of net family property and a specific bequest under the will. In order to claim the matrimonial property entitlement the spouse is required to give up any specific bequest or interest gifted under the will.

In Ontario, difficulty has arisen with respect to section 6(8) of the *Family Law Act*. When a surviving spouse opts for an equalization of net family property that section deems the surviving spouse to have died before the deceased spouse. Case law in that province has held that the purpose of the provision is to ensure that the surviving spouse who elects to take an equalization does not accept an appointment as executor of the deceased's estate.⁸³⁰ But the provision effectively brings into effect any gifts in the deceased spouse's will that are contingent on the spouse predeceasing the testator, even though the spouse is still living, which may be contrary to the intention of the testator.⁸³¹

11.2.3.4. Discussion and Recommendations

Ontario's election procedure is the simplest method of effecting a top-up approach, but it may needlessly hinder judicial discretion and prevent a spouse from receiving specific bequests under the will which may hold sentimental value. We recommend that the *Act* should require the surviving spouse, registered domestic partner, or common law partner to elect between taking from the estate or by way of a family property division, but the choice of a family property division

⁸²⁹ *Ibid*, ss 6(6), 6(7).

⁸³⁰ *Reid Martin v Reid* (1999), 35 ETR (2d) 267, 11 RFL (5th) 374 (Ont Div Ct) at para 1.

⁸³¹ E.g., *Stewart v Stewart Estate*, (1989) 67 OR 321 (HCJ), where the spouse elected an equalization, resulting in her daughter receiving the remainder interest in the residuary estate by virtue of the deemed predecease clause. According to the will, had the daughter in fact predeceased her mother the residuary estate might have ended up being given to certain named charities, but because of the deemed predecease clause the daughter's gift over took effect immediately. See also *Ambrose v Ambrose Estate* (2005), 19 ETR (3d) 133, 144 ACWS (3d) 305 (Ont Sup Ct J), in which the spouse elected an equalization, resulting in the payment of individual legacies to her four children from a previous marriage, which were supposed to be contingent on the wife having predeceased the testator. For commentary see Barry S Corbin, "Misplaced Criticism?" (2006) 21:3 *Money & Family Law* 17-19.

should be effected by way of a deduction-style approach. This means that the spouse or partner should receive their entitlement under the will or by intestate succession legislation, plus whatever amount is needed over and above this amount to ensure an equal division of family assets.

The *Act* should also provide that the spouse, registered domestic partner, or common law partner who elects a family property division should be barred from acting as the personal representative of the deceased's estate in respect of matters relating to the family property division claim. Once the claim is resolved there should be no bar to the spouse continuing as personal representative.

In order to ensure that a surviving spouse, registered domestic partner, or common law partner can reliably predict what they are entitled to by way of a family property division, the *Act* should not permit a claim for unequal division in these circumstances. This limits the discretion that would ordinarily be available to account for situations where an equal division would be unfair - for example, in the case of a short marriage - but on the other hand, where a spouse or partner is making an application for a division of property on death it is more likely that the relationship was intact at the time of death and would have continued intact.

Recommendations:

Family property legislation should provide that upon the death of a spouse, registered domestic partner, or common law partner, the surviving spouse or partner must elect between:

- (a) their entitlements under the deceased spouse or partner's will or by intestacy, or
- (b) a division of family property.

The legislation should provide that where the surviving spouse or partner elects to make a claim for division, subject to any direction in the deceased spouse or partner's will, the spouse or partner will receive their entitlements under the will or by intestacy (for spouses and registered domestic partners), plus whatever property is needed to ensure an equal division of family assets.

The legislation should provide that the surviving spouse or partner may receive their entitlement to an equal division of family assets, as well as the gifts made to him or her in the deceased spouse or partner's will, if the will expressly provides for that result.

The legislation should provide that a spouse, registered domestic partner, or common law partner who elects a family property division should not be permitted to act as the personal representative of the deceased spouse or partner's estate in matters relating to the family property claim.

The legislation should provide that where a spouse, registered domestic partner, or common law partner elects a family property division on the death of a spouse or partner, the *Act's* provisions for an unequal division do not apply.

Public legal education materials should highlight the options available to a surviving spouse or partner and their consequences in different factual scenarios. They should explain the option for a testator to provide in the will that the surviving spouse or partner may have their entitlement under the will, in addition to a family property claim.

11.3. What Property Should be Included as Family Property on Death?

The interaction of a family property division and death gives rise to a number of issues in terms of how to account for property that may pass to the surviving spouse, registered domestic partner, common law partner, or a third party. The surviving spouse or partner may inherit from the estate of the deceased by will or, if the spouses were married or had registered a domestic partner declaration, under intestate succession legislation. Property may also succeed to the surviving spouse or partner by rights of survivorship, by way of survivor pension benefits, life insurance, and beneficiary designations for annuities, or retirement savings vehicles. Finally, the deceased may have set up a testamentary or *inter vivos* trust from which the surviving spouse or partner may benefit.

Unlike family property legislation in some other jurisdictions, the Nova Scotia *Matrimonial Property Act* does not expressly indicate whether and to what extent property passing to the surviving spouse on the death of the other spouse should be characterized as matrimonial or non-matrimonial assets. As well, the deceased may have left property to third persons by way of trusts, beneficiary designations or joint ownership with a right of survivorship. Such property may be considered a matrimonial asset and therefore included in a matrimonial property division, or its value may be included for purposes of quantifying the surviving spouse's matrimonial property entitlement. But if the assets have passed to third parties prior to the division, they may not be available to satisfy the order.

The following sections examine the issues that may arise in a family property division in relation to property passing in various ways upon the death of one spouse.

11.3.1. Deeming Certain Property to be Jointly Owned

The *Matrimonial Property Act* expressly does away with the presumption of advancement between spouses, and imposes a presumption of resulting trust.⁸³² The presumption of advancement presumes that a spouse intended a transfer of property to the other spouse to be a gift, unless proven otherwise. The presumption of resulting trust presumes that the spouse did not intend the transfer of property to be a gift; rather, the recipient spouse was intended to hold the property in trust for the transferring spouse. The *Act* therefore requires spouses who receive property from the other spouse to be ready to prove that the transfer - e.g., putting title in the other spouse's name - was intended as a gift, rather than assuming otherwise.

There are two exceptions - for property taken as joint tenants and money held in a bank account in both names. Section 21(1) of the *Matrimonial Property Act* is as follows:

The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that

- (a) the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property; and
- (b) money on deposit in a chartered bank, savings office, loan company, credit union, trust company or other similar institution in the name of both spouses shall be *prima facie* proof that the money is on deposit in the name of the spouses as joint tenants for the purposes of clause (a). [emphasis added]

Professor Alastair Bissett-Johnson maintained that the intention behind section 21 was to overcome the problem created by the elimination of the presumption of advancement as between husband and wife, in the absence of direct knowledge of the intention of the transferor:

The presumption of advancement between spouses (but not between father and child) is retrospectively abolished and replaced by the presumption of a resulting trust, except that the fact that property is held by the spouses as joint tenants will be regarded as *prima facie*

⁸³² *Matrimonial Property Act*, s 21(1).

proof that each spouse is intended to receive a one-half beneficial interest in that property if the joint tenancy is severed. Money on deposit in a joint account in a savings institution will also be regarded as prima facie evidence of a deposit in the spouses' names as joint tenants. This latter provision serves to ensure that the surviving spouse can have access to a (sic) co-owned accounts without them forming part of the deceased's estate, and possibly to avoid complicated rules about whether a voluntary conveyance unaccompanied by a declaration of trust gives rise to a resulting trust. [emphasis added]⁸³³

In *Levy*, however, Hallett J. commented that the provision does not on its face ensure “that the surviving spouse can have access to co-owner accounts without them forming part of the deceased's estate.”⁸³⁴ He found that the section does not address what happens to funds in a joint account on death of a spouse, since the death of one joint tenant does not sever the joint tenancy. The severance of a joint tenancy can only occur during the lifetime of a joint tenant.⁸³⁵ Therefore, the exceptions in sub-sections 21(1)(a) and (b) did not apply to the funds in the joint account at issue in that case, and Mrs. Levy, the surviving spouse, was required to rebut the presumption of resulting trust. Justice Hallett held:

With the greatest respect to Professor Bissett-Johnson, I do not agree that Section 21(1)(b) as drafted ensures that the surviving spouse can have access to co-owner accounts without them forming part of the deceased's estate. If the purpose of clause (b) was to ensure the result suggested by Professor Bissett-Johnson, the legislation has failed. The words used indicate to me that the Legislature intended to limit the exception to situations where there has been a severance of the joint tenancy which could only have occurred during the lifetime of the joint tenants. The section seems to have been taken from the Family Law Reform Act, 1978, of Ontario (Section 11), but under that Act a surviving spouse does not have the right to apply for an equal division of matrimonial assets as is the case under the Nova Scotia *Matrimonial Property Act*. I am inclined to think that the draftsman of the Nova Scotia Act did not direct his attention in the preparation of the exceptions to the activation of the resulting trust provision to the question of beneficial ownership of joint tenancy holdings following the death of one of the spouses. [emphasis added]⁸³⁶

⁸³³ Alastair Bissett-Johnson & Winifred Holland, eds, *Matrimonial Property Law in Canada* (Toronto: Carswell, 1980) at NS-36.

⁸³⁴ (1981) 50 NSR (2d) 14, 98 APR 14 at para 34.

⁸³⁵ Bissett-Johnson & Holland, *supra* note 833 at NS-36, quoted in *Levy* at para 31.

⁸³⁶ *Ibid* at para 34.

Other provinces have similarly (although more effectively) included provisions in family property legislation to preserve the presumption of advancement between spouses for the purposes of property held jointly, including deposit accounts in the names of both spouses. This is presumably, as Prof. Bissett-Johnson points out, so that surviving spouses are assured access to co-owned property without being required to rebut the presumption of resulting trust.

In Ontario, for example, the 1978 provision – upon which Hallett J. surmised that the Nova Scotia provision was based – was amended in 1990 to remove the language of severance. The relevant section now provides:

The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

- (a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants;⁸³⁷ and
- (b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).⁸³⁸

In our view, surviving spouses and common law partner should have access to jointly owned property, including accounts in the names of both spouses, without being required to rebut the presumption of resulting trust. This will ensure that the surviving spouse, registered domestic partner, or common law partner will presumptively enjoy a right of survivorship on the death of the other spouse or partner. Where the estate of the deceased can bring evidence of the deceased's intention which rebuts the presumption of advancement, the property will be subject to a resulting trust in the deceased's favour.

Recommendation:

Family property legislation should provide that the presumption of resulting trust should apply in questions of ownership between spouses and partners where property is not held by them as joint tenants, but the presumption of advancement should be maintained for property held in the name of spouses and partners as joint tenants, including money on deposit in the name of both spouses or partners.

⁸³⁷ As opposed to the *Matrimonial Property Act* which provides at s 21(1)(a): “is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property”.

⁸³⁸ *Family Law Act*, RSO 1990, c F3, s 14.

11.3.2. Property Passing by Survivorship or Beneficiary Designation

Nova Scotia's *Matrimonial Property Act* does not indicate how property passing outside of the estate of the deceased spouse should be accounted for in a matrimonial property division. Spouses and third parties may receive property upon the death of a spouse, as designated beneficiaries in life insurance policies, pensions, or private retirement savings vehicles. Spouses and third parties may take property by right of survivorship as joint tenants. The question is whether such property should be included as subject to a presumptive equal division, or potentially subject to a claim for unequal division under section 13 of the *Matrimonial Property Act* - and if so, how to account for the value of that property.

There is little case law on the subject, but in some cases courts have included in a division property received by one spouse upon the death of the other by rights of survivorship or by virtue of a beneficiary designation outside the will, where the property does not fall into one of the categories of non-matrimonial assets.⁸³⁹

Where a third party is the designated beneficiary or joint tenant, courts in Nova Scotia have treated the value of this property as capable of being accounted for in a matrimonial property division.⁸⁴⁰

Therefore, as the *Matrimonial Property Act* is currently drafted, the surviving spouse is presumptively entitled to the following:

- a) an equal division of the matrimonial assets - including survivor benefits, pension benefits and benefits from annuities and retirement savings vehicles, even if these are designated for or held jointly with third parties;⁸⁴¹
- b) property transferred to the surviving spouse by will or inherited upon intestacy, from the remaining estate of the deceased spouse; and,

⁸³⁹ As we see in the case of *Levy, supra*, what Mrs. Levy retained outside the will – by way of an *inter vivos* gift and by right of survivorship – was held to be both matrimonial property.

⁸⁴⁰ See *Driscoll v Driscoll Estate* (1988), 88 NSR (2d) 1 (TD). Where retirement savings vehicles were designated to Driscoll's children, Rogers J still found they were matrimonial assets. Had he not found that an unequal division of the matrimonial assets was warranted he would have been obliged to divide the value of these accounts evenly despite the designations.

⁸⁴¹ For example, see Hallett J's calculation of matrimonial assets in *Levy v Levy Estate* at para 54.

- c) non-matrimonial assets transferred to the surviving spouse outside the estate of the deceased, such as the proceeds of a life insurance policy or non-matrimonial assets owned jointly with the deceased, without having to account for such in the event of a matrimonial property claim.

Regardless of how the case law has developed in Nova Scotia, it seems clear that reformed family property legislation should clearly address the status of such property in a division. The following sections will consider areas that are not currently addressed by the *Matrimonial Property Act*, including life insurance proceeds and other property received by the surviving spouse on the death of the other spouse, property either designated to or held jointly with third parties, and how to account for property passing outside of the estate of the deceased spouse on a matrimonial property application.

11.3.2.1. Life Insurance Proceeds Designated to Spouses or Third Parties

On a plain reading of the terms of section 4(1)(c) of the *Matrimonial Property Act*, the death benefit portion of a life insurance policy is technically “money paid or payable to one spouse under an insurance policy”⁸⁴² and therefore excluded from a presumptive equal division as a non-matrimonial asset. However, it is open to question whether section 4(1)(c) contemplates money paid or payable to one spouse under an insurance policy from the other spouse. At other subsections of section 4, assets received by one spouse from the other spouse are presumptively included in an equal division, even though they fall into categories that are otherwise excluded.⁸⁴³

In its 2000 report on matrimonial property division on death, the Alberta Law Reform Institute recommended that life insurance proceeds paid to the surviving spouse should not be exempt from division:

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

⁸⁴² *Matrimonial Property Act*, s 4(1)(c).

⁸⁴³ See *ibid*, s 4(1)(a) which exempts from the definition of matrimonial assets, “gifts, inheritances, trusts or settlements received by one spouse *from a person other than the other spouse* except to the extent to which they are used for the benefit of both spouses or their children” [emphasis added].

for these proceeds. To do otherwise is to severely distort the principle of equal division of matrimonial property in favour of the surviving spouse.⁸⁴⁴

We agree that a surviving spouse, registered domestic partner, or common law partner should account for the full value of life insurance proceeds received on the death of the other spouse or partner in an application for a family property division. The value attributed to the policy should reflect any contingent tax liabilities in respect of the proceeds of the life insurance policy.

In our view the estate of the deceased spouse or partner should likewise have to account for life insurance designated to third parties. Typically the life insurance policy will have been bought with funds that would otherwise have been used in the marriage or partnership. In this case, however, the division should account for the cash surrender value of the policy corresponding to the period of the couple's cohabitation, rather than the amount of the death benefit. The cash surrender value better accords with the actual amount of property removed from the family pool to finance the policy. Including the full value of the death benefit may unduly inflate the size of the estate to the benefit of the surviving spouse, registered domestic partner, or common law partner.

Some life insurance policies should be exempt from a division of family property. In Alberta, the abandoned reforms of the province's *Matrimonial Property Act* included life insurance proceeds and death benefits arising from beneficiary designations as matrimonial property. However, the amendments would have exempted certain life insurance proceeds, as follows:

- (a) the proceeds of a life insurance policy that is owned by the deceased spouse and paid or payable to any person on the death of the deceased spouse, if the purpose of the policy is
 - (i) to satisfy an order or agreement to pay maintenance or support, or any other debt, liability or obligation that the deceased spouse had during life, or
 - (ii) to provide funds that the beneficiary of the policy will likely require, or compensation for loss that the beneficiary is likely to suffer, in respect of a business undertaking in the event of and as a result of the death, injury, illness, disability or incapacity of the deceased spouse;⁸⁴⁵

The exemptions were intended to, "recognize that people use life insurance to plan for certain obligations on death such as to satisfy child support payments or for a company to weather the

⁸⁴⁴ *Division of Matrimonial Property on Death*, *supra* note 797 at 96.

⁸⁴⁵ *Matrimonial Property Act*, RSA 2000, c M-8, s 7.1(2), as amended by *Wills and Succession Act*, SA 2010, c W-12.2s 117, repealed by *Statutes Repeal Act*, SA 2013, c S-19.3, s 28.

unanticipated loss of an individual who is considered essential to the ongoing operation of the business.”⁸⁴⁶

In our view, life insurance policies purchased in order to satisfy a child or spousal support claim, or any other debt, liability or obligation the deceased had during their lifetime, and policies purchased to compensate for the loss of the deceased in respect of a business undertaking (ie., key person insurance) should be exempt from a calculation of family assets.

Recommendations:

Family property legislation should provide that, where one spouse or partner has died, the full value of life insurance proceeds, less any contingent tax liabilities, paid or payable to the surviving spouse or partner as a result of the death of the other spouse or partner, will be included as a family asset.

Family property legislation should provide that, where one spouse or partner has died, the portion of the cash surrender value of a life insurance policy on the life of the deceased spouse or partner, paid or payable to a third party, corresponding to the cohabitation of the parties, will be included as a family asset.

The legislation should presumptively exclude from an equal division life insurance proceeds paid or payable to any person on the death of the deceased spouse, if the purpose of the policy is to satisfy a child or spousal support claim, or any other debt, liability or obligation the deceased had during their lifetime, or to compensate for the loss of the deceased in respect of a business undertaking.

Public legal education materials should explain the treatment of life insurance under the new legislation.

The legislation should expressly permit a spouse or partner to indicate in writing that upon their death the surviving spouse or partner shall receive life insurance proceeds as well as a division of family property.

⁸⁴⁶ Hierlmeier, *supra* note 755 at 10.

11.3.2.2. Other Property Passing Outside of the Estate to the Surviving Spouse

In Manitoba, a surviving spouse, registered domestic partner, or common law partner is not required to account for the value of any property passing to him or her outside of the estate of the deceased, as a result of the death of the deceased. This includes life insurance proceeds, beneficiary designations, and property received by way of rights of survivorship.⁸⁴⁷ The exclusion arose out of a concern that “elderly women, who already form a disproportionate portion of Canada’s poor, would be further harmed by the proposed after-death marital property equalization regime.”⁸⁴⁸

The Alberta Law Reform Institute recommended that death benefits and joint property that pass outside of the estate of the deceased should be subject to a presumptive equal division. Noting that joint property, pensions, annuities, registered retirement savings plans, and registered retirement income funds usually represent assets of significant value, the Institute argued that they should be included in the accounting if the principle of equal sharing of property acquired during marriage is to be upheld. The Institute considered that allowing the surviving spouse to take an undivided interest in property passing outside of the estate, plus one half of the matrimonial property, would infringe testamentary capacity because it would remove such property from the estate of the deceased spouse and frustrate whatever bequest the testator may have wanted to make of it. As the Institute commented, “The fact of death should not be an invitation to exclude what would otherwise have been property available for distribution.”⁸⁴⁹

⁸⁴⁷ CCSM, c F25, s 37:

The following assets of a surviving spouse or common-law partner are not subject to an accounting for the purpose of an equalization of assets under this Part:

- (a) an asset owned jointly with the deceased spouse or common-law partner where the surviving spouse or common-law partner has a right of survivorship;
- (b) life insurance payable on the death of the other spouse or common-law partner;
- (c) a TFSA (tax-free savings account) as defined in the *Income Tax Act* (Canada), retirement savings plan, retirement income fund or annuity, or a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees or former employees payable to the surviving spouse or common-law partner on the death of the other spouse or common-law partner.

⁸⁴⁸ As per letter of March 29, 1996, from Joan MacPhail, QC, Director of the Family Law Branch, Manitoba Justice to the Alberta Law Reform Institute. See *Division of Matrimonial Property on Death*, *supra* note 797 at 89-90.

⁸⁴⁹ *Division of Matrimonial Property on Death*, *ibid* at 93-94.

The Ontario *Family Law Act* was amended in 2009 to require that, where surviving spouses have elected to take an equalization, the value of proceeds of life insurance policies, death and survivor benefits, and rights of survivorship which they have received will count towards their entitlement to equalization.⁸⁵⁰ The amendments were passed in order to address the perceived windfall of surviving spouses receiving both an equalization of net family property and property received outside of the estate of the deceased, particularly real property held between the spouses as joint tenants and joint bank and investment accounts having a right of survivorship.⁸⁵¹

We agree that the surviving spouse should have to account for the full value of property received as a result of the death of the deceased spouse, less contingent tax liabilities, passing outside of the deceased's estate. As with proceeds from a life insurance policy, the surviving spouse may be overcompensated and the deceased's spouse's other heirs disadvantaged by not accounting for the full value of such property.

Recommendations:

Family property legislation should provide that, where one spouse or partner has died, any benefit, payment or other property, less any contingent tax liability, which the surviving spouse or partner has received or will receive by right of survivorship or otherwise as a result of the death of the other spouse or partner will be included as a family asset.

The legislation should expressly permit a spouse or partner to indicate in writing that upon their death the surviving spouse or partner shall receive property passing outside their estate, as well as a division of family property.

11.3.2.3. Property Other than Life Insurance Proceeds Passing to Third Parties

The abandoned amendments to the Alberta *Matrimonial Property Act* would have seen assets that pass outside of the estate of the deceased spouse to third parties treated as matrimonial

⁸⁵⁰ *Family Law Act*, RSO 1990, c F.3, s 6(7).

⁸⁵¹ For a discussion see Barry S Corbin, "Fairness in Matrimonial Property Equalization on Death" (2008-2009) 28 Est Tr & Pensions J 215.

property for the purpose of calculating – although not satisfying – a matrimonial property division. Specifically, the following property, *inter alia*, would be deemed to be property of the deceased for the purpose of a matrimonial property division:

- (a) the market value of any gift *mortis causa* given by the deceased spouse to a person other than the surviving spouse;
- (b) property that, immediately before the deceased spouse's death, was held jointly with a right of survivorship by the deceased spouse and a person other than the surviving spouse, to the extent of the deceased spouse's beneficial interest in the property at the time of the death;
- (c) any property that a person other than the surviving spouse or the estate received or is entitled to receive under a plan as defined in, or prescribed in regulations under, section 71 of the *Wills and Succession Act*⁸⁵² on the death of the deceased spouse, unless the surviving spouse waived any entitlement under the plan; ...⁸⁵³

These assets would have been included for purposes of calculating the value of the surviving spouse's matrimonial property entitlement, even though the assets themselves might not have been available to satisfy the order.⁸⁵⁴ Only where property transferred to a third party fell within section 10 of the *Act* (transfers for insufficient consideration to defeat a matrimonial claim) or where there was "some other argument to bring the assets back into the estate"⁸⁵⁵ would the assets in question have been themselves available to satisfy the matrimonial property claim.

In consultations held before the amendments were brought into force, practitioners expressed concerns about including property passing to a third party by way of a beneficiary designation in a matrimonial property calculation:

Discussions about life insurance led participants to raise questions about designations in general, and whether they should be included in the matrimonial property calculation. One major question was feasibility. Since designations flow outside of the estate, how

⁸⁵² Designation of person to receive benefit under plan.

⁸⁵³ *Matrimonial Property Act*, RSA 2000, c M-8, s 7.1(1), as amended by *Wills and Succession Act*, SA 2010, c W-12.2s 117, repealed by *Statutes Repeal Act*, SA 2013, c S-19.3, s 28. See Hierlmeier, *supra* note 755 at 8.

⁸⁵⁴ *Matrimonial Property Act*, RSA 2000, c M-8, s 7.1(1), as amended by *Wills and Succession Act*, SA 2010, c W-12.2s 117, repealed by *Statutes Repeal Act*, SA 2013, c S-19.3, s 28., s 9(4).

⁸⁵⁵ Hierlmeier, *supra* note 755 at page 8, fn 15.

would lawyers know about all the designations of a deceased, let alone their values? Moreover, assuming one could determine which designations existed, there would be difficulty getting a financial institution to share information about these designations. How would counsel obtain the authority to determine this information in order to undertake a matrimonial property calculation.

The issue of fairness was also raised. Participants said they support achieving symmetry of matrimonial property rights between divorce and death. However, the case of death should not have give (sic) spouses better rights than they would have in the case of divorce. Including designations on death that are not included in divorce would have the effect of unfairly enriching the surviving spouses' rights.⁸⁵⁶

Like those discussed earlier, these amendments were repealed before they were brought into force.

Our view is that the full value of property gifted or designated to third parties upon the death of the deceased should be accounted for in a division. These include the value of gifts *mortis causa*, the extent of the spouse's beneficial interest in property held jointly with a third party, and property in plans designated to third parties. Unlike the death benefit portion of life insurance proceeds designated to third parties, there is no element of "windfall" caused by the death of the deceased in this case.

Accounting for jointly held property which passes to a third party on the death of a spouse is consistent with division upon separation or divorce - the spouse's interest as joint tenant would be included if the spouse were alive. On the other hand, including third party designations on death may be inconsistent. But this is necessarily the case with death benefits, which have after all been paid for, generally speaking, with assets that would otherwise have been available to the family. There is simply a different financial reality on death, where a spouse has purchased life insurance policies, or has designated property by way of pension plans and savings plans, than there is at divorce or separation. Accounting for such property is also consistent with requiring the surviving spouse to account for the value of property received outside of the estate of the deceased, as we have recommended.

For purposes of a family property claim upon the death of a spouse, the rules should require disclosure by the estate and third parties of property, including policies and plans held immediately prior to death. Accounting for the value of property designated to third parties may cause practical problems for personal representatives. The personal representative representing the estate in family property proceedings may be required to inquire with banks and insurance

⁸⁵⁶ *Division of Matrimonial Property on Death*, *supra* note 797 at 8.

companies holding plans and policies designated to third parties about the value of these designations. While this may be onerous on the personal representative, the representative is the party best placed to pursue this information (as opposed to the surviving spouse, for example).

Recommendations:

Family property legislation should provide that, where one spouse or partner has died, the value of any benefit, payment or other property, less any contingent tax liability, which a third party has received or will receive by right of survivorship or otherwise as a result of the death of the spouse or partner will be included as a family asset for purposes of calculating the parties' respective entitlements.

Family law disclosure rules and probate rules should require disclosure by the estate of a deceased spouse or partner, and third parties, of any property, including policies and plans held by the deceased spouse or partner immediately prior to death.

11.3.2.4. Property Passing by way of an Order for Dependants' Relief

Finally, unlike most family property legislation in Canada,⁸⁵⁷ the *Matrimonial Property Act* does not address the priority of awards under dependants' relief legislation and orders or agreements for family property division. An award under the *Testators' Family Maintenance Act* is property that may pass to the surviving spouse upon the death of the other spouse, but not by will or intestacy, and therefore not subject to section 12(4) of the *Matrimonial Property Act*.⁸⁵⁸ It will be

⁸⁵⁷ New Brunswick's *Marital Property Act*, s 4(10) provides: "The authority of a court under the *Provision for Dependants Act* is subject to the rights of a surviving spouse to a division of marital property under this section"; Saskatchewan's *The Family Property Act*, SS 1997, c F-6.3, s 37 provides that nothing in the Act affects the right of the surviving spouse to make an application pursuant to the *Dependants' Relief Act*, 1996, and applications under the two Acts may be joined. Alberta's *Matrimonial Property Act*, RSA 2000, c M-8, s 18 contains a substantially similar provision; Manitoba's *Family Property Act*, CCSM c F25, s 41(1)(c) provides that an equalization payment has priority over an order of the court under the *Dependants' Relief Act*; in Ontario, the *Family Law Act*, RSO 1990, c F.3, s 6(12)(c) similarly provides that an equalization payment takes priority over dependants' relief in Ontario; however, in Ontario at section 6(12)(c), and in the Northwest Territories and Nunavut, in the *Family Law Act*, SNWT (Nu) 1997, c 18, s 37(10)(b)(ii) while a spouse's entitlement has priority over dependants' relief legislation, the exception to this priority is an order made under that legislation against the deceased spouse's estate and in favour of a child of the deceased spouse.

⁸⁵⁸ See Ray Adlington, "3.3 – Marital Property Legislation" in *Atlantic Canada – Estate Administration*

addressed, however, by our recommendation to include in a division property passing to the surviving spouse by reason of the death of the other spouse.

Practically speaking, both Acts impose limitation periods of six months from the date probate is granted or administration of the estate. The Supreme Court of Canada has held that a division under the *Matrimonial Property Act* must be carried out first.⁸⁵⁹ This in mind, we can expect the court to use its discretion to ensure that any further order above and beyond the *Matrimonial Property Act* division will make adequate provision for the proper maintenance and support of the surviving spouse.⁸⁶⁰

In Ontario,⁸⁶¹ the Northwest Territories and Nunavut,⁸⁶² an order made under dependants' relief legislation against the deceased spouse's estate and in favour of a child of the deceased spouse may have priority over the surviving spouse's family property entitlement.

In our view, family property legislation should affirm the priority of a family property division over a dependants' relief award. We do not agree that an exception should be made for dependants' relief awards made in favour of a child of the deceased spouse. It is more appropriate

Manual (Carswell, WestlawNext) (accessed on 09 October 2014) at 4. Adlington offers the example of a testator who is survived by a widow and three adult children of a former marriage. In his example, the widow and testator owned the matrimonial home jointly, valued at \$80,000 and the testator owned investments worth \$60,000. Adlington asks what would be the result if the testator left everything to the three children and the wife brought both an *Matrimonial Property Act* and *Testators' Family Maintenance Act* application:

What if the wife owned the residence in her own name, or it was owned jointly by the spouses? What if there was a will — that left everything to the children — and the wife successfully brought an application under dependant relief legislation? The Court would rule that the husband had made inadequate provision for his wife, and would award her some of the assets. As sole surviving joint owner — or as a successful plaintiff under the dependants' relief statute — she becomes entitled to her husband's interest in certain property. But these rights do not “arise on intestacy or by will”, as the statute states. What does ss. 12(4) of the *Matrimonial Property Act* do for a spouse in the circumstances?

⁸⁵⁹ *Tataryn*, *supra*. See *Casavechia v Casavechia Estate*, 2015 NSSC 119 at paras 11-13.

⁸⁶⁰ *Testators' Family Maintenance Act*, s 3(1).

⁸⁶¹ *Family Law Act*, RSO, c F.3, s 6(12).

⁸⁶² *Family Law Act*, SNWT (Nu) 1997, c 18, s 37(10)(b)(ii).

that the priority of an order made under dependants' relief legislation in favour of a minor child of the deceased be determined in reference to the share of the deceased's estate only.

Recommendation:

An award or agreement for a family property division in favour of a surviving spouse or registered domestic partner should take priority over an award made under dependants' relief legislation.

12. CONFLICT OF LAWS

12.1. Territorial Jurisdiction

In Nova Scotia, territorial jurisdiction or “competence” over matrimonial property actions is governed by the *Court Jurisdiction and Proceedings Transfer Act*.⁸⁶³ The *Court Jurisdiction and Proceedings Transfer Act* is modelled on the *Uniform Court Jurisdiction and Proceedings Transfer Act* adopted by the Uniform Law Conference of Canada in 1994. It provides for territorial competence in three situations: where the defendant is ordinarily resident in Nova Scotia; where the defendant consents or is deemed to have consented (ie., submitted) to the jurisdiction of the Nova Scotia court; or where there is a real and substantial connection between the forum and the facts upon which the proceedings are based.⁸⁶⁴ The Nova Scotia court is precluded from trying an action for a claim of title or trespass where the land is situated in another jurisdiction.⁸⁶⁵

Where there is no territorial competence a court may nonetheless hear a matter on the basis of “forum of necessity”.⁸⁶⁶

A court which has territorial competence may refuse to exercise jurisdiction on the basis that another court is the more appropriate forum (ie., *forum non conveniens*).⁸⁶⁷ The *Court Jurisdiction and Proceedings Transfer Act* sets out a number of factors that the court must consider in making this assessment, including the comparative convenience and expense for the parties, the law to be applied, the desirability of avoiding a multiplicity of legal proceedings, the

⁸⁶³ SNS 2003, c 2 (2nd Sess).

⁸⁶⁴ The *Court Jurisdiction and Proceedings Transfer Act* presumes a real and substantial connection in a number of circumstances which are set out at section 11. Among these are where real or personal property in question is located in Nova Scotia. Vaughan Black notes that the *Court Jurisdiction and Proceedings Transfer Act* does not provide for jurisdiction on the basis that the defendant was served while the defendant was in the jurisdiction – the old common law rule for taking jurisdiction. See Vaughan Black, “Choice of Law and Territorial Jurisdiction of Courts in Family Matters” (2013) 32 CFLQ 53 at 59.

⁸⁶⁵ See *British South Africa Co v Companhia de Mocambique*, [1893] AC 602 (HL).

⁸⁶⁶ Section 7 of the Nova Scotia *Court Jurisdiction and Proceedings Transfer Act* permits a court to hear a proceeding where there is no court outside Nova Scotia in which the plaintiff can commence the proceeding; and b. the commencement of the proceeding in a court outside of Nova Scotia cannot be reasonably required.

⁸⁶⁷ *Court Jurisdiction and Proceedings Transfer Act*, s 12(1).

desirability of avoiding conflicting decisions, the eventual enforcement of a judgment, and the fair and efficient working of the Canadian legal system as a whole.⁸⁶⁸

In 1997, the Uniform Law Conference of Canada adopted the *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act* (the “Uniform Act”). It incorporates substantially the rules for territorial competence from the *Uniform Court Jurisdiction and Proceedings Transfer Act*, modified slightly for the purposes of family property proceedings.

British Columbia was the first, and to date only, province to adopt substantially similar provisions to those contained in the Uniform Act. The *Family Law Act* sets out the terms of territorial jurisdiction of the court hearing an application for a division of property.⁸⁶⁹ The *Family Law Act* also sets out the factors that a court may consider in declining to take jurisdiction over a matter.⁸⁷⁰ The factors for declining jurisdiction are substantially the same as those contained in the Uniform Act, except that the *Family Law Act* adds the possibility of declining jurisdiction on the basis of “any other circumstances the court considers relevant.”⁸⁷¹

Section 106(3) of the *Family Law Act* sets out the factors that will presumptively establish a substantial and real connection for the purposes of a British Columbia court taking jurisdiction in a family property application on substantially the same terms as the Uniform Act:

(3) For the purposes of subsection (2)(d), a real and substantial connection is presumed to exist if one or more of the following apply:

⁸⁶⁸ *Ibid*, s 12(2).

⁸⁶⁹ *Family Law Act*, SBC 2011, c 25, s 106. Vaughan Black, “Choice of Law and Territorial Jurisdiction of Courts in Family Matters” (2013) 32 CFLQ 53 at 57. Black sets out four factors from the *Court Jurisdiction and Proceedings Transfer Act* which will presume a real and substantial connection that he says are most pertinent to intra-familial disputes:

1. is brought to enforce, assert, declare or determine proprietary or possessory rights in property in the province;
2. concerns restitutionary obligations that, to a substantial extent, arose in the province;
3. is for the determination of the personal status of a person ordinarily resident in the province;
4. concerns contractual obligations that were, to a substantial extent, to be performed in the province or were, by the contract’s express terms, to be governed by the law of the province.

⁸⁷⁰ Section 106(5)(2).

⁸⁷¹ Section 106(5)(2)(g).

- (a) property that is the subject of the proceeding is located in British Columbia;
- (b) the most recent common habitual residence of the spouses was in British Columbia;
- (c) a notice of family claim with respect to the spouses has been issued under the *Divorce Act* (Canada) in British Columbia.⁸⁷²

It may be useful to expressly provide that a court will have jurisdiction over a matrimonial property division where a notice has been issued under the *Divorce Act*, to ensure clarity and certainty particularly with respect to the interaction between the two acts. Section 3(1) of the *Divorce Act* sets out the jurisdiction of courts hearing an application for divorce:

3 (1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.

On the other hand, as Vaughan Black points out, even in provinces where family property legislation does not contain a provision such as British Columbia's, courts that have jurisdiction over a divorce proceeding pursuant to section 3 of the *Divorce Act* will take jurisdiction over the matrimonial property claim in any event.⁸⁷³

⁸⁷² Section 106(3) substantially adopts the Uniform Act provision:

X.4. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a domestic property proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if

- (a) the domestic property that is the subject matter of the domestic property proceeding is located in [enacting province or territory],
- (b) the last common habitual residence of the plaintiff and defendant was in [enacting province or territory],
- (c) the habitual residences of both the plaintiff and the defendant when the proceedings are commenced are in [enacting province or territory]
- (d) a petition with respect to the marriage of the plaintiff and defendant has been validly issued under the *Divorce Act* in [enacting province or territory].

⁸⁷³ Black, *supra* note 869 at 64.

Recommendations:

Family property legislation should reproduce the provisions from the *Court Jurisdiction and Proceedings Transfer Act* for the territorial jurisdiction of superior courts, including the factors to consider in declining jurisdiction.

Family property legislation should provide that a real and substantial connection to the proceeding shall be presumed where:

- (a) property that is the subject of the proceeding is located in Nova Scotia;
- (b) the last common habitual residence of the plaintiff and the defendant was in Nova Scotia;
- (c) the habitual residences of both the plaintiff and the defendant when the proceedings are commenced are in Nova Scotia; or,
- (d) a petition with respect to the marriage of the plaintiff and defendant has been validly issued under the *Divorce Act* (Canada) in Nova Scotia.⁸⁷⁴

The legislation should permit the court to decline jurisdiction on the basis of “any other circumstances the court considers relevant”.

⁸⁷⁴ Section 106(3) substantially adopts the Uniform Act provision:

X.4. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a domestic property proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if

- (a) the domestic property that is the subject matter of the domestic property proceeding is located in [enacting province or territory],
- (b) the last common habitual residence of the plaintiff and defendant was in [enacting province or territory],
- (c) the habitual residences of both the plaintiff and the defendant when the proceedings are commenced are in [enacting province or territory]
- (d) a petition with respect to the marriage of the plaintiff and defendant has been validly issued under the *Divorce Act* in [enacting province or territory].

12.1.1. Remedies

Questions of territorial competence are distinct from but related to questions of recognition and enforcement of judgments. The common law rules around recognition and enforcement of foreign judgments are based on the type of property involved and hence the type of orders at issue. For example, in the case of *Duke v. Andler*,⁸⁷⁵ the Supreme Court of Canada held that foreign judgments concerning local immovables would not be recognized. Later cases decided by the Supreme Court of Canada have held that both pecuniary and non-pecuniary judgments issued by Canadian courts wherever situated should be recognized and enforced in Canada if they meet certain criteria.⁸⁷⁶ However, these cases have not overturned the restriction from *Duke* with regard to judgments concerning real property.⁸⁷⁷

Importantly, in *Morguard Investments Ltd. v. De Savoye*,⁸⁷⁸ the Supreme Court of Canada held that within Canada, judgments must be recognized by any jurisdiction if the court finds that the issuing jurisdiction had a real and substantial connection to the action. The *Morguard* decision provided the impetus for the creation of the *Uniform Enforcement of Canadian Judgments and Decrees Act* by the Uniform Law Conference of Canada. Nova Scotia adopted substantially similar legislation in 2001, titled the *Enforcement of Canadian Judgments and Decrees Act*.⁸⁷⁹

The *Enforcement of Canadian Judgments and Decrees Act* allows registration of judgments for the purposes of recognition and enforcement simply on the basis that the judgment originates in Canada. The definition of Canadian judgment in the *Enforcement of Canadian Judgments and Decrees Act* is as follows:

"Canadian judgment" means a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than the Province

(i) that requires a person to pay money, including an order for the payment of money that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than the Province and that is enforceable as a

⁸⁷⁵ [1932] SCR 734, 4 DLR 529.

⁸⁷⁶ See *Hunt v T&N plc*, [1993] 4 SCR 289, 109 DLR (4th) 16; *Morguard Investments Ltd v De Savoye* (1990), 76 DLR (4th) 256.

⁸⁷⁷ For a discussion see, Elizabeth Edinger, "Is *Duke v. Andler* Still Good Law in Common Law Canada?" (2011) 51 Can Bus LJ 52.

⁸⁷⁸ (1990), 76 DLR (4th) 256.

⁸⁷⁹ SNS 2001, c 30.

judgment of the superior court of unlimited trial jurisdiction in that province or territory,

(ii) under which a person is required to do or not do an act or thing, or

(iii) that declares rights, obligations or status in relation to a person or thing,⁸⁸⁰

This excludes orders for maintenance, payment of fines, care, control or welfare of a minor, anything other than the payment of money if issued by a tribunal, and a grant of probate or letters of administration.⁸⁸¹ It does not expressly exclude judgments concerning real property, and indeed includes judgments with respect to ‘things’. It is arguable that the position in *Duke v. Andler* has been overridden in the *Enforcement of Canadian Judgments and Decrees Act* as far as Canadian judgments are concerned, but this has not been decided definitively by the courts.⁸⁸²

In this context the question is how a court should effect a division of property where some property subject to division is located outside Nova Scotia. Section 22(3) of the Act provides that:

Notwithstanding subsection (2), where the law of the Province governs the division of assets, the value of the immoveable [immovable] property wherever situated may be taken into consideration for the purposes of a division of assets.⁸⁸³

In the case of *Gomez-Morales*⁸⁸⁴ the Nova Scotia Court of Appeal upheld the decision of the trial judge to divide the value of an apartment building in Ontario. While the common law rule prevents courts from affecting ownership or title of foreign immovables, Hallett J.A. held that the court could consider the value of such immovables:

⁸⁸⁰ Section 2(aa).

⁸⁸¹ Sections 2(aa)(iv) to (viii).

⁸⁸² While it has not been decided yet, the *dicta* of some decisions seem to indicate that the *Enforcement of Canadian Judgments and Decrees Act* and even the *Court Jurisdiction and Proceedings Transfer Act* may provide judges with the power to enforce orders dealing with title to immovable property. See for example, the British Columbia case of *Monteiro v Monteiro*, 2015 BCSC 1543, para 31, where the court noted that in having territorial competence pursuant to the *Court Jurisdiction and Proceedings Transfer Act*, the court also had jurisdiction to enforce a foreign order dealing with real estate in the province. It is noteworthy that British Columbia’s *Court Jurisdiction and Proceedings Transfer Act* is substantially similar to Nova Scotia’s.

⁸⁸³ RSNS 1989, c 275, s 22.

⁸⁸⁴ *Gomez-Morales v Gomez-Morales* (1990), 100 NSR (2d) 137, 30 RFL (3d) 426.

In my opinion, the intention of the Legislature of this province is clear: a court may take into consideration for the purpose of a division of assets the value of immovable property wherever situate. No argument has been made before us that the law of the province does not govern the division of assets between the spouses. They were residing in the province at the time of separation. Therefore, the learned trial Judge was not in error in considering the value of the Laval Street property in Ottawa, Ontario, in determining what was an appropriate division of assets. Subsection 3 clearly refers to the division of assets and is not limited to the division of matrimonial assets.⁸⁸⁵

The Uniform Act provides that a court with territorial competence can dispose of all issues relating to ownership and division of domestic property. The Uniform Act expands upon the remedial provision of section 22(3) of the *Matrimonial Property Act*.⁸⁸⁶ In particular, it sets out the alternatives open to the court in dealing with matrimonial property cases where some property is outside the court's jurisdiction:

- X.9. (1) A court with territorial competence to entertain a proceeding relating to domestic property may dispose of all issues relating to ownership and division of the domestic property.
- (2) Where the court has territorial competence to entertain a proceeding relating to domestic property, some of which is located outside [enacting province or territory], the court may
- (a) reapportion entitlement to domestic property within [enacting province or territory] to compensate for rights in domestic property located outside [enacting province or territory],
 - (b) order the party who has legal title to domestic property located outside [enacting province or territory] to pay compensation to the other party in lieu of division,
 - (c) make an order in connection with domestic property located outside of [enacting province or territory] that is enforceable against the party that owns the domestic property, including an order preserving the domestic property, respecting possession of the domestic property or requiring the owner to convey or charge all or part of the owner's interest in it to the other party, or

⁸⁸⁵ *Ibid* at para 21.

⁸⁸⁶ Section x.9.(1).

(d) if the internal law of the territory in which the domestic property is located allows for the recognition and enforcement of an order for non-monetary relief made by a court of another territory, make an order for non-monetary relief.

We recommend that family property legislation in Nova Scotia should adopt the Uniform Act's provisions regarding recognition and enforcement of division orders. It will be helpful to expressly provide for the various methods by which the court may deal with a division where some property is in another jurisdiction. It will encourage clarity and consistency with other jurisdictions. Setting out these alternatives may also assist parties in coming to their own family property settlements.

The provisions of the Uniform Act that address recognition and enforcement of family property orders made by courts with territorial competence leave open the possibility that where another jurisdiction does allow for the recognition and enforcement of foreign orders dealing with title to land, the court may make such an order.⁸⁸⁷ This provision may be especially important where the option is available and where the other alternatives fail to adequately compensate for the value of the foreign property.

Recommendations:

Family property legislation should provide that where a court has territorial competence to entertain a proceeding relating to family property, some of which is located outside of Nova Scotia, the court may:

- a) reapportion entitlement to family property within Nova Scotia to compensate for rights in family property located outside Nova Scotia,
- b) order the party who has legal title to family property located outside Nova Scotia to pay compensation to the other party in lieu of division,
- c) make an order in connection with family property located outside of Nova Scotia that is enforceable against the party that owns the family property, including an order preserving the property, respecting possession of the property or requiring the owner to convey or charge all or part of the owner's interest in it to the other party, or

⁸⁸⁷ X.9.(2)(d).

d) if the internal law of the territory in which the family property is located allows for the recognition and enforcement of an order for non-monetary relief made by a court of another territory, make an order for non-monetary relief.

12.2. Choice of Law and Family Property Proceedings

12.2.1. The “Proper Law” of the Marriage

The question of which territory’s law will determine the division of family property is governed by “choice of law” rules. These may arise from statute, common law, and choice of law provisions in private instruments. Section 22(1) of the *Matrimonial Property Act* provides a statutory choice of law rule:

(1) The division of matrimonial assets and the ownership of moveable property as between spouses, wherever situated, are governed by the law of the place where both spouses had their last common habitual residence or, where there is no such residence, by the law of the Province.

The “last common habitual residence” guides division of matrimonial assets and ownership of moveable property. Ownership of real (“immoveable”) property is determined by the law of the jurisdiction in which the property is located, although the court may consider and divide the value of the property.⁸⁸⁸

A statutory last common habitual residence rule solves certain problems that occurred under the common law rule of domicile, which establishes an individual’s personal law.⁸⁸⁹ A person’s domicile could be determined by their “domicile of origin” (domicile at birth), “domicile of choice” (the intention to remain in a jurisdiction indefinitely) or “domicile of dependency”.⁸⁹⁰ Domicile of dependency, or ascribing to that person the domicile of the person on whom they are dependent, is applied to persons who are found not to have legal capacity, including minors, persons without legal capacity due to a disability and to married women under the common law.⁸⁹¹

⁸⁸⁸ See ss 22(2) and (3).

⁸⁸⁹ Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws* (Toronto: Irwin Law Inc, 2010) at 10.

⁸⁹⁰ *Ibid.*

⁸⁹¹ For example, pursuant to the domicile of dependency, a married woman’s domicile would be that of her

The use of a last common habitual residence rule instead of the common law rules of domicile removes the discriminatory aspects of the domicile rule – particularly the domicile of dependency aspect of the rule – and assures that the mutual expectations of the parties are better accounted for. As Vaughan Black has commented:

[S]ince the residence must have been a common one, the problem of the husband unilaterally changing the law governing the spouses' property rights inter se by simply changing his domicile is eliminated. Yet, since the matrimonial property regime can shift when the spouses move together, they will not have their rights determined by the law of a jurisdiction with which they have long lost contact.⁸⁹²

The Uniform Act sets out the following criteria for the “proper law of the marriage” - that is, the choice of law rule in matrimonial property proceedings:

Choice of Law Rules: Proper Law of the Marriage

X.8. (1) Subject to sections X.6 and X.7, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the parties had their last common habitual residence.

(2) If the territory selected by the application of subsection (1) is located outside Canada and is not the territory most closely associated with the marriage, the substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory that is most closely associated with the marriage.

(3) If there is no place where the parties had a common habitual residence, substantive rights of the plaintiff and defendant in a domestic property proceeding must be determined by the internal law of the territory where the plaintiff last habitually resided.

In other words, the Uniform Act provides an exception to the last common habitual residence rule, where the last common habitual residence is outside Canada and another territory has a closer connection to the marriage. The ULCC reasoned that moving a common residence to another jurisdiction within a federation like Canada does not involve transitioning to a vastly different legal system. By contrast, moving to another country – for example, to work temporarily

husband. *Ibid* at 17-19.

⁸⁹² See Black, *supra* note 869 at 77. See also Annalise Acorn, “Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms” (1991) 29 Osgoode Hall LJ 419.

– might do so and in that case the choice of law should take care to ensure that the laws applicable to the division of property are those of the jurisdiction most closely connected to the relationship.⁸⁹³ In its 1998 report on the Uniform Act, the British Columbia Law Institute recommended the adoption of this exception, commenting:

A consideration of the connections between the territory and the marital relationship could do much to help the court decide which is the best forum for hearing the dispute and the most appropriate law to be applied. Allowing the court to examine this connection would do much to harmonize conflict of law rules with the *Family Relations Act*.⁸⁹⁴

We agree that for purposes of family property division where the couple's last common habitual residence is not within Canada the legislation should apply the law of the territory which is most closely connected to the relationship. This allows the court to take account of the fact that despite locating their common residence in a nation outside Canada, even for a long time, the couple may have little connection to, and may not necessarily agree with, the legal principles and norms of that territory. In our view this approach will be generally consistent with a couple's reasonable expectations as to how their family property will be divided.

12.2.2. *Renvoi*

Renvoi (meaning “to send back”) refers to a potential “catch-22” situation where the private international law rules of jurisdiction A provide that the law of jurisdiction B applies, whereas the private international law rules of jurisdiction B provide that the law of jurisdiction A, or a third jurisdiction, will apply.

The *Uniform Act* prevents the operation of *renvoi* by providing that the “substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the parties had their last common habitual residence.”⁸⁹⁵ Since only the internal law of the territory applies, private international law rules of the territory are excluded, thereby preventing *renvoi*.

⁸⁹³ *Uniform Act*, s 8 (2) (“Commentary”).

⁸⁹⁴ British Columbia Law Institute, *The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings* (Vancouver: BCLI, 1998) at 5, online: <<http://www.bcli.org/sites/default/files/uclrdpp.pdf>>. These recommendations were made with regard to the province's former matrimonial property legislation, the *Family Relations Act*, RSBC 1996, c 128.

⁸⁹⁵ *Uniform Act*, s X.8.(1).

The *Matrimonial Property Act* does not expressly prevent *renvoi*. In the case of *Vladi v. Vladi*,⁸⁹⁶ two Iranian nationals who had resided in West Germany before immigrating to Canada were applying for a division of property in Nova Scotia. The Nova Scotia court had territorial jurisdiction and next had to determine the applicable choice of law. Justice Burchell made the following comment:

If a local rule (such as Section 22 of the *Matrimonial Property Act* of Nova Scotia) imports foreign rules and they, in turn, invoke the law of a third jurisdiction, the reference to the law of the third jurisdiction is called *renvoi* or remission. In some Canadian statutes such a further reference is precluded by a stipulation that it is only the "internal" foreign law that is to be applied. Section 22 of the *Nova Scotia Act*, however, does not specify that it is the "internal" law of the place of last common habitual residence that is to govern a division of matrimonial assets. The possibility of *renvoi* is thus left open and it can be argued that Section 22 imports both the internal and external law of West Germany including, in this case, the provisions of Iranian law that a West German court would adopt as applicable to Mr. and Mrs. Vladi as Iranian nationals in accordance with an existing German/Iranian treaty, and on general principles recognized under West German law.⁸⁹⁷

The court in *Vladi* refused to give effect to the 'external' law of West Germany which would see the law of Iran applied to the division of property, however. The matrimonial property law of Iran at that time would have seen Mrs. Vladi receive only a nominal gift of property. The court held that it was against public policy to apply the law of Iran, and applied the law of West Germany as it applied to the division of matrimonial property.⁸⁹⁸

Leaving the possibility of *renvoi* open raises concerns of uncertainty and complexity of proceedings. Determining which law to apply may require a potentially complex and costly litigation, as spouses lead evidence as to the private international law rules of jurisdiction B, and potentially as to the substantive family property rules of jurisdiction C. Eliminating *renvoi* would provide for a more certain, more direct determination of which law applies, as it will always be the substantive law of the territory where the couple had their last common habitual residence or which is most closely connected to the relationship, as we have recommended. It ensures that the

⁸⁹⁶ *Vladi v Vladi* (1987), 79 NSR (2d) 356 (TD).

⁸⁹⁷ *Ibid.*

⁸⁹⁸ *Ibid.* The court did apply Nova Scotia law, however, and in particular section 18 of the *Matrimonial Property Act*, for purposes of dealing with the husband's business assets, which Burchell J found should not be included; paras 42-44. Under West German internal law there was no presumptive exclusion of business assets, however, Burchell J held that section 22 of the *Matrimonial Property Act* only applied to matrimonial assets, the definition of which excludes business assets.

law applied has the closest connection to the parties' relationship and therefore most likely accords with their expectations as to family property division. As one commentator has noted, allowing the private international law rules of the territory most closely connected to oust its own law in favour of another is counter to this goal.⁸⁹⁹

On the other hand, eliminating the possibility of *renvoi* is to some extent an unprincipled approach to conflicts of laws problems.⁹⁰⁰ The legislation will artificially restrict the scope of the laws of the foreign jurisdiction found to be the proper law of the relationship, solely because a Nova Scotia court has taken jurisdiction. It may be argued that this unduly conflates territorial competence and the proper law of the relationship. Finally, it may be that the private international law rules of the territory of the couple's last common habitual residence or most closely associated with the relationship are the ones that the couple expected would apply.

In our view, a central goal of reform is the simplification of family property laws and the elimination of undue expense for the parties. We are persuaded that the legislation should prevent the operation of *renvoi*, to ensure that the substantive family property law of the territory where the couple had its last common habitual relationship, or which is most closely connected to the relationship, should govern.

12.2.3. A Single Choice of Law Rule for Family Property

The Uniform Act provides a single choice of law rule for all "domestic property". The Uniform Act defines "domestic property" as, "real property or personal property wherever located owned by the plaintiff or defendant separately or as co-owners and acquired by them before or during their marriage".⁹⁰¹

By contrast, the *Matrimonial Property Act* provides that, unlike the ownership of personal property, the ownership of real ("immovable") property shall be governed by the law of the territory where the property is situated.

A different choice of law rule for immovable and movable property may raise inconsistencies and foster multiple proceedings in determining a final division of property. The British Columbia Law Institute has noted that the common law distinction between movable and immovable property

⁸⁹⁹ See David Alexander Hughes, "The Insolubility of *Renvoi* and Its Consequences" (2010) 6 J of Priv Int L 195 at 205-206.

⁹⁰⁰ *Ibid* at 198.

⁹⁰¹ Section X.1.(1).

means that “it is possible, under the common law, that a house and a motor home purchased at the same time and in the same province would be divided according to different laws”.⁹⁰² Furthermore, as Vaughan Black points out, the *lex situs* rule may introduce the law of a jurisdiction with which the property owner has little connection.⁹⁰³

In our view the legislation should clearly stipulate a single choice of law rule for real and personal property.

The definition of “domestic property” in the Uniform Act refers to matrimonial property, whereas section 22(1) of the *Matrimonial Property Act* refers to “The division of matrimonial assets”. On a strict interpretation of section 22(1), then, the court may not divide non-matrimonial assets according to the law of the couple’s last habitual residence. In our view new family property legislation should adopt the more comprehensive terminology of family property in the conflict of law provisions, in order to make clear that the court may divide non-matrimonial assets according to the same laws applicable to family assets, where appropriate.

12.2.4. Property Subject to Community of Property Regime

The Uniform Act addresses any potential conflict between a community of property regime and a deferred sharing regime such as that provided for by the *Matrimonial Property Act*:

X.7. Subject to section X.6 [choice of law rules: contract], if the internal law of the territory in which the plaintiff and defendant *first* had a common habitual residence during their marriage provides that some or all of their domestic property is held in a regime of community of property, then regardless of a change of residence, their rights in the domestic property that is subject to the regime of community of property on the break up or termination of their marriage are determined by the internal law of that territory.

The provision is meant to give effect to the “doctrine of immutability of original regime” and to the distinction between family property rules in common law and civil law jurisdictions.⁹⁰⁴ In civil law jurisdictions marital property is commonly held in a community of property, which deems all property to be held jointly on marriage. By contrast, most common law jurisdictions recognize a

⁹⁰² British Columbia Law Institute, *The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings* (Vancouver: BCLI, 1998) at 5, online: <<http://www.bcli.org/sites/default/files/uclrdpp.pdf>>.

⁹⁰³ Vaughan Black, “*Manitoba (Public Trustee) v. Dukelow* Annotation” (1994) 4 ETR (2d) 2-6 at 5.

⁹⁰⁴ *Uniform Act*, s X.7, “comment”.

deferred sharing regime where spouses hold property separately and only deem certain property to be shared equally at the end of marriage. Rules adopted by common law jurisdictions tend look to the end of the marriage whereas rules adopted in civil law jurisdictions look to the beginning of the relationship. The Uniform Act provides the following definition of “regime of community property”:

X.1. (1) In this Part

"regime of community of property" means any regime of domestic property which is imposed by law and which

- (a) determines the extent to which each spouse has rights in and over all or certain of the domestic property owned by the other spouse during the marriage, and
- (b) provides for the sharing of domestic property on the break up or termination of their marriage and includes a regime of partnership of acquests, but does not include
- (c) a regime of separate property, or
- (d) a regime under which rights in or with respect to domestic property are deferred until, or after, the occurrence of an event signifying the break up or termination of the marriage.

There are exceptions, however. The Commentary to the Uniform Act explains that in jurisdictions such as Quebec where a couple can hold their property separately and partition family patrimony at the end of the marriage, the rule would not apply to property held separately outside of the community of property.

We recommend that this provision should be adopted in Nova Scotia, to ensure that a couple whose property was deemed to be held jointly on marriage has the law of community property applied at the end of the relationship, regardless of whether their last common residence was in a jurisdiction that applies the law of deferred sharing of family property. Knowing that they married under a community of property regime may have affected the economic choices of the spouses before marriage and going forward in the marriage and the legislation should respect those expectations. This may be particularly important, for example, when the parties move to a jurisdiction with a separate property regime and one spouse declares bankruptcy before a matrimonial property division order is made. The non-bankrupt spouse's interests will be protected in the division despite the intervening bankruptcy.

Recommendations:

Family property legislation should provide that:

(a) Where the spouses, registered domestic partners or common law partners have made a domestic contract setting out a choice of law rule, the terms of the contract will govern which territory's laws apply to the division of family property.

(b) Where the spouses or partners have not made a domestic contract as provided in (a), the substantive rights of the spouses or partners in a family property proceeding will be determined by:

(i) the internal law of the territory where the parties had their last common habitual residence;

(ii) if the parties' last common habitual residence is located outside Canada and is not the territory most closely associated with the marriage or common law relationship, or registered domestic partnership, the internal law of the territory that is most closely associated with the marriage, common law relationship or registered domestic partnership; or,

(iii) if there is no place where the parties had a common habitual residence, the internal law of the territory where the plaintiff last habitually resided.

The legislation should provide that subject to the terms of a domestic contract setting out a choice of law rule, if the internal law of the territory in which the plaintiff and defendant first had a common habitual residence during their marriage provides that some or all of their family property is held in a regime of community of property, then regardless of a change of residence, their rights in the family property that is subject to the regime of community of property shall be determined by the law of that territory.

12.2.5. Choice of Law and Domestic Contracts

The *Matrimonial Property Act* does not specifically address the choice of law in the case of domestic contracts. The implication is that the proper law of the contract will apply unless the agreement specifically references the law of another jurisdiction. Where the parties to the contract have not specifically provided for a choice of law, the proper law of the contract is the law of the place with which the contract has the closest and most real connection.⁹⁰⁵ However, Nova Scotia's courts have held that even where the law of another jurisdiction applies, the courts may set aside the contract (in this case a consent order) on the basis that it is unconscionable.⁹⁰⁶

The Uniform Act modifies the proper law of the contract insofar as domestic contracts are concerned. The Act provides:

X.6. (1) If the plaintiff and defendant entered into a contract, either before the formation of, or during, their marriage, that specifies how domestic property is to be divided in the event of the break up or termination of their marriage, their rights in domestic property are determined by the contract.

(2) The contract referred to in subsection (1) is enforceable subject to the internal law of the territory **determined in accordance with [the proper law of the marriage]**. [emphasis added]

In other words, the enforceability of any domestic contract will be subject to the internal law of the jurisdiction which governs the division of the couple's matrimonial property - i.e., the last

⁹⁰⁵ *Imperial Life Assurance Co of Canada v Colmenares*, [1967] SCR 443. At para 15 Ritchie J set out the following factors to take into consideration in determining the proper law to be applied, quoting from *Cheshire on Private International Law*, 7th ed, p 190:

The court must take into account, for instance, the following matters: the domicile and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; ... the economic connexion of the contract with some other transaction; ... the nature of the subject matter or its *situs*; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.

⁹⁰⁶ *Walker v Walker* (2003), 211 NSR (2d) 197. It is also noteworthy that the court applied section 22 to determine the choice of law applicable to the contract and not the proper law of contract.

common habitual residence, except in a few cases.⁹⁰⁷ This means that where the proper law of the relationship is Nova Scotia, regardless of the parties' choice of law in the domestic contract, under the Uniform Act it would not be enforceable if a term of the contract is found to be "unconscionable, unduly harsh on one party or fraudulent".⁹⁰⁸

The question of validity, as opposed to enforceability is a separate consideration. The commentary to the Uniform Act notes that the choice of law rule for domestic contracts does not apply to the question of whether the contract was validly made. The commentary provides rather that validity "would continue to be determined by the rules of private international law", including potentially the proper law of the contract. This means that the system of law with the closest and most real connection to the contract would apply to determine the validity of the contract.⁹⁰⁹

British Columbia's *Family Law Act* sets out the choice of law rules as they relate to contracts on substantially the same basis as the Uniform Act:

(3) Subject to subsection (4), if spouses make an agreement respecting the division of property or debt, the substantive rights of the spouses in a proceeding under this Part are determined by the agreement.

(4) The enforcement of an agreement under subsection (3) is subject to any restriction that the proper law of the relationship places on the ability of spouses to determine the division of property or debt by agreement.⁹¹⁰

In our view, family property legislation should provide that enforceability will be governed by the proper law of the relationship. This will help to clarify that the prevailing consideration in determining a choice of law for all purposes will be the connection of the marriage to the territory as opposed to the connection of the contract to the territory.⁹¹¹ It should also better reflect the

⁹⁰⁷ *Uniform Act*, ss X.6(2) and s X.8(1). The exceptions are where the last common habitual residence is outside Canada and is not the territory most closely associated with the marriage - in which case the law of the territory most closely associated with the marriage governs: s X.8(2) - and where there is no common last habitual residence, in which case the law of the territory where the plaintiff last habitually resided governs: s X.8(3).

⁹⁰⁸ *Matrimonial Property Act*, s 29.

⁹⁰⁹ Uniform Law Conference of Canada, *Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act*.

⁹¹⁰ Section 108.

⁹¹¹ In Ontario, the *Family Law Act*, RSO 1990, c F.3, s 58 provides that both the effect and validity of a

expectation of the parties in most cases. A couple may make a domestic contract in one jurisdiction but have lived out much of the marriage in another.

We recommend that the Uniform Act provisions with regard to domestic contracts should be adopted; however, because it is more clearly limited to restrictions on enforceability with regard to family property and debt we prefer the formulation of the second part of the provision as provided for in the British Columbia *Family Law Act*.

Recommendations:

Family property legislation should provide that if spouses, registered domestic partners or common law partners make a domestic contract respecting the division of family property or debt, the substantive rights of the spouses or common law partners regarding the division of property and debt will be determined by the agreement.

The legislation should provide that the enforcement of a domestic contract is subject to any restriction that the proper law of the relationship places on the ability of spouses or partners to determine the division of family property or debt by agreement.

12.3. Extra-jurisdictional Polygamous Marriages

In Canada, section 293 of the *Criminal Code* criminalizes polygamous marriages and “any kind of conjugal union with more than one person at the same time”.⁹¹² The section was held to infringe freedom of religion under section 2(b) the *Charter*, and the right to liberty under section 7, but was found to be demonstrably justified in a free and democratic society under section 1.⁹¹³

domestic contract is to be guided by the proper law of the contract. On the other hand, uncertainty has arisen as cases have looked not to the proper law of contract in deciding the choice of law rule for domestic contracts but rather to the system of law that governs the marital property rights: see *Stark v Stark* (1990), 26 RFL (3d) 425, 71 DLR (4th) 626 (CA); *Bosch v Bosch* (1991), 6 OR (3d) 168, 36 RFL (3d) 302 (CA).

⁹¹² In *Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 28 BCLR (5th) 96, the court interpreted the reference to ‘conjugal union’ to require the ceremonial formality of a marriage; it does not, in other words, apply to multiple cohabitating partners.

⁹¹³ *Ibid.*

Nevertheless, private international law rules of marriage provide that polygamous marriages that have been celebrated in a country in which polygamy is legal may be found to be valid in Canada.⁹¹⁴ Where a “potentially polygamous” marriage is found to be valid in Canada it can be deemed to be converted into a monogamous marriage.⁹¹⁵ Where a valid polygamous marriage is “actually polygamous”, and not converted to a monogamous marriage coming within the definition of “spouse” in either the *Divorce Act* or provincial family law acts, some provinces have specifically provided in their family law legislation that these spouses can apply for relief such as child support, spousal support and matrimonial property division.

Both Ontario’s and Yukon’s family property legislation extend the definition of “spouse” to include parties to a marriage that has been found, according to private international law rules, to be valid in Canada, although it is an actually or potentially polygamous marriage. Ontario’s *Family Law Act* provides:

1(2) In the definition of “spouse”, a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.⁹¹⁶

Yukon’s *Family Property and Support Act* defines spouse to include parties who are married to each other “even though the marriage is actually or potentially polygamous if the marriage was celebrated in a jurisdiction whose system of law recognizes the marriage as valid”.⁹¹⁷

⁹¹⁴ Private international law rules governing the validity of marriage provide that questions of essential validity are governed by the *lex domicilli*. Once essential validity is determined then the *lex loci celebrationis* governs the formalities necessary for the solemnization of marriage. *Kaur v Ginder* (1958), 13 DLR (2d) 465, 25 WWR 532 (BCSC).

⁹¹⁵ *Sara v Sara* (1962), 38 WWR 143 (BCSC).

⁹¹⁶ RSO 1990, c F.3, s 1(2).

⁹¹⁷ *Family Property and Support Act*, RSY 2002, c 83, s 1 “spouse”.

Express recognition of spouses to valid actual or potentially polygamous marriages in family property legislation is in the interests of women and children to these marriages in particular. Parties to a valid polygamous marriage are likely to be immigrants to Canada who may have less access to the Canadian labour market. In a report commissioned by the Status of Women Canada, researchers found that providing access for women in foreign, valid polygamous marriages to a division of matrimonial property, as well as spousal support, provided important protections for these women and their children on separation.⁹¹⁸ As one of the writers of the Report has more recently opined,

A legal response to polygamy that genuinely seeks gender equality and the protection of women would do more than prosecute a handful of men...

Instead, it would promote the recognition of polygamous unions if only to ensure that spouses can claim and benefit from the property sharing and alimentary support obligations that accompany monogamous partnerships.⁹¹⁹

On the other hand, polygamous marriages have been found to be offensive to public policy in Canada, and to entrench the subordination of women in these marriages.⁹²⁰ Recognizing family property division rights will not formally validate such marriages, but may serve to legitimize polygamous relationships in provincial law. Furthermore, although current Canadian immigration rules make it unlikely that multiple spouses will be making multiple claims to the same matrimonial property, extending the definition of spouse to plural marriages raises questions of how the same family property may be distributed among multiple claimants.

Nevertheless, in our view the practical, real-life protection of spouses in polygamous marriages is more compelling than any limited blow against polygamy that omitting spouses from such protection might strike. The legislation should recognize such spouses' entitlement to family property division.

⁹¹⁸ Angela Campbell et al, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Papers* (Ottawa: Status of Women Canada, 2005) online, Government of Canada <<http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>>.

⁹¹⁹ Angela Campbell, "Polygamy Prosecutions a Mixed Blessing for Women," *The Globe and Mail* (23 July 2015), online: <www.theglobeandmail.com>.

⁹²⁰ *Re Section 293 of the Criminal Code of Canada*.

Recommendation:

The definition of “spouse” should include reference to a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

13. TRANSITION

The transition from the *Matrimonial Property Act* to new family property legislation raises three key issues:

- a) how the new provisions will apply to common law partners;
- b) how the new law will affect applications begun under the old law; and,
- c) how the new provisions will apply to domestic contracts formed before the new legislation came into effect.

With regard to common law partners the new legislation will need to explicitly set out when rights and obligations under the new legislation will apply. Should the rights and obligations apply immediately to partners whose relationships have exceeded the prescribed duration period, and therefore ‘crystallized’, before the new *Act* comes into force?

In our view it should. We have not found any jurisdiction which has ‘grandfathered’ older common law relationships when family property legislation was extended to cover them. Likewise, when the *Matrimonial Property Act* came into force spouses who were already married were not excluded from its effect. It will be up to common law spouses who do not wish to be bound by the new law to make arrangements - e.g., a cohabitation agreement - in the lead-up to the new law.

There is also the issue of whether the new law or old will apply to applications begun, but not concluded, before the new law comes into effect. In British Columbia, the transition provisions to the *Family Law Act* provide that the old legislation will apply in the case of applications begun prior to the new law by a married spouse.

But the new law does not address the issue with regard to common law couples. In particular, it does not specify whether they may bring an application under the new law even though they have separated prior to its coming into force, or whether an existing application may be in effect converted to an application under the new law. This has led to some confusion. In particular, in the case of *Bressette v. Henderson*,⁹²¹ the trial judge noted the difficulty as follows:

122 The transition section under the *FLA*, s. 252, expressly continues proceedings under the former Act, the *Family Relations Act*, so that the new Act does not apply to those proceedings. But of course property claims between unmarried partners could not be brought under the *Family Relations Act*, nor was the present proceeding such a claim.

⁹²¹ 2013 BCSC 1661, WDFL 5343.

123 Arguably, there is ambiguity in the drafting of the transition provisions of the *FLA* as concerns property rights of unmarried spouses. The transition section does not expressly address what is to happen to proceedings between unmarried spouses which are undetermined when the *FLA* comes into force: does the new law apply or not?⁹²²

The *Family Law Act* limits the extent of the problem by requiring an application by a common law partner to be made within two years after separation,⁹²³ but for those who had already commenced an application, the issue of which law should apply remained unresolved.

The court in *Bressette* declined to decide the issue of whether the claimant was able to bring an application under the new Act, on the basis that the court did not have the benefit of sufficient argument on the point.⁹²⁴ The court decided the claim on an unjust enrichment analysis, commenting that even if the new Act did apply the result would have been the same.⁹²⁵

In a subsequent decision, *Meservy v. Field*,⁹²⁶ Hyslop J. held that if the parties met the definition of spouse in section 3 of the *Family Law Act* and they had brought their claim within two years of separation pursuant to section 198 of the Act, then the provisions of the new Act would apply.⁹²⁷

On the other hand, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* provides that the rights it affords with respect to lands and structures on reserve will be available only if the spouses or common law partners were still living together up to the day that the new law applied to the First Nation in question.⁹²⁸ Parties who separated before the new law came into effect will not be entitled to family property rights under the new law, in other words.

In our view the new legislation should have limited retrospective effect. New family property legislation in Nova Scotia should confirm that its provisions apply to parties who have qualified

⁹²² *Ibid* at paras 122-123.

⁹²³ *Family Law Act*, s 198(2)(b).

⁹²⁴ *Bressette v Henderson*, 2013 BCSC 1661, WDFL 5343 at para 130.

⁹²⁵ *Ibid* at para 133.

⁹²⁶ 2013 BCSC 2378, BCWLD 1070.

⁹²⁷ *Ibid* at paras 27-29, 58.

⁹²⁸ Section 54.

as common law partners, whether before the *Act* came into force or after, as long as the claim is brought within the applicable limitation period after separation. The transition provisions of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* have the benefit of certainty, but they defeat the claim of someone who left a relationship before the new law came into effect, even though the applicable limitation period has not run out. We have favoured including common law spouses under the legislation on the same basis as married spouses, for the most part, and the reasons for doing so apply whether the couple separated before or after the new legislation comes into effect. We do not see a significant reliance interest that would justify requiring a common law spouse who separated prior to the new law to be limited to a claim for a common law remedy once the new legislation has come into effect.

The new legislation should, however, continue the application of the *Matrimonial Property Act* to applications between married spouses or registered domestic partners begun under that *Act* - that is, before the new law is brought into effect.

That leaves the question of whether the same approach should apply to common law partners who have an existing claim under the common law (e.g., for unjust enrichment) in process when the new law comes into effect (ie., they may have been separated for more than two years). We recognize that there are procedural difficulties in permitting a conversion: a claim pleaded on the basis of unjust enrichment may require additional evidence and argument on both sides in order to be carried forward under the new legislation. This raises concerns about delay and access to justice.

But the new legislation will offer significant protection to former common law partners - in particular a presumptive equal division of family assets - as compared to the common law. The Commission is of the opinion that procedural concerns should not pre-empt an important evolution of the law's protection. We therefore recommend that where a common law partner has brought an application before the coming into force of new family property legislation the partner should be able to convert this application to one for a division of family property. We note that the courts in both British Columbia⁹²⁹ and Saskatchewan⁹³⁰ have found that common law partners can convert their applications for unjust enrichment and constructive trust brought before the respective Acts came into force into applications for division of family property.

⁹²⁹ See *Newton v Crouch*, 2016 BCCA 115, 85 BCLR (5th) 232.

⁹³⁰ *The Family Property Act*, SS, 1997, c F-6.3, s 3(c); see *Kelln v Walker*, 2002 SKQB 360.

Recommendations:

Family property legislation should provide that unless spouses or registered domestic partners agree otherwise, a proceeding respecting property division started under the *Matrimonial Property Act* must be continued under the *Matrimonial Property Act* as if the *Matrimonial Property Act* had not been repealed.

The new law should apply to common law partners or former common law partners regardless of whether the relationship reached the qualifying conditions (e.g., two years continuous cohabitation) or the parties separated prior to the new law coming into effect.

The legislation should expressly confirm that a common law partner may make an application under the new law, provided that the application is brought within the applicable limitation period (24 months) following separation.

The legislation should permit a common law partner to convert an application in respect of family property brought under the common law (e.g., for unjust enrichment) to an application for a statutory division of property under the new legislation.

There is also the issue of how the new *Act* should apply to domestic contracts. If eligible common law partners have made an agreement prior to the new law, which substantially deviates from the protections afforded by the new *Act*, should one of them be able to bring an application to challenge the enforceability of that domestic contract on the basis that its provisions are unconscionable or unduly harsh, in light of the new law extending rights to a presumptive equal division? In fact, the problem is not limited to common law partners, but also arises with regard to married spouses and registered domestic partners who made agreements prior to the new law which differ substantially from the new law's provisions - e.g. with regard to the presumptive equal division of (formerly excluded) business assets, or the presumptive exclusion of (formerly included) pre-cohabitation values. In light of the new law, such agreements may appear to be unduly harsh or unconscionable, even though they were not at the time they were negotiated.

British Columbia's *Family Law Act* provides that a proceeding to enforce an agreement as to property division made before the new law came into effect must be started or continued pursuant to the terms of the old law.⁹³¹

⁹³¹ *Family Law Act*, s 252(2)(a).

We disagree with this approach, as applied to marriage contracts and cohabitation agreements. Parties make agreements on the basis of the existing law - that is, in mind of what it already gives them. If that baseline changes the agreement may well turn out to be unduly harsh, in light of contemporary norms and the parties' own expectations in relation to their respective baseline entitlements. In that case the court should have discretion to intervene.

We did receive feedback on the Discussion Paper raising concern that this recommendation may serve to invalidate some domestic contracts. However, we anticipate that successful claims would be rare, since the party attacking the agreement would have to show that the parties' expectations had been seriously affected by the new law, to the point of unconscionability or undue harshness.

We do not recommend applying the standards of the new law to separation agreements made before the new law comes into effect. A separation agreement will be made at a time when spouses are finally dividing their assets and separating permanently. Separation agreements are akin to orders for family property division in this respect and should not be revisited on the basis of a change in the law since it was made. Separation agreements made prior to the new law coming into effect should be enforced according to the standards of the *Matrimonial Property Act*, or the common law, as the case may be.

Recommendations:

The legislation should not require that a proceeding concerning the enforcement of a marriage contract or cohabitation agreement made prior to the new law coming into effect must be started or continued under the former law.

The legislation should require that a proceeding concerning the enforcement of a separation agreement made before the coming into force of the new legislation must be started or continued under the former law.