

*Manitoba Association of
Women and the Law Inc.*



The Changing Family: Furthering Equality in Manitoba's Property Legislation

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Executive Summary

Equality between the many diverse families in Manitoba and Canada fails to always be a reality. Current discrepancies in provincial legislation favour married couples over common-law and same-sex couples although statistics show an ever-increasing number of couples are choosing to live as common-law couples rather than marrying. Same-sex couples have even fewer rights within marital property and succession law legislation. MAWL Inc. encourages the Government of Manitoba to step forward and eliminate this discrimination through legislation that will ensure that rights are attainable for all. Our present system is heavily reliant on turning to the courts when the legislation is unclear or discriminating. For the public to attempt to right such inequity singularly means expensive litigation. This option is not available to most Manitobans. Only the provincial government can correct this injustice.

The government of Manitoba has already made very progressive steps in amending its previous legislation to conform to our changing families. MAWL Inc. congratulates the government for encouraging equality among families with the proclamation of *The Charter Compliance Act*, which extends to same-sex and common-law couples rights they were long denied. However, MAWL Inc. is troubled by the lack of consistency in defining common-law relationships shown within the amended legislation.

The government has also introduced *The Common-Law Partner's Property and Related Amendments Act*, a particularly progressive statute that would entrench equality of common-law and same-sex couples. But MAWL Inc. is concerned that this *Act* has yet to be proclaimed. The provincial government may feel there is no need to proclaim *The Common-Law Partners' Property and Related Amendments Act* because of the recent Supreme Court of Canada decision of *Walsh v. Bona*, where the court denied that common-law couples have the same property rights as married couples. However, to allow common-law and same-sex couples to go unprotected when most Manitobans favour this legislation is extremely unfair and unjustifiable. MAWL Inc. strongly urges the government to proclaim *The Common-Law Partners' Property and Related Amendments Act* as soon as possible.

MAWL Inc.'s review of family property legislation reveals clearly that more work must be done to improve the rights available to Manitoban families. After examining various pieces of legislation in Manitoba, including *The Marital Property Act*, *The Homesteads Act*, *The Dependent's Relief Act*, *The Intestate Succession Act* and *The Family Maintenance Act*, MAWL Inc. has developed a list of recommendations required to guarantee to all Manitobans equal treatment and equality under the law and to eliminate uncertainty in the law. These recommendations reflect the shifting face of Manitoba's families.

MAWL Inc.'s Key Recommendations
Recommendations Re: *The Marital Property Act*

1. The *Act* should be amended to allow the estate of a deceased spouse to make an application under the *Act* if the parties were living separate and apart at the time of the death of one party.
2. The exemption in s. 7(4) to the sharing of the increase or decrease in value of a gift or inheritance should be abolished. In all cases, the increase or decrease in value and the income from the gift or inheritance during the time of cohabitation or marriage should be shareable unless the court considers it grossly unfair or unconscionable. This recommendation brings Manitoba in line with provisions available in Alberta, Saskatchewan, Prince Edward Island, The Northwest Territories and Nunavut.
3. S. 7 of *The Marital Property Act* should be amended so that gifts and inheritances are presumed exempt unless:
 - i. The gift or inheritance was intended to benefit both parties;
 - ii. The gift or inheritance was used as a family asset instead of only to purchase a family asset;
 - iii. The gift or inheritance was used to purchase or improve a family asset.
4. There should be more specific discretion given to the courts to encourage judges to alter the equal sharing of assets where the exemption in the marital property divisions having regard to all the circumstances, including the efforts of both spouses towards that property.
5. Jointly-held assets should be included in *The Marital Property Act* to give judges more flexibility in awards and to ensure equality
6. A new section should be added regarding management and control of non-shareable property. The owning spouse should be placed under a fiduciary duty towards the non-owning spouse. Although one spouse owns the property, that spouse's actions towards the non-shareable property must have regard to the marital property situation as a whole. For instance, the spouse may not manage or control the non-shareable property in a way that limits, diminishes or fails to produce income from or increase the value of that property of which income and appreciation should be shareable.

7. Professional degrees earned entirely during marriage should be classified as shareable property upon the dissolution of marriage, similar to a recent New York state decision.
8. Detailed regulations should be adopted for *The Marital Property Act*, further defining what is shareable and what is not shareable.
9. Sections 31 and 32 of *The Marital Property Act* should be amended to require independent legal advice of a spouse releasing the estate and to make clear that notice be served in all instances where a spouse does not receive the entire estate of his/her deceased spouse.

Recommendations Re: *The Homesteads Act*

1. A revision should be made to the statements respecting the election of a homestead filed at the Land Titles Office. The statement should be revised with clauses stating:
 - 1) I have never lived on this property with my spouse or common-law spouse or same-sex partner; or
 - 2) My spouse, common-law spouse or same-sex partner has filed an election to elect a different property as the homestead, or
 - 3) The person who consents to this transfer is my spouse, common-law/same-sex partner.
2. The homestead consent or any other election of a spouse or document required to be signed by a spouse under *The Homesteads Act* must be accompanied by a declaration of independent legal advice.
3. *The Homesteads Act* should be amended to require the owners to give notice to a surviving spouse of their right to elect a different homestead if *The Homestead Act* could apply to more than one property and to give notice of the spouses homestead rights to the spouse. The notice should be similar to section 31 of *The Marital Property Act*.

Recommendations Re: *The Dependent's Relief Act*

1. *The Court of Queen's Bench Surrogate Practices Act* should be amended to require the executor or administrator of an estate to make an investigation of the deceased's affairs and to list any persons the executor/administrator thinks may be a potential dependent of the deceased in their application for probate or

administration. The executor/administrator should be made to serve these potential dependents with a notice notifying the potential dependents of their right to make a claim under *The Dependents Relief Act*. Personal liability should be imposed upon the executor/administrator if they fail to serve the notice and distribute the estate when they know or ought to have known that a person was a dependent and might have a claim pursuant to *The Dependents Relief Act*.

2. *The Court of Queen's Bench Surrogate Practices Act* should also be amended to require all executors/administrators to make applications for probate/administration notwithstanding that third party financial institutions may agree to transfer the estate assets without probate. The Act should make third party institutions that deal with estate assets without probate or administration liable to any potential dependents for their claims under *The Dependents Relief Act*.

Recommendations Re: New Legislation

1. *The Common-Law Partners' Property and Related Amendments Act* should be proclaimed immediately.
2. *The Charter Compliance Act* should be further reviewed to ensure a consistent definition of "spouse" in all Acts with the exception of *The Adoption Act*. *The Adoption Act* should be amended to ensure that judicial discretion is only available to shorten the qualifying period and not to increase it.
3. All amendments under *The Common-Law Partners' Property and Related Amendments Act* should apply to all relationships that existed on the date the legislation was introduced into the legislature (August, 2002) so no one is left without protection.
4. Spousal Agreements
 - a) Any agreement between spouses/partners made prior to the introduction of either *The Charter Compliance Act* or *The Common-Law Partners' Property and Related Amendments Act* should be presumed invalid but that presumption should be rebuttable if the parties or a party can show a court that there was valuable consideration given by each spouse for the waiver and that the valuable consideration was of sufficient nature considering the rights being waived.
 - b) Any spousal/partner agreement, prenuptial or postnuptial agreement made prior to the introduction of either *The Charter Compliance Act* or *The Common-Law Partners' Property and Related Amendments Act* waiving property rights

should be presumed invalid unless both spouses obtained independent legal advice.

- c) All future spousal/partner agreements will be presumed invalid unless both spouses/partners obtain independent legal advice.

National Recommendations

1. MAWL Inc. applauds the decision and the Government of Canada's principled approach in amending *The Marriage Act* to allow same-sex marriages and equality rights. The Government's position upholds the Charter and is the only position it could take. These amendments should be proclaimed as soon as possible. MAWL Inc. urges all Members of Parliament to vote in favour of amending *The Marriage Act*. MAWL Inc. recommends that all provinces and territories amend their legislation to give common-law and same-sex couples equal rights to property division upon separation from or upon the death of their partner/spouse.
2. The rights of spouses upon separation vary widely throughout the country. MAWL Inc. calls on the federal government to use their persuasive powers to encourage all provincial and territorial governments to treat all their citizens fairly and to encourage provincial and territorial governments to revise their family and property legislation to ensure equality for all.

Re: Adopting Instantaneous Community of Property

MAWL Inc. reviewed the jurisdictions and types of community of property. After careful consideration, MAWL Inc. recommends that Manitoba refrain from adopting a full instantaneous community of property scheme provided our other recommendations (including those dealing with fiduciary duty to account) are adopted.

Spouses should hold all marital property in a fiduciary capacity for both spouses' benefit regardless of who is the owner. The spouses should have a legal duty to keep the other spouse informed and to discuss with the other spouse decisions that affect the property. The failure to keep the other spouse informed or the failure to act prudently with the assets should be a factor in awarding an unequal sharing of marital property. This fiduciary duty cannot be altered by any marital property agreement.

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PART ONE: Marital Property Law in Manitoba – As It Exists Today and Suggestions For Improvement

I. INTRODUCTION

This paper is founded upon the principles of equality. All Canadians, regardless of their gender or sexual orientation, have the right to be treated equally under the law. An examination and analysis of current family law in Manitoba, and in Canada in general, reveals that equality does not always exist. The purpose of this project is to explore family legislation, including recent statutory amendments, and provide recommendations for further amendments in an effort to bring greater equality to Manitoban and Canadian families. The following analysis outlines the discrepancies in the rights provided for married couples, opposite-sex common-law couples and same-sex common-law couples in family and property legislation. The uncertainty and discrimination present in many statutes may lead to costly litigation in an attempt to equalize status. It is unfair to force an individual to take a matter to court when that right is already guaranteed through *The Charter of Rights and Freedoms*

The general public presumes that an unmarried, cohabiting couple automatically gain rights after they have cohabited for a set period (the usual assumption is six months to one year). This is not the law in Manitoba or in Canada. This project will examine the legal regime that extends rights to married couples only, and the steps that have

recently been taken by government and the courts to better equalize the lives of common-law couples with those of married couples.

At present, even after considering recent amendments to legislation, family law in Manitoba is administered by a number of statutes that generally extend rights to married couples only. *The Marital Property Act* authorizes the distribution of family assets after marital breakdown or the death of a spouse; the *Act* is only concerned with the rights of the married couple. The *Act* does not address the needs of common-law couples, particularly those in long-term relationships that end with one partner being left financially empty-handed. A common-law, cohabiting relationship is not recognized under the law as a relationship of shared responsibilities and obligations. Common-law partners, therefore, do not have equal rights to family and commercial assets, nor to any appreciation in the value of such assets, after the relationship has terminated. In addition, a common-law spouse does not have the right to occupy the home in which the couple resided prior to the end of the relationship. The only way a common-law partner can receive a share in the family assets is by constructive trust, a costly, time-consuming litigation procedure.

The Marital Property Act raises concern regarding married couples, also. Although most family assets are shareable, the *Act* exempts from sharing certain specific assets, namely gifts and inheritances received from a third party. A spouse is also not entitled to any appreciation or depreciation in value of those assets. Although the court has

jurisdiction to order an unequal distribution of assets, there is no specific judicial discretion to vary the gift and inheritance provision. The appreciation in value of an asset that may have appreciated due to the contribution of the non-owning spouse is excluded from sharing.

Similarly, *The Homesteads Act* is only applicable to married spouses. This *Act* guarantees a surviving spouse the right to a life estate in the family home after the death of the owning spouse. When the common-law partner who owns the home the couple has been living in dies, the surviving partner has no right to remain living in the home. Unlike married spouses, the owning common-law partner has the right to dispose of the home without any consent on the part of the non-owning, common-law partner. Furthermore, the owning partner may give the property to someone in his/her will without concern for the non-owning partner.

In addition, *The Homesteads Act* fails to fully protect married spouses despite its intent to do so. A surviving spouse may elect only one home as a homestead, but often the surviving spouse is unaware of this. There is no requirement for independent legal advice under the *Act* to ensure that all individuals make an informed choice that is most beneficial to them.

The Dependent's Relief Act is available to common-law partners, provided they meet the time qualification requirement of cohabitation of not less than five years. The definition

specifies a couple of opposite-sex, thus excluding same-sex couples. The *Act* authorizes partners to apply for support after their partner has died, and the order may be varied according to judicial discretion. However, the *Act* does not require an executor/administrator to seek out all individuals who may have been dependent on the deceased.

The Family Maintenance Act is applicable to married spouses and to common-law couples, but only to opposite-sex couples. The *Act* provides support and maintenance to married and opposite-sex common-law couples during and after the termination of their respective relationships. The *Act* provides wide judicial discretion in the awarding of support and maintenance. *The Intestate Succession Act* and *The Wills Act* extend rights to married couples only. Therefore, a common-law partner does not automatically incur rights after the death of their partner.

It was only a matter of time before the Canadian courts had to consider the inequality of family law legislation. This area of the law was forced to undergo major revamping after a Supreme Court of Canada decision in 1999. The result of the case of *M. v. H.* has been the drastic amending of provincial legislation throughout Canada to provide the same rights for same-sex, cohabiting couples as those provided for opposite-sex, cohabiting couples. The decision of the Court was 8-1 in favour of extending support and maintenance rights to same-sex couples; opposite-sex couples were already provided with those rights. The Supreme Court held that the *Family Law Act* of Ontario

drew a distinction by specifically giving rights to individual members of an unmarried, cohabiting, opposite-sex relationship while denying those same rights to members of an unmarried, cohabiting, same-sex relationship.

This decision has had a profound impact on family law across Canada, redefining the rights of same-sex couples in almost all jurisdictions. In response to the *M. v. H.* decision and its implications on provincial legislation, the Manitoba government created a review panel comprised of two distinguished legal experts to examine what changes were needed. In recognition of the recommendations of the panel, the government introduced *The Charter Compliance Act*, which amends various pieces of legislation. The *Act* came entirely into force on January 01, 2003 and is now the law in Manitoba.

The Charter Compliance Act amends the definition of “spouse” and “common-law relationship” in most existing statutes. In all cases, a common-law relationship includes a same-sex relationship. In many but not all cases, the definition provides a common-law relationship with the same rights as married couples. The amendments mean that same-sex and opposite-sex cohabiting couples may adopt jointly under *The Adoption Act*. Same-sex couples may be registered as parents of a child at birth, under *The Vital Statistics Act*. A common-law partner has the right to be protected from their partner’s criminal offender, under *The Victims Bill of Rights*. A common-law partner has the right to make treatment decisions for his/her partner if the partner is not mentally

competent, under *The Mental Health Act*. A common-law partner has the right to claim the body of their partner, under *The Anatomy Act*.

The *M. v. H.* decision has required that throughout the provinces the definition of common-law couple must now include same-sex couples. However, the new definitions are uncertain because they are different in all jurisdictions, and often differ among specific legislation within each jurisdiction.

In Manitoban legislation, for instance, there are four different definitions of a common-law relationship. Thirty-three statutes characterize a common-law relationship as “a relationship of some permanence”. Six statutes employ a definition of “a relationship of at least one year”, two statutes employ the definition “six months of cohabitation” and one uses “three years of cohabitation, or one year if the couple are the parents of a child”. Some amendments use a three year definition and do not specify a different time period if there is a child. Three statutes state a one year requirement if neither party is married and a three year requirement if one party is married (but not married to the partner in question). These discrepancies propagate uncertainty that should have been eliminated by the amendments. MAWL Inc. recommends that the government create a more certain and reliable definition of common-law partner. Six definitions among forty-one pieces of legislation are confusing to the general public; rights should be extended in a comprehensive manner to guarantee certainty in the law for common-law cohabiting couples.

Other provinces have made amendments to their family legislation in accordance with the Supreme Court of Canada. All jurisdictions have passed some form of legislation that will extend the same rights to opposite-sex and same-sex cohabiting couples except Prince Edward Island, as their *Act* has not yet been proclaimed. However, the rights extended are generally restricted to spousal support and maintenance rights and do not include property rights. Only Saskatchewan and Quebec have granted property rights to cohabiting couples.

An examination of European legislation revealed that most European countries extend rights to both same-sex and opposite-sex common-law couples and have done so for a number of years. Several countries have registration systems in place, mostly restricted to same-sex couples, and the Netherlands recognizes same-sex marriage. MAWL Inc. will examine European family laws to determine whether or not Manitoba should take a similar course.

The Supreme Court of Canada decided another important family law case. The case of *Walsh v. Bona*, decided in December 2002, has had a significant impact on family property law. The decision was expected to result in the overhaul of all provincial legislation related to marital property. The case involved a couple that had lived common-law. After the end of their relationship, one partner sought a division of family assets under the Nova Scotia *Matrimonial Property Act*. The Court decision, however, was not in favour of extending marital property rights to common-law

couples. The Court held that a marriage was an economic contract and a common-law relationship was not; therefore, no property rights were available to common-law couples.

MAWL Inc. was disappointed in this decision. It is commonly thought by the majority of Canadians that property rights are available to common-law couples after they have lived together for a certain amount of time. This is not the case; therefore, people who have not formalized any sort of agreement regarding property need protection when their relationship breaks down. Common-law relationships are clearly on the rise. Statistics show that these relationships grow in number every year. A lessening of religious influence on the lives of Canadians may be increasing the number of common-law relationships, and statistics show that this decreasing religious affiliation is also on the rise.

The province of Manitoba expected the *Walsh v. Bona* decision to conclude that common-law partners should have equal property rights to married partners. In anticipation of this result, the Legislature had introduced and received Royal Assent to *The Common-Law Partners' Property and Related Amendments Act* in August, 2002. Under this Act, amendments would be made to all existing property legislation to include common-law partners, both same-sex and opposite-sex, as well as married partners. For instance, the property rights provided for under *The Marital Property Act*, including an accounting and equalization of family assets, would be extended to unmarried,

cohabiting couples. In addition, *The Homesteads Act* and *The Intestate Succession Act* would extend rights to common-law partners. However, the Supreme Court of Canada went in the opposite direction. As a result, the government has not yet proclaimed this *Act*.

The *Act* is extensive in granting equality rights and MAWL Inc. applauds the government for introducing such innovative legislation. MAWL Inc. urges the government to proclaim the *Act* immediately. MAWL Inc. is concerned, however, with a provision in *The Common-Law Partners' Property and Related Amendments Act* dealing with pre-existing agreements. The *Act* proposes that agreements between couples in place before the *Act* is proclaimed will remain valid. MAWL Inc. disagrees: an agreement made when rights were not guaranteed cannot remain valid once those rights become available. The agreement was signed with the understanding that the common-law spouse had no right to property. Therefore, no rights were being given up. MAWL Inc. recommends that such agreements be presumed to be invalid, with the option of rebutting the invalidity by proving valuable consideration was given and independent legal advice was sought.

Furthermore, MAWL Inc. is worried that *The Common-Law Partners' Property and Related Amendments Act* is only applicable to couples after the *Act* has been proclaimed. This allows and indeed encourages current common-law partners to abandon their relationships before property rights are applicable to them. This does not afford

protection to those who need it the most - vulnerable partners. MAWL Inc. is aware of lawyers who are counselling their clients to leave their common-law spouses prior to proclamation. MAWL Inc. thus recommends that the *Act* be applicable to all couples as of the date the legislation was introduced into the legislature.

A recent Court of Appeal of Ontario decision, rendered June 10, 2003, is expected to cause further monumental changes to family law in Canada.¹ Eight same-sex couples launched a constitutional challenge against the definition of marriage being limited to a union between a man and a woman. The Ontario Court of Appeal held that that definition offends the *Charter of Rights and Freedoms* rights of s. 15(1) in that the definition creates a formal distinction between same-sex and opposite-sex couples based on sexual orientation. The Court declared the current definition invalid and created a new definition: the voluntary union for life of two persons to the exclusion of all others. The Court ordered that this definition take immediate effect. The Federal government has announced it does not intend to appeal this decision to the Supreme Court of Canada, and that it will introduce into Parliament an bill to legalize same-sex marriages. Organizations opposed to this proposed legislation have indicated they will appeal the decision to the Supreme Court of Canada as being contrary to the *Charter*. In its decision, the Ontario Court of Appeal held that recent amendments to legislation were not good enough to extend equal treatment under the law to same-sex couples. MAWL Inc. applauds the federal government's progressive approach in ensuring that

¹ *Halpern et al. v. Attorney-General of Canada* (2003), Ontario Court of Appeal

equality for all Canadians is guaranteed. MAWL Inc. encourages all Members of Parliament to vote in favour of the bill to amend *The Marriage Act*, and that that *Act* be amended as soon as possible.

As mentioned, this paper also examines the sections of the current *Marital Property Act* related to the exemption of certain family assets from accounting and equalization, specifically assets acquired by gift or inheritance. Although the *Act* has a provision for judicial discretion to make an unequal distribution of assets, there is no discretion available to make a gift or inheritance, or its appreciation or depreciation, shareable. These exemptions and the lack of discretion raises question as to the fairness of the section.

The uncertainty reflected in case law in this area strengthens the need for change to create greater fairness in family property distribution. The case law is inconsistent in determining what is a shareable and non-shareable asset under the gifts and inheritances section. An examination of various cases reveals a complete lack of certainty in the area. MAWL Inc. provides various suggestions and recommendations on this issue to create more reliable provisions.

The changes, both in effect and pending, to family law in Manitoba are progressive. MAWL Inc. praises the government of Manitoba for taking broad steps to better equalize families in this province. MAWL Inc. is disappointed, however, at the limited

focus in approaching the amendments. All relevant statutes should have been reviewed thoroughly to analyze their impact on the changing face of Manitoban families. MAWL Inc. recommends that the government undertake a further review of family property legislation as soon as possible and enact further amendments to ensure greater equality and to eliminate uncertainty.

MAWL Inc. is further disappointed that the government has delayed proclaiming *The Common-Law Partners' Property and Related Amendments Act*. The *Act* goes a long way in bringing equality rights to Manitobans and should be instituted as law in this province. However, MAWL Inc. would prefer to support a statute that was retroactive to the date of introduction into the legislature instead of the date of proclamation.

II. SUMMARY OF THE LAW REGARDING COMMON-LAW SPOUSES AND SAME-SEX SPOUSES IN MANITOBA PRIOR TO THE NEW LEGISLATION

Many people believe that when a man and woman live together, unmarried, for a certain amount of time, they acquire the same rights as a married couple. This has not been the case in Manitoba. Prior to the passing of two new statutes, *The Charter Compliance Act*, which is proclaimed and now law, and *The Common-Law Partner's Property and Related Amendments Act*, which is not yet proclaimed, legislation that concerned family and property issues mostly applied to married couples only.

A) The Marital Property Act

The Marital Property Act was introduced in Manitoba on May 6, 1977.² The *Act* applies to all married persons living in Manitoba, whether they were married before or after the proclamation of the *Act*. It applies to individuals married in Manitoba or in another jurisdiction. However, it does not apply to spouses who were living separate and apart when the *Act* took effect (May 6, 1977) and who have not resumed cohabitation for more than 90 days after that date.

The *Act* defines a spousal relationship as two people who are married to each other.

The rights, responsibilities and obligations of the *Marital Property Act* are not applicable

² *The Marital Property Act*, CCSM, c. M45

to common-law spouses nor are they applicable to same-sex spouses because neither of those relationships is solemnized through legal marriage.

The purpose of the *Act* is to recognize that because some marriages break down and the balance end upon the death of one spouse, a system is needed to provide for a distribution of marital assets upon the occurrence of either event. The *Act* provides the presumption that marriage is a relationship of shared responsibilities and obligations; each spouse has equal rights within the marriage. For example, each spouse has the same right to the use and enjoyment of the family car (use of family assets- s. 6[3]). The *Act* also supports the presumption that a spouse who manages the household contributes to the marriage as equally as a spouse who earns an income outside of the home.

The Marital Property Act presumes that in a marriage, because there are shared responsibilities and obligations between each spouse, each spouse should equally share the rights to the family and commercial assets acquired during the marriage. Family assets are those owned by both or either of the two spouses and used for family purposes, such as shelter, transportation, household, educational or social purposes. One example is money in a savings account where the account is ordinarily used for paying the house mortgage; another example is the summer cottage used by the family on vacations. Commercial assets are assets that do not fall under the family asset category; examples include small businesses, farms and investments. The marital home

is the dwelling in which both spouses have resided as their family home. The marital home definition also includes the land on which the home itself sits. Each spouse has an equal right to the use and enjoyment of the marital home and the other family assets, and the right to share equally in both family and commercial assets less the debts owing on the assets. These assets are thus called shareable assets.

The *Act* exempts certain property from being shared. Any property that was owned by one spouse prior to the marriage is not shareable, according to s. 4[1a], [1b], [1c]. This includes any assets acquired while the spouses were living separate and apart or while unmarried. However, if the property was purchased in contemplation of marriage, it will be shareable (s. 4[2]).

A spouse is also generally entitled to any appreciation or depreciation in the value of a shareable asset. A spouse has the right to an equal share of appreciation in value of an asset that occurred while the spouses were married to and cohabiting with each other (s. 4[3a]). A spouse is entitled to any depreciation in value of the asset and any income that was earned from the asset (s. 4[3b] and 4[3c]). Also, the proceeds of a non-shareable asset may be shareable if the proceeds of an otherwise unshareable asset were used to purchase a family asset (s. 6[5a] and s. 6[5b]). For instance, the RV that was bought with the wife's inheritance and used for all family vacations may be deemed shareable. The process of changing a non-shareable asset into a shareable asset is called conversion.

The *Act* also exempts from sharing the following: gifts made to one spouse by a third party if the gift is not intended to benefit both spouses (s. 7[1]), an insurance policy paid for by a third party (as a gift) (s. 7[2]), and an inheritance (s. 7[3]). The appreciation and depreciation of these assets are also not shareable (s. 7[4]). The *Act* does give a judge some discretion with respect to gifts and inheritances – s. 14 states that either spouse may apply for an unequal division of assets if the court is satisfied that an equalization would be grossly unfair or unconscionable, having regard to any extraordinary financial or other circumstances of the spouses or the extraordinary nature or value of any of their assets. This could include gifts or inheritance. S.14 (2) deals with commercial assets and allows a judge to vary an equal sharing of commercial assets based on one of the eight factors. One of these is whether the spouse has extraordinary assets acquired by gift or inheritance. However, Manitoba judges have not used this section.³

▪ **RECOMMENDATION**

MAWL Inc. recommends that a more specific discretion should be included in s. 14 of *The Marital Property Act* To encourage judges to exercise their discretion to vary the equal sharing of assets where the exemption of an inheritance or gift creates unfairness in the marital property division, having regard to all the circumstances

³ Although s. 14(1) does let a judge consider the extraordinary nature or value of a gift or inheritance, it has not often been used.

including the efforts of both spouses toward that property, the impoverishment of one spouse due to the marriage, etc.

Jointly held assets are also not included in an accounting as, in theory, they are already jointly shared (s. 10). The fact that the court cannot consider jointly shared assets often causes hardship to one spouse – this asset could be the only property. The exemption of joint assets from the *Act* may result in further court proceedings (partition and sale), which are expensive and unnecessary. The exemption of jointly held assets limits the courts ability in making fair and just awards.

▪ **RECOMMENDATION**

MAWL Inc. recommends that the *Act* should be changed to include jointly held assets in an accounting and equalization of assets.

If a marriage dissolves or is ended by the death of one spouse, the separated spouses or the surviving spouse have a right to an equal division of the shareable assets. To facilitate the sharing of marital assets after separation and/or divorce, the spouses must apply for an accounting and an equalization of the marital assets in accordance with s. 13. An accounting is the process of compiling a complete list of the assets and debts owned by each spouse. This list must include the value of each asset and debt at the time of separation. The court then determines an equalization. The equalization is the amount that the spouse who owns assets of greater value will pay to the other spouse in

order to have the assets shared equally. A spouse may apply to the court for an accounting and equalization of marital property even if the parties are living together (s. 13), although this rarely, if ever, occurs. MAWL Inc. is not aware of any cases in this area. Upon dissolution of the marriage or the death of one spouse, the non-owning spouse cannot claim the actual asset of the owning spouse, but he/she is entitled to an equalization and accounting from the other spouse.

It should be noted that only the surviving spouse has a right to apply for an accounting; the estate of the deceased spouse cannot apply. The estate can only continue an action already started. This provision forces separating spouses to make an application under the *Act* immediately to protect their share of the marital assets for their family.

▪ **RECOMMENDATION**

MAWL Inc. recommends that the *Act* be amended to allow the estate of a deceased spouse to make an application under the *Act* if the parties were living separate and apart at the time of the death of one party.

The court has jurisdiction to alter the equalization so that one spouse receives a greater than equal amount. For the equalization of family assets, the court will only alter the amount if it considers that an accounting based on the *Act* is “grossly unfair or unconscionable” (s. 14[1]). To determine this, the court may look at any extraordinary financial or other circumstances of the spouses, or the extraordinary nature or value of

any of the family assets. For the equalization of commercial assets, the court has greater discretion to determine if the equalization would be inequitable (s. 14[2]). Some factors the court might consider are: unreasonable impoverishment of the spouses; the amount of debts and liabilities of the spouses and how they were incurred; any extraordinary assets that were acquired through a gift or inheritance; spousal agreements; the length of time the spouses were separated; the nature of assets, and; the extent to which the earning capacity of the spouse is affected by the circumstances and responsibilities of the marriage. To date, Manitoba courts have rarely used their discretion to vary the equal sharing. MAWL Inc. is pleased that courts have rarely exercised their discretion to vary an equal sharing of shareable assets. However, MAWL Inc. is concerned that judges have not varied sharing to account for one spouse receiving gifts or inheritances even in cases where the non-owning spouse has added value to these assets. Further guidance by the legislature is obviously necessary.

▪ **RECOMMENDATION**

MAWL Inc. recommends that the exemption in s. 7(4) of *The Marital Property Act* to the sharing of the increase or decrease in value of a gift or inheritance should be abolished. In all cases, the increase or decrease in value and the income from the gift or inheritance during the time of cohabitation or marriage should be shareable unless the court considers it grossly unfair or unconscionable. This recommendation brings Manitoba in line with provisions available in Alberta, Saskatchewan, Prince Edward Island, The Northwest Territories and Nunavut.

There is great uncertainty under the *Act* as to the definition of shareable assets and debts, and how each should be considered in the accounting and equalization. For instance, how is a farm inventory such as growing crops and crops in bins to be valued? What is shareable and what debts are shareable? What about inventory of a business or a farm where the business or farm was acquired prior to the marriage but has increased in value during the marriage? What about the debts associated with these assets or debts attributable to non-shareable assets or debts? Or debts part attributable to non-shareable assets and part attributable to shareable assets, such as operating lines of credit in a business or farm? The land may have been acquired prior to marriage by a gift so it is exempt, but how are the growing crops on the land to be characterized? What about the debt that accrued to put in the crop? Does it make a difference if the debt is secured by a mortgage on non-shareable property or on shareable property? This uncertainty results in lawyers being unable to properly advise their clients and in unnecessary litigation, which costs all Manitobans significantly in unnecessary legal fees to the litigants directly involved and in unnecessary court administration expenses to Manitoban taxpayers generally.

It is also unclear whether gifts or inheritances acquired before the marriage fall within s. 7 as a gift, which is totally exempt from sharing, including any increase or decrease in value during the marriage, or whether they fall within s. 4, as an acquisition prior to the

marriage where the increase or decrease in value is shareable. These uncertainties should be clarified.

▪ **RECOMMENDATION**

MAWL Inc. recommends that the government adopt detailed regulations to *The Marital Property Act (The Family Property Act)* to address these uncertainties. These regulations should also include making gifts and inheritances acquired prior to the marriage s. 4 assets so their increase or decrease in value during the marriage is shareable.

Part IV of *The Marital Property Act* specifically contemplates the accounting and equalization of marital assets upon the death of a spouse. The value of the shareable assets can be included in equalization if the spouses were cohabiting at the time of the death. Part IV was added to the *Act* in 1992 to meet the argument of women's groups that the *Act* gave an incentive to separate. Before this provision, a separated spouse was entitled to significantly more than the widow(er), who was left with only her *Homestead Act* entitlement and a potential claim under *The Testator's Family Maintenance Act* (now *The Dependent's Relief Act*) or what her spouse bequeathed to her in his will. Part IV attempts to give the spouse who remained married and cohabiting until death at least as great a claim to the deceased spouse's estate as a separated spouse would have. In fact, it gives the married spouse a greater claim - that spouse now has the right to: half of all the shareable assets and all of the jointly held assets, and; life insurance and

RRSPs payable directly to the surviving spouse on the death of a spouse. Part IV also provides protection to the surviving spouse if the deceased spouse attempted to divest assets to others prior to his/her death for less than full value. In addition, the costs of the funeral and testament will not be included in the equalization; these costs are fully payable from the share of the deceased spouse's estate going to others (s. 36).

The surviving spouse has the right to apply for an accounting after other estate liabilities have been paid, but before any gifts in the will are paid. The surviving spouse's rights also supersede maintenance obligations or orders of the court under *The Dependent's Relief Act* (s. 41[1]). In the equalization process available to the surviving spouse, certain provisions exempt some marital assets. These include an asset that was owned jointly with the deceased spouse, if the surviving spouse has the right of survivorship (s. 37[a]), and a life insurance policy payable on the death of the deceased spouse (s. 37[b]).

It is important to note that Part IV does not occur automatically. The executor of the deceased's estate must serve a notice on the surviving spouse within one month of probating the estate. That notice gives the surviving spouse the right to elect an accounting under the *Act* within six months of service (s. 31). If the executor fails to service the notice and/or distributes the estate prior to getting a release or waiting the six months, the executor becomes personally liable to the surviving spouse under s. 31. Therefore, unless the surviving spouse is receiving the entire estate in the will, the

executor should always serve the notice on the surviving spouse. What if the executor does not do this and distributes the estate? If the surviving spouse does not know his/her rights or if the executor has little or no personal assets, the surviving spouse may have a right but that right may be unenforceable. Under s. 30, the surviving spouse has the right to apply to the court to suspend the transfer of the deceased's assets to the other beneficiaries. However, the surviving spouse has to be aware of this right.

MAWL Inc. is concerned that often the notice to the surviving spouse is not served. This can occur for a number of reasons: first, the executor or administrator does not obtain legal advice and is unaware of the requirement of serving notice. A recent trend has developed where financial institutions often do not require probate, so many estates are now administered without probate or any legal assistance; second, legal counsel to the estate does not take the time to calculate the accounting owed to the spouse and therefore, the legal counsel does not properly advise the executor/administrator that the notice must be served; third, the surviving spouse need not obtain independent legal advice to release their claim to the estate. The spouse may not realize they are not adequately provided for and what their actual entitlement is. The surviving spouse thus signs off without being properly advised.

▪ **RECOMMENDATION**

MAWL Inc. recommends that s. 31 and 32 of *The Marital Property Act* be amended to require independent legal advice of the spouse releasing the estate and to make clear that a notice be served in every instance where the spouse does not receive the entire estate.

B) The Homesteads Act

The Homesteads Act replaced *The Dower Act* and was proclaimed in Manitoba on August 15, 1993.⁴ *The Homesteads Act* only applies to married couples; it does not apply to common-law spouses or same-sex spouses (s.3). *The Homesteads Act* only applies if the marital home is in one spouse's name and the other spouse has lived there with their spouse. The purpose of this *Act* is to give to a non-owning spouse a life interest in the homestead when his/her owning spouse dies and does not leave the homestead to the surviving spouse. The *Act* protects the surviving spouse after his/her spouse dies by ensuring the surviving spouse may remain in the family home. The *Act* guarantees the surviving spouse the ability to continue to live in the marital home rent-free for the rest of their life. If the house is on a farm, the *Act* defines homestead to include up to 320 acres of land surrounding the home. The surviving spouse is entitled to the income from the homestead, being the rental income from the house and the surrounding 320 acres of land if they choose not to live in the marital home or actively farm the adjacent land. These rights exist for the term of the surviving spouse's life.

Any gift of the homestead to children or others in the will is subject to the life interest of the surviving spouse. Thus, the homestead can only be passed on to anyone else in the deceased spouse's will subject to the surviving spouse's life interest in the homestead. If the owning spouse has tried to give the homestead to someone else through his/her will, the surviving spouse has the right to claim his or her life estate under *The*

⁴ *The Homesteads Act*, CCSM c. H80

Homestead Act and upset the will. The property would not be able to be transferred without the consent of the surviving non-owning spouse. Note that there are time limits in effect and no requirement to give notice to the surviving spouse. Therefore the property could just not be dealt with for many years and the spouse might be unaware of their homestead rights and not be taking advantage of their life interest. There is also the potential that the property had been transferred fraudulently prior to death or on death. Although an action can be taken against the owner's personal representative, it is limited to the undistributed assets of the estate and the limitation period on death is six months from the date of death (s. 16(4)). Again, the owner's personal representative is not required to serve a notice on the surviving spouse. How is a surviving spouse made aware of this? MAWL Inc. is aware of many spouses who have lost their entitlements under the *Act* due to their ignorance of their right to apply under *The Homesteads Act*.

Even if the spouses change residence, *The Homestead Act* will continue to apply to the prior residence, provided it is still owned by only one of the spouses, until the non-owning spouse consents in writing to change the homestead, releases their homestead rights or the homestead is sold. This must be done in accordance with the *Act* and with the consent of the spouse.

When the deceased spouse owns more than one home that the spouses have occupied, the surviving spouse can file an election, choosing one property to be the homestead.

No election is allowed after the earlier of six months following the granting of letters probate for the owning spouse's estate or one month after notice has been served to the non-owning spouse by the executor of the estate requiring the non-owning spouse to elect a homestead (s. 8[2]). Again, no notice need be served. MAWL Inc. is concerned with the potential of the non-owning spouse to lose property rights without being made aware of the rights he/she has in the first place. The owner's personal representative should be required to serve notice on the surviving spouse of their right to elect similar to s. 31

A spouse may seek damages if the owning spouse does not comply with the *Act* or files a false statement at the Land Titles Office indicating that the property is not a homestead. However, the non-owning spouse must know their rights in order to go to court and enforce them. It is easy for a spouse to file a false declaration saying the property is not the homestead. It is costly for the non-owning spouse to move to challenge that fraudulent statement. Given that women are traditionally the non-owning spouses, this situation adversely affects women's property rights. For instance, many Manitoban women do not have access to the courts to pursue their property rights due to lack of funds. According to 1997 statistics, one in five Canadian women lives in poverty. 16.3% of Canadian women live below the Low Income Cut Off (before

tax).⁵ Among immigrant women, 26.4% live below the Low Income Cut Off,⁶ and 63% of Aboriginal households live below the Low Income Cut Off.⁷

Elections during the lifetime of the spouse:

A non-owning spouse can only elect one property at a time to be the homestead. If the owning spouse possesses more than one home that has been lived in by both spouses, the non-owning spouse must choose which home will be the homestead. This frequently happens in farming situations where the couple first lived on the farmland and later retired and moved into a nearby town. The non-owning spouse can elect the farm home and the surrounding 320 acres or the home in town as the homestead, because both qualify as homesteads under the *Act*. MAWL Inc. questions how often the non-owning spouse is made aware of their right to elect either property as their homestead. MAWL Inc. is aware of many instances where the non-owning spouse was not made aware that they could elect the farm property, which was greater in value, as their homestead. Many women are unaware they still have homestead rights in the farm property. It is important for lawyers to ask their clients if the non-owning spouse has ever lived in a home other than that in which they currently reside with their spouse. This way, the client and lawyer can properly evaluate if the property is subject to *The Homesteads Act* and which home they should elect as their homestead, knowing that they have the opportunity to elect the property with the greatest value as their

⁵ Online. Available: www.criaw-icref.ca/Poverty_fact_sheet.htm

⁶ Online. Available: www.ccsd.ca/facts.html

⁷ Online. Available: www.spcw.mb.ca/reference/socialplanning-insidespread.pdf

homestead. Unfortunately, the Land Titles statements required to be signed by the owning spouse is very vague: “this property is not my homestead”. This statement requires the person attesting to understand the definition of homestead and often it is not properly explained by counsel prior to the attestations. Also, the statement does not have to be witnessed by a lawyer, it can be witnessed by any person and then the witness must sign an affidavit of witness in front of a commissioner for oaths. There is no requirement to seek legal assistance in transferring land, and there is a disturbing trend toward persons doing their own transfers of land or financial institutions or title companies assisting persons in acting who may not fully understand the spouse’s rights under *The Homestead Act*.

The *Act* prevents disposition or mortgaging of the homestead and of up to 320 acres of land without the written consent of the non-owning spouse, unless a court order has dispensed with that consent. In order to give consent to a disposition, the non-owning spouse must be aware of his/her rights to the property and be aware of the effect of giving consent. The non-owning spouse must also give consent freely and voluntarily without undue influence from the owning spouse, and must sign without the owning spouse being present. The *Act*, however, does not require the non-owning spouse to seek independent legal advice and execute the document in the presence of any lawyer, let alone an independent lawyer. If the owning spouse disposes of the property without the other’s consent, the defrauded spouse may sue for damages or a reversal of the transaction depending on the circumstances. However, MAWL Inc. recognizes the

high financial burden of litigation and the reality that most spouses cannot afford to pay lawyers to go to court for them.

If the marital home is already owned jointly, most of the provisions of the *The Homestead Act* do not apply because the surviving spouse already shares in the title to the property and will automatically become the owner of the property upon their spouse's death or be entitled to half of the net sale proceeds upon sale.

▪ **RECOMMENDATION**

MAWL Inc. recommends a revision be made to the statements respecting the election of a homestead filed at the Land Titles Office. The statement should be revised to say

- 1) I have never lived on this property with my spouse or common-law spouse (opposite-sex and same-sex), or**
- 2) My spouse, common law spouse or same-sex partner has filed an election to elect a different property as the homestead, or**
- 3) The person who consents to this transfer is my spouse, common-law/same-sex partner.**

MAWL Inc. recommends that the homestead consent or any other election or document required to be signed by a spouse under *The Homesteads Act* of a spouse must be accompanied by a declaration of independent legal advice.

MAWL Inc. further recommends that *The Homesteads Act* should be amended to require the owners to give notice to a surviving spouse of their right to elect a

different homestead if The Homestead Act could apply to more than one property and to give notice of the spouses homestead rights to the spouse. The notice should be similar to section 31 of The Marital Property Act.

C) The Dependents Relief Act

The Dependents Relief Act came into effect in Manitoba on July 1st, 1990 and replaces *The Testator's Family Maintenance Act*.⁸ The purpose of the *Act* is to provide maintenance and support to a dependent individual after the death of the person on whom they were dependent (s. 2[1]). This support and maintenance comes out of the deceased's estate, and is provided whether or not the deceased had a will. An application for relief may be made by the dependent, or by a person on the dependent's behalf. Note that there is a time limit in effect. The application must be made no later than 6 months from the grant of letters probate or letters of administration. However, the court may make an exception under s. 6[3] if one of three events occur: the dependent did not know until after the time period had elapsed that the deceased had died; the dependent's need for relief did not arise until after the time limit had passed, or; circumstances beyond the dependent's control prevented him/her from making an application.

The *Act* defines a dependent to include the minor or substantially dependent child of the deceased, the spouse of a deceased or a person divorced from the deceased. Spouse

⁸ *The Dependent's Relief Act*, CCSM ch. D. 37

is defined as a man or woman married to each. The dependent definition also includes a person of the opposite sex who, although not legally married, has cohabited with the deceased for not less than five years, and was cohabiting with the deceased at the time of death or not less than one year prior to the death, or; had cohabited with the deceased for one year if there was a child of the union. Therefore, the *Act* is applicable to opposite-sex, common-law unions provided they meet the requirements, but it is not applicable to same-sex unions. A pre-condition of a claim is that there was a dependency on the deceased prior to the deceased's death.

The *Act* provides discretion to a court to determine the amount and length of maintenance and support available for a dependent, according to financial need. Several factors are considered, including the nature of deceased's estate; the assets and financial resources of the dependent at present and in the future; the age, physical and mental health of the dependent, and; the dependent's ability to become financially independent. If the dependent is a spouse, the court may consider any life estate received by the spouse pursuant to *The Homesteads Act* and/or any property or accounting available to the spouse pursuant to *The Marital Property Act*. The rights of the surviving spouse under those *Acts* have priority over the rights of other dependents under the *Dependent's Relief Act*.

▪ **RECOMMENDATION**

***The Dependents Relief Act* does not require the executor or administrator of the estate to serve a notice on anyone they think may have been dependent on the deceased, informing them of their rights. A right cannot be enjoyed if the dependent does not know he/she has it. MAWL Inc. therefore recommends that the *Court of Queen's Bench Surrogate Practices Rules* be amended to require the executor or administrator of an estate to make an investigation of the deceased's affairs and to list any persons the executor/administrator thinks may be a potential dependent of the deceased in their application for probate or administration. The executor/administrator should be made to serve these potential dependents with a notice (similar to s. 31 of *The Marital Property Act*) notifying the potential dependents of their right to make a claim under *The Dependents Relief Act*.**

MAWL Inc. further recommends that personal liability be imposed upon the executor/administrator if they fail to serve the notice and distribute the estate when they knew or ought to have known that a person was a dependent and might have a claim pursuant to *The Dependent's Relief Act*. This recommendation is similar to the requirement under s. 7[1] of the *Alberta Administration of Estates Act*, where notice of an application pertaining to the rights under *The Dependent's Relief Act* must be sent to the adult interdependent partner of the deceased if that partner is not the sole beneficiary under the will.

MAWL Inc. also recommends, because many estates are settled without grants of probate or letters of administration, that *Court of Queen's Bench Surrogate Practices Rules* be amended to require all executors/administrators to make applications for probate/administration notwithstanding that third party financial institutions may agree to transfer the estate assets without probate. The *Rules* should make third party institutions that deal with estate assets without probate or administration liable to any potential dependents for their claims under *The Dependent's Relief Act*, to spouses for their potential Part IV claims under *The Marital Property Act* and to spouses for their potential elections under *The Homesteads Act*.

D) *The Family Maintenance Act*

The purpose of *The Family Maintenance Act* is to ensure that spouses financially support and maintain each other while they live together, and upon separation.⁹ This mutual obligation applies both to married couples and to common-law, opposite-sex couples. For a common-law relationship to apply, the partners must have cohabited together continuously for not less than five years in a relationship in which one party was substantially dependent on the other for support or for one year if there is a child of the union. An application for support must be made while the partners are cohabiting or within one year of the cohabitation ceasing. A partner may make an application under the *Act* if their partner is in breach of the provisions of the *Act* or if they desire an order

⁹ *The Family Maintenance Act*, CCSM ch. F20

to fix an amount payable for support and maintenance. Therefore, the *Act* is applicable to a relationship both while it exists, and after its termination.

The duty to provide support and maintenance means a partner must give reasonable amounts to their partner for clothing and other personal expenses (s. 5). The partner seeking support has the sole discretion to use that amount free from all interference from their partner. At the same time, however, the partner seeking support has a duty to take reasonable steps to become financially independent of their partner.

There is wide judicial discretion in the ordering of support. To determine whether to make an order or what conditions to place on an order, the court should consider all the circumstances of each partner in the relationship (s. 7[1]). The court also looks at:

- the financial needs of each partner
- the financial means, earnings and earning capacities of each partner
- the standard of living
- any obligations to support or maintain a child or other person
- the amount of property settlement between the two partners
- the measures available to a partner to become financially independent
- any impairment of the earning capacity and financial status of a partner as a result of the relationship, and
- the duration of the marriage or common-law partnership.

The *Act* also provides that domestic service, for instance, housekeeping and childcare, is to be considered as a contribution to support and maintenance as if the time was spent in gainful employment (s. 7[2]).

The court may make a number of different support and maintenance orders after it has examined the circumstances of the relationship (s. 10[1]). Among those orders are an order for a lump sum or periodic payment to one partner; a finding as to the length of time a common-law relationship existed, including the dates the relationship began and ended, and; an order that one partner's financial information be disclosed. The court may also give one partner the right to continue to occupy the family residence even if that partner is not the owner or lessee of the home (s. 13[1]). Furthermore, the court can order the postponement of the sale of the family home for a period of time. Therefore, even if one partner is not the owner of the house, he/she has the opportunity to apply for an order to let him/her remain in the residence.

In 1994, MAWL Inc. undertook a review of spousal support in Manitoba.¹⁰ In an analysis of 146 Manitoba cases, the report revealed that the judgments often undervalued the contributions of women who have dedicated years to childcare and household duties with the understanding that they will be supported for this contribution to their marriage. Courts are not awarding sufficient support to spouses, particularly in long-term marriages. There were some cases where wives in long-term, traditional marriages have been denied support or been given a limited duration order.¹¹ *The Family Maintenance Act* is well worded, however, judges in some cases are

¹⁰ *Fairness in Family Law: A Study* by the Manitoba Association of Women and the Law Inc., Sept. 1994

¹¹ *Fairness in Family Law*: p. 3 - 2

not awarding sufficient spousal support nor are they seriously considering the loss of income-earning capacity and impoverishment of the stay-at-home, long-term spouse.

▪ **RECOMMENDATION**

MAWL Inc. recommends that a compensatory model for spousal support determination be adopted. This means that lawyers and judges must place equal emphasis on all obligations under s. 15 and s. 17 of *The Divorce Act*, rather than emphasizing self-sufficiency by the recipient spouse. Furthermore, there must be recognition of the economic realities of women and the decision they make within the context of a marriage. Judges must ask more questions and demand more information from counsel. Support orders should not be time limited or for fixed terms where the marriage is long-term and the recipient spouse has not been fully compensated for the past and ongoing effects of marriage and childrearing. Judges must compensate the stay-at-home spouse or spouse who has sacrificed career advancements to accommodate the other spouse's career for their loss of income earning capacity.

Several other statutes relate to family relationships, both marital and common-law. Many of these *Acts* do not apply to common-law relationships, particularly same-sex, common-law relationships. Under *The Intestate Succession Act*, for instance, when a common-law spouse dies without a will, his/her common-law partner is not

automatically entitled to the estate.¹² Similarly, in *The Wills Act*, a common-law partner has no right to inherit over his/her partner's estate when the partner dies.¹³

Pension benefit rights are available to common-law couples, but only when the couple is proactive and jointly register their partnership, a requirement that is not expected of married couples. A common-law partner must sign a declaration stating that they want to share their benefits with their common-law partner. This proactive position is applicable to same-sex relationships because the definition does not specify a common-law partnership must be opposite-sex. The requirement to register that your common-law partner is to share in the benefits of the pension is included under *The Pensions Benefit Act*, *The Teacher's Pensions Act*, *The Civil Service Superannuation Act*, and *The Legislative Assembly Act* as well.

▪ **RECOMMENDATION**

MAWL Inc. recommends that *The Common-Law Partners' Property and Related Amendments Act* be proclaimed with the suggested amendments recommended herein.

¹² *The Intestate Succession Act*, CCSM ch. I85

¹³ *The Wills Act*, CCSM ch. W150

III. THE 1999 SUPREME COURT OF CANADA DECISION OF

M. v. H.

In May, 1999, the Supreme Court of Canada released the decision of **M. v. H.** The 8-1 decision has resulted in significant changes to the definition of “spouse” under many provincial statutes as they relate to the rights of common-law and same-sex relationships.

The case of **M. v. H.** considered two Ontario women who lived together in a conjugal relationship for approximately ten years. They occupied a home that was owned by one partner. They started a business together that was the main source of income for both partners; each partner contributed equally to the success of the business.

When the relationship ended, one partner left the home. She brought a petition against her former partner for support and for division of the home they had both occupied.

The statute under which she applied was *The Family Law Act* of Ontario, which, under s. 29, defines “spouse” as an individual actually married, or a man and woman who are not married but have cohabited continuously in a conjugal relationship for not less than three years. She argued that this definition excluding same-sex couples was contrary to her rights under the *Charter of Rights and Freedoms*

In motions court, the judge held that s. 29 of *The Family Law Act* of Ontario offended s. 15 of the *Charter of Rights and Freedoms*. S. 15 provides that everyone is equal before and under the law, and everyone has the right to equal protection and equal benefit of the law without discrimination. The Court of Appeal upheld the motions court decision, but suspended making s. 29 invalid to give the Ontario legislature time to amend *The Family Law Act* to comply with s. 15. Although the Court of Appeal decision was not appealed by either party, the Ontario Attorney General stepped in and appealed the decision to the Supreme Court of Canada.

The Supreme Court of Canada, in May of 1999, agreed with the decisions of the lower courts. They said that s. 29 of *The Family Law Act* of Ontario should have no force or effect because it discriminated against same-sex partners contrary to the *Charter of Rights and Freedoms*¹⁴. They suspended the invalidation of the *Act* for six months to give the Ontario government time to amend the statute. The SCC held that the *Family Law Act* drew a distinction by specifically giving rights to individual members of an unmarried, cohabiting, opposite-sex relationship while denying those same rights to members of an unmarried, cohabiting, same-sex relationship. This omission clearly discriminated based on sexual orientation and was therefore contrary to the *Charter*.

This case was a landmark decision for same-sex couples and caused governments throughout Canada to re-think their family and, in some provinces, property

¹⁴ *The Family Law Act*, R.S.O 1990, ch. F3

legislation. The decision was not unanimous, however. The minority judge, Gonthier, held that the discrimination/differentiation was justifiable because only opposite-sex couples had the ability to procreate and care for children. Furthermore, Gonthier opined that women tended to be dependent on their male partners whereas lesbian relationships are more egalitarian so there is less of a need for a legislated support structure.

As a result of this decision, many provinces introduced omnibus legislation to comply with the Supreme Court of Canada decision by changing the definition of spouse to include same-sex and common-law couples. We propose to examine the law in each province.

A) Manitoba Compliance: Qualification Periods

Initially, the provincial government struck a Review Panel on CommonLaw Relationships and appointed lawyer Jennifer Cooper, Q.C. and retired Court of Queen's Bench Justice A.C. Hamilton, Q.C., L.L.D to conduct hearings across Manitoba. The panel was asked to prepare a report with recommendations to the government. Both Cooper and Hamilton advised the government to change its legislation to comply with the *M. v. H.* decision. Hamilton recommended a very broad approach that would avoid any need for further judicial interpretation or judicial discretion. Cooper, however, preferred a slightly more narrow approach. She recommended changes needed to be made only as much as was necessary to satisfy the *Charter*.

In response to the Cooper/Hamilton report, the government introduced the *Charter Compliance Act* in July, 2002.¹⁵ The Act was given assent on August 1, 2002. The statute came entirely into force on January 1, 2003 and is now the law in Manitoba. The changes provided for in *The Charter Compliance Act* will guarantee equality between common-law and married person. The new definitions apply to same-sex couples in many, but not all, statutes.

The following analysis looks at the definitional changes that were made to several statutes to follow the panel's recommendations. In particular, the term "common-law relationship" has come to be defined as akin to marriage in that the same sets of rights are given. The meaning of "common-law relationship" has been altered so that, in most instances, it includes same-sex couples. However, throughout the amended legislation, discrepancies exist concerning the appropriate time period to gain legal status as a common-law relationship.

i) The Adoption Act

An example of the application of the review panel's recommendations can be found in Manitoba's adoption legislation.¹⁶ The provincial government adopted a broad approach when defining the qualifications for adopters in Manitoba. In *The Adoption*

¹⁵ *The Charter Compliance Act*, (2002) S.M. ch. 24

¹⁶ *The Adoption Act*, CCSM ch. A2

Act, the exact definition of “common-law partner” will permit same-sex couples to adopt children jointly, and will permit same-sex partners to adopt the biological or extended family member of their common-law partner. This definition is two persons cohabiting in a relationship of some permanence. Furthermore, the declaration of commitment regulation was extended to include not only married spouses and common-law partners, but also any two adults who are adopting jointly but do not live in a spousal relationship. This approach is so broad that there can be no mistake that any two adults, be they homosexual or heterosexual, are eligible to apply to jointly adopt. MAWL Inc. applauds these changes.

It is interesting to note that the definition of “common-law partner” found in *The Adoption Act* (relationship of some permanence) is incorporated into the following amended statutes, so that legal marriage is not the only relationship considered:

- *The Agricultural Producers’ Organization Funding Act*
- *The Animal Liability Act*
- *The Builders’ Liens Act*
- *The Change of Name Act*
- *The Charities Endorsement Act*
- *The Child and Family Services Act*
- *The Civil Service Act*
- *The Communities Economic Development Fund Act*
- *The Consumer Protection Act*
- *The Cooperatives Act*
- *The Corporations Act*
- *The Credit Unions and Caisses Populaires Act*
- *The Development Corporation Act*
- *The Elderly and Infirm Persons’ Housing Act*
- *The Elections Act*
- *The Executions Act*
- *The Family Farm Protection Act*

- *The Farm Lands Ownership Act*
- *The Department of Health Act*
- *The Judgments Act*
- *The Landlord and Tenant Act*
- *The Legislative Assembly and Executive Council Conflict of Interest Act*
- *The Municipal Act*
- *The Municipal Council Conflict of Interest Act*
- *The Powers of Attorney Act*
- *The Privacy Act*
- *The Property Tax and Insulation Assistance Act*
- *The Manitoba Public Insurance Corporation Act*
- *The Public Schools Act*
- *The Victims' Bill of Rights*
- *The Vital Statistics Act, and*
- *The City of Winnipeg Act*

ii) The Vital Statistics Act

The amendments made to *The Vital Statistics Act* to comply with **M. v. H.** are also particularly progressive.¹⁷ A birth mother still must consent to have the father/other parent registered on the birth certificate of her child conceived through artificial insemination. As well, the birth certificate includes father, mother and other parent, so same-sex couples may both be registered as parents.

iii) The Public Schools Act

In its definition of common-law relationship, *The Public Schools Act* uses a “conjugal relationship of some permanence” definition. However, when determining who is entitled to vote in an election of school trustees for the Francophone School Board the *Act* differs. In that provision, a common-law partner is only entitled to elect if he/she

¹⁷ *The Vital Statistics Act*, CCSM ch. V60

has cohabited with an entitled person for a period of at least 12 months immediately before the election.

iv) The Victim's Bill of Rights

The *Victims' Bill of Rights* considers the needs, concerns and interests of the victims of crime and other offences.¹⁸ The *Act* categorizes a common-law partner as "family", which bestows certain rights. Although the *Act* adopts the "some permanence" definition of a common-law partner, it then specifically defines a time qualification. The common-law partner of a victim is a person who cohabited with the victim in a conjugal relationship for either three years before the victim's death, in which time the partner was dependent on the income of the victim, or for one year prior to the victim's death, if a child of the union was dependent on the victim. The *Act* gives a common-law partner the right to be protected from their partner's offender. This protection may come in the form of guaranteed confidentiality of address and place of employment (s. 6) or notification of escape by the offender (s. 8).

¹⁸ *The Victims' Bill of Rights*, CCSM ch. V. 55

v) ***The Mental Health Act***

Similar to *The Victims Bill of Rights*, *The Mental Health Act* restricts the common-law relationship to a time frame.¹⁹ A common-law partner must have cohabited in a conjugal relationship with their partner for at least six months prior to the partner being admitted to a mental facility. The *Act* categorizes a common-law partner as being the “nearest relative” and therefore grants certain rights. For instance, the partner has the right to make treatment decisions on the patient’s behalf if the patient is not mentally competent to make these decisions (s. 28[1]). There are three requirements to be given this right (s. 28[3]):

1. The partner must have been in personal contact with the patient in the previous twelve months
2. The partner must be willing to assume responsibility for making treatment decisions, and
3. The partner must make a statement certifying the relationship and the above two facts

The *Act* also gives a partner the right to receive notification and information regarding the patient’s status and mental competency.

¹⁹ *The Mental Health Act*, CCSM ch. M110

vi) The Anatomy Act

The Anatomy Act governs the reception by medical institutions, for instance the University of Manitoba, of dead persons for scientific purposes.²⁰ The *Act* states that common-law partner must have cohabited with their partner in a conjugal relationship for at least one year before the death of their partner, or of less than one year if the couple is parents of a child together. The *Act* provides that the common-law partner is also a “preferred claimant” and therefore has the right to claim the dead body of their partner at any time, and to remain in possession of that body as long as the body has been lawfully acquired (s. 4). The common-law partner may waive the right to claim the body (s. 5[4]). The *Act* also states that the preferred claimant is responsible for the costs of a proper burial of the body (s. 9).

vii) The Off-Roads Vehicle Act

The Off-Roads Vehicle Act regulates the registration and use of recreational vehicles off common, public roads.²¹ The *Act* requires a common-law partner to have lived conjugally with their partner for at least three years, or one year if the couple has a child. The *Act* includes a common-law partner in its definition of “family”. The *Act* gives a common-law partner the right to apply to obtain the transfer of registration and

²⁰ *The Anatomy Act*, CCSM ch A80

²¹ *The Off-Roads Vehicle Act*, CCSM ch. O31

number plate of an off-roads vehicle upon the death of his/her partner, the registered owner (s. 9[5]).

viii) The Vulnerable Persons Living with a Mental Disability Act

The purpose of *The Vulnerable Persons Living with a Mental Disability Act* is to encourage and support a vulnerable person's right to make his/her own decisions.²² To apply, the *Act* requires only that a common-law couple have lived together in a conjugal relationship for at least six months. The common-law partner then becomes the "nearest relative" to the vulnerable person, surpassing even the rights of a married spouse, if the partner has one. The common-law partner is thus imparted with certain rights, specifically the right to notice. This may include the right to be informed of emergency intervention action towards the vulnerable person (s. 28[2]) or the right to be informed of a decision by authorities to classify the person as vulnerable (s. 51[1]).

ix) Use of the Federal Income Tax Act

Some legislation looks to federal statutes to determine the required time frame of a relationship. The following statutes import a definition from the federal *Income Tax Act*: *The Certified General Accountants Act*, *The Chartered Accountants Act*, *The Dental*

²² *The Vulnerable Persons Living With A Mental Disability Act*, CCSM ch. V90

Association Act, The Law Society Act, The Medical Act. A common-law partner under s. 248(1) of *The Income Tax Act* is: a person who cohabits at that time in a conjugal relationship with the taxpayer and has either so cohabited with the taxpayer for a continuous period of at least one year, or is the parent of a child of whom the taxpayer is a parent. The couple is deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least ninety days that includes the particular time because of a breakdown of their conjugal relationship.

These discrepancies allow for flexibility but with this comes a lack of certainty. Giving some obligations to a common-law couple that have cohabited for only six months seems unfair when another couple must be cohabiting for three years to acquire rights. Furthermore, the definition of “some permanence” has not as yet been qualified by Manitoba case law.

B) Qualification Systems in Other Jurisdictions

i) Saskatchewan

In its amendments following the *M. v. H.* decision, the province of Saskatchewan created a time qualification period to gain legal status as a common-law partnership. That time period is 24 months of continuous cohabitation. Unfortunately, Saskatchewan does not have the option of a voluntary registration system. The termination of the common-law relationship occurs after the couple has ceased

cohabiting for 24 months. This definition is followed in *The Family Property Act*, *The Homesteads Act*, *The Intestate Succession Act* and *The Wills Act*.

ii) Ontario

The amendments in Ontario legislation included a definition of same-sex partner and common-law spouse in *The Family Law Act*. A same-sex partner is defined as a person who has cohabited continuously with another for not less than 3 years, or with some permanence if they are together the natural/adoptive parents of a child. For the purposes of support and maintenance, the term spouse includes a man and woman who are not married to each other but have cohabited continuously with one another for not less than 3 years, or with some permanence if they are together the natural/adoptive parents of a child. There is as yet no case law that determines what “of some permanence” actually means in terms of a time value. Unfortunately, Ontario has not endorsed a voluntary registration system.

iii) Nova Scotia

Nova Scotia’s amendments created a registration system that gives registrants the same rights and obligations as married spouses. Each applicant must be a resident of the province or own real property in the province, and one cannot make a declaration if they are currently married. The relationship is terminated upon the earliest of the following events: filing a statement of termination, living separate and apart for one year with the intention not to continue the relationship, or getting married to someone

else. A termination is not considered interrupted when the parties resume cohabitation for a period of less than 90 days with reconciliation as their purpose. The termination does not need independent legal advice to be valid. Unfortunately, Nova Scotia does not have a default qualification period.

iv) Quebec

In Quebec, the provincial government proclaimed *The Act instituting civil unions and establishing new rules of filiation* on June 24, 2002. The *Act* creates a civil union, which will give all conjugal couples the same rights as married couples. To register a union, the couple must make a contract openly before an officiant who is competent to solemnize marriages and before two witnesses. The couple then have the same rights and obligations of a married couple. The union may be dissolved by death, by court judgment or by a notarized joint declaration of termination.

The *Act* also makes amendments to *The Interpretation Act*. In that *Act*, the definition of “spouse” includes a *de facto* spouse unless the context will indicate otherwise. A *de facto* spousal relationship is when two persons of opposite-sex or same-sex live together and represent themselves publicly as a couple, except where otherwise provided, regardless of how long they’ve been living together. A *de facto* relationship is presumed if the couple have lived together for at least one year and it is also presumed from the time they become parents of a child.

v) Australia

The government of New South Wales in Australia introduced property legislation with significant judicial discretion in its 1999 *Property (Relationships) Act*. They define a *de facto* relationship as between two adults who live together as a couple and are not married or related by family. There is no time qualification as the court determines when a spousal relationship is significant enough to warrant legal status. The court looks at the following factors:

- Duration of relationship
- Nature/extent of common residence
- Whether a sexual relationship exists
- Financial dependence, interdependence
- Ownership, use and acquisition of property
- Degree of mutual commitment to shared life
- Care/support of children
- Performance of household duties
- Reputation and public aspects of relationship

The *Act* also created a domestic relationship that is other than a marriage or *de facto* relationship. A domestic relationship is defined as between two adult persons, whether or not related by family, who are living together, one or each of who provides the other with domestic support and personal care. This relationship provides for legal rights and obligations to two individuals who are not participating in a spousal relationship with one another but still live together in a partnership.

vi) California

The State of California has a registration system in effect. The Domestic Partner

Registration requires seven factors:

1. a common home
2. joint responsibility for each others basic living expenses
3. no other marriage
4. no blood relation between partners
5. each must be over the age of 18
6. the partners can be of the same sex, and
7. both must be capable of consenting.

To register, the couple must file a registration. No couple can file anew until 6 months after official termination of relationship has been filed. Termination occurs when a letter states the relationship is over, one partner dies or marries, or the couple no longer shares a common home. There is no default qualification; the registration process is completely voluntary and proactive.

C) MAWL Inc.'s Concern

MAWL Inc. applauds the Manitoba government for its progressive dual approach to defining common-law relationships through voluntary registration and *de facto* rights. MAWL Inc. is concerned, however, with discrepancies in the legislation in terms of determining when a common-law relationship gains legal status. MAWL Inc. believes that instead of the vague definition, "a conjugal relationship of some permanence", it is

preferable that the government give a consistently specific time period. A definition that needs to be judicially interpreted fails to provide the certainty in the law the public needs; it requires individuals to seek legal action to determine what “some permanence” means. Lawyers, too, will find it difficult to advise their clients because of the uncertainty. Furthermore, even when a time qualification period is present in the legislation, the preceding statutory analysis reveals it is inconsistent.

This uncertainty is perpetuated further by proposed property legislation that again varies the qualifying period from one statute to another. These provisions will be discussed in greater detail in the following pages. MAWL Inc. can understand why the government may have preferred a more vague definition and judicial discretion for the definition of common-law spouse in the *Adoption Act* - in order to allow spouses to adopt with a lesser qualifying period. Nonetheless, MAWL Inc. believes that the advantage of uniformity and certainty outweigh the advantages of judicial discretion. Certainly all other statutes should have kept a consistent definition of common-law spouse. Of the statutes changed to comply with *M. v. H.*, thirty-three contain the “relationship of some permanence” definition, six contain the “relationship of at least one year” definition, two contain the “six months of cohabitation” definition and one contains the “three years of cohabitation, or one year if they couple are parents of a child”. This exemplifies the inconsistency.

Furthermore, examining the similar legislation in other provinces in Canada shows that there is more widespread uncertainty. A clear definition of common-law relationship is lacking throughout the entire country. The Law Reform Commission of Canada published a report that examined marriage, same-sex and opposite-sex common-law relationships in Canada and Europe.²³ The report acknowledges the discrepancy among Canadian provincial legislation in its definition of common-law relationships: “the various definitions of spouse across Canada and for different purposes do not create a consistent or coherent legal framework for opposite-sex couples.”²⁴

▪ **RECOMMENDATION**

MAWL Inc. recommends further revision to the *Charter Compliance Act* to ensure a consistent definition of “spouse” in all Acts with the exception of *The Adoption Act*. MAWL Inc. recommends *The Adoption Act* be amended to ensure that judicial discretion is only available to shorten the qualifying period and not to increase it.

C) Compliance with the *M. v. H.* Decision in Other Provinces

All jurisdictions in Canada have passed some form of legislation to allow common-law and same-sex couples some rights, with the exception of Prince Edward Island, which has not yet proclaimed its *Act*. Only Saskatchewan, Quebec, Nova Scotia, Nunavut and the Northwest Territories have passed and proclaimed property rights for common-law

²³ Dr. Martha Bailey, Marriage, Faculty of Law (Queen’s University)

²⁴ Online. Available: http://www.lc.gc.ca/en/themes/pr/cpra/bailey/bailey_main.asp

and same-sex couples. Manitoba law extending property rights to common-law and same-sex couples has been passed, but it has not yet been proclaimed.

BRITISH COLUMBIA

- Amendments to *The Family Relations Act* apply to spousal support obligations only, not to matrimonial property or the division of pension benefits

ALBERTA

- Proclaimed *The Adult Interdependent Relationships Act*
- Act not applicable to family property distribution

SASKATCHEWAN

- Amendments to *The Family Property Act* extend property distribution rights to common-law couples, both opposite sex and same sex

ONTARIO

- Amendments to *The Family Law Act* apply to spousal support obligations only, not to family property distribution

QUEBEC

- Proclaimed Bill 84, *The Act instituting civil unions and establishing new rules of filiation*
- Creates civil union and *de facto* spouse definitions to extend the same rights to common-law partners as married partners have, including family property distribution

NEW BRUNSWICK

- Amendments to *The Family Services Act* apply to spousal support obligations only, not to family property distribution

PRINCE EDWARD ISLAND

- Passed *The Act to Amend the Family Law Act*, but have not yet proclaimed it
- Amendments will only apply to spousal support obligations, not to family property distribution

NOVA SCOTIA

- Amendments to *The Vital Statistics Act* created a domestic partner registration system (proactive) that applies to both same-sex and opposite-sex couples
- Once a domestic partnership has been properly registered, the *Act* extends maintenance and support rights as well as matrimonial property rights to the registered couple

NORTHWEST TERRITORIES

- *The Family Law Act* extends spousal support and property rights to married and cohabiting couples

NUNAVUT

- *The Family Law Act (Nunavut)* extends spousal support and property rights to married and cohabiting couples

NEWFOUNDLAND

- *The Same Sex Amendment Act* applies to spousal support obligations only, not to family property distribution

YUKON

- *The Family Property and Support Act* extends spousal support rights to married couples and common-law couples, but does not extend property rights to common-law couples

i) British Columbia

British Columbia amended its family support legislation to comply with the *M. v. H.* decision. Amendments made to *The Family Relations Act*, which governs family support and maintenance, and family property distribution, created a definition for a common-law relationship.²⁵ In the *Act*, “spouse” is defined as a person who lived with another person in a marriage-like relationship for a period of at least two years if the application made under the *Act* is made within one year after they ceased living together. And, for the purposes of the *Act*, the marriage-like relationship may be between two persons of the same gender. This definition applies throughout the *Act*, except in Part 5 (Matrimonial Property) and Part 6 (Division of Pension Entitlement). Therefore, the common-law relationship definition is only applicable for spousal maintenance and support obligations.

ii) Alberta

The Alberta provincial legislature proclaimed *The Adult Interdependent Relationships Act* in 2002 in response to the decision of *M. v. H.*²⁶ The *Act* begins by recognizing that marriage has a traditional religious, social and cultural meaning within Alberta society, and that it is a fundamental principle that marriage is between a man and a woman. However, the *Act* also recognizes that some persons choose interdependent relationships instead of marriage. The *Act*'s purpose is to define the nature of these

²⁵ *The Family Relations Act*, R.S.B.C. 1996, ch. 128

²⁶ *The Adult Interdependent Relationships Act*, R.S.A. 2002, ch. A-4.5

interdependent relationships in a legal context to set out how they are applicable to Alberta law. The *Act* applies to relationships in existence before and after the coming into force of the *Act* (s. 2).

The Adult Interdependent Relationships Act defines a relationship of interdependence as: a relationship outside of marriage in which any two persons share one another's lives, are emotionally committed to one another and function as an economic and domestic unit (s. 1(f)). To determine whether two persons function as an economic and domestic unit, all circumstances of the relationship must be taken into account. These circumstances include whether or not the persons have a conjugal relationship; the degree of exclusivity of the relationship; the conduct and habits of the persons regarding household activities and living arrangements; the degree to which they hold themselves out as an economic and domestic unit; the degree to which legal obligations, intentions and responsibilities towards each other are formalized; the extent to which direct and indirect contributions have been made by either partner to the other partner or towards their mutual well-being; the degree of financial dependence and interdependence and any arrangements of financial support between them; the care and support of children, and; the ownership, use and acquisition of property (s. 1[2](a - i)).

The *Act* defines an adult interdependent partner as: a person who has lived with another in a relationship of interdependence for either a continuous period of not less than three years, or of some permanence if there is a child of the relationship by birth or

adoption. A person can also become an adult interdependent partner if he/she enters into an adult interdependent partnership agreement with another (s. 3[1]). The *Act* states that it is not a relationship of interdependence when one person provides the other with domestic support and personal care for a fee or other consideration, or on behalf of someone else (s. 4[2]).

The *Act* provides that a married person cannot have an adult interdependent partner while he/she is living with a spouse (s. 5[2]). A person may not enter into an adult interdependent partnership agreement if already partner to an existing adult interdependent partnership agreement, or married. A person also may not enter into the relationship if he/she is a minor unless he/she is at least 16 or has his/her parent's written consent (s. 7[7]).

The adult interdependent partnership agreement becomes invalid in the following three circumstances (s. 8[1]). The agreement is invalid if it was induced by fraud, duress or undue influence; if one partner lacked the mental capacity to understand the nature of the agreement, or; when entered into, the partners were not living together nor intending to live together in a relationship of interdependence. If one partner purports to enter into an agreement but is actually prohibited from doing so or induces the other partner to enter, the dishonest partner is liable to the other for damages as to the consequences of the invalid agreement (s. 8[2], [3], s. 9).

S. 10 of the *Act* specifies how an adult interdependent partnership is terminated. The partnership agreement becomes a former agreement when the earliest of four circumstances occurs: the partners sign a written agreement that they intend to live separate and apart without the possibility of reconciliation; the partners live separate and apart for more than one year and one or both intend the partnership not to continue; the adult interdependent partners marry each other or a third party, or; in the case of an interdependent relationship automatically extending rights to each partner after three years, one partner enters into a similar agreement with a third party. The condition of living separate and apart is not interrupted or terminated by reason only that either adult partner has become incapable of forming the intention to live separate and apart or by reason only that the adult interdependent partners resumed their relationships during a single period of not more than ninety days with reconciliation as the primary purpose (s. 10[2]).

The Adult Interdependent Relationships Act provides that amendments be made to other Alberta legislation. For example, in several statutes, the term “or adult interdependent partner” is placed after the term “spouse” wherever it occurs. These statutes include *The Alberta Health Care Insurance Act*, *The Alberta Personal Income Tax Act*, *The Dependent’s Relief Act*, *The Insurance Act* and *The Intestate Succession Act*. Under *The Intestate Succession Act*, an adult interdependent partner is to be treated as a spouse and therefore receives the intestate’s estate if the intestate had no other issue, or else receives at least the net value of \$40,000 from the estate.

Another amendment is found under *The Administration of Estates Act*, where notice of an application pertaining to rights under *The Dependents Relief Act* must be sent to the adult interdependent partner of the deceased if the adult interdependent partner is not the sole beneficiary under a will (s. 7[1]). *The Adult Interdependent Relationships Act* guarantees that common-law couples have the same rights as married spouses, but only in specified circumstances. These rights do not extend to matrimonial property distribution.

iii) Saskatchewan

The Saskatchewan government amended several pieces of provincial legislation to comply with the *M. v. H.* decision. In the Saskatchewan *Family Property Act*, which administers the distribution of family property, the definition of spouse includes a person who is or has cohabited continuously with another as spouses for not less than two years.²⁷ This definition extends the right of family property distribution to common-law spouses. Spouses may apply for property distribution even if their relationship began before the *Act* came into effect, the family property was acquired before *Act* came into effect or any legal proceedings to determine spousal rights started before the *Act* came into effect. The only requirement is that an action for distribution must be brought within twenty-four months after cohabitation ceases.

²⁷ *The Family Property Act*, ch. F-6.3 of the Statutes of Saskatchewan, 1997

In *The Intestate Succession Act*, the definition of spouse includes a person who cohabited continuously with another as spouses for a period of not less than two years.²⁸ To qualify for property rights from the deceased spouse's estate, at the time of the intestate's death, the surviving spouse must have been continuing to cohabit with the intestate or must have ceased to cohabit with the intestate within the twenty-four months before the intestate's death (s. 2).

Under *The Homesteads Act*, the definition of non-owning spouse includes a person who cohabited with an owning spouse, or has cohabited, for a period ending within the preceding twenty-four months.²⁹ The non-owning spouse must also have cohabited with an owning spouse as spouses continuously for a period of not less than two years. The homestead will cease to be a homestead if the spouses have not cohabited in the preceding twenty-four months.

Under *The Adoption Act*, any unmarried adult is able to adopt alone.³⁰ Married persons may adopt jointly, and so may any other person or persons that the court may allow, having regard to the best interests of the child (s. 17[2]). Therefore, common-law couples have the ability to apply for joint adoption and the court may allow it.

²⁸ *The Intestate Succession Act*, ch. I-13.1 of the Statutes of Saskatchewan, 1996

²⁹ *The Homesteads Act*, ch. H-5.1 of the Statutes of Saskatchewan, 1989-90

³⁰ *The Adoption Act*, ch. A-5.1 of the Statutes of Saskatchewan, 1989-90

iv) Ontario

In Ontario, the provincial legislature amended *The Family Law Act*, which governs family support and property distribution, to comply with the *M. v. H.* decision.³¹ In general terms, the *Act* defines cohabit as living together in a conjugal relationship, within or outside marriage. This definition is only applicable under Part III of the *Act* (Support Obligations). More specific definitions are found in s. 29 of *The Family Law Act*. Same-sex partner is defined as one of two persons of the same sex who have cohabited either continuously for a period of not less than three years or in a relationship of some permanence if they are the natural or adoptive parents of a child. The definition of spouse includes either of a man and woman who are not married to each other and have cohabited either continuously for a period of not less than three years or, in a relationship of some permanence if they are the natural or adoptive parents of a child. The *Act* states that within these two relationships there lies an obligation to support each other and any children of the union. The *Act* also provides for cohabitation agreements between two persons of the opposite sex or the same sex and who are not married to each other (s. 53[1]). These agreements may contemplate such issues as property division and support obligations. The *Act* does not extend rights to family property distribution to common-law spouses.

³¹ *The Family Law Act*, R.S.O. 1990, c. F.3

v) Quebec

The province of Quebec introduced Bill 84, *The Act instituting civil unions and establishing new rules of filiation* in June, 2002.³² The *Act* came into force on June 24th, 2002. The *Act* provides for a civil union that will give all conjugal couples the same rights as married spouses; the term spouse is defined as either a married partner or a civil union partner. To register a union, the couple must contract openly before an official competent to solemnize marriages, and before two witnesses. After the contract has been registered, the couple gain the same rights and obligations as a married couple. The union is terminated by death, by a court judgment or by a notarized joint declaration of termination. A civil union may be between two persons of the same sex or of the opposite sex.

Bill 84 amended s. 61.1 of *The Interpretation Act* so that the term spouse also includes a *de facto* spouse unless the context of the situation indicates otherwise.³³ A *de facto* spouse is one of two persons of the opposite sex or the same sex who live together and represent themselves publicly as a couple regardless, except where otherwise provided, of how long they have been living together. The *de facto* spouse is presumed to be such when the couple have lived together for at least one year, or from the time the couple become the parents of a child. Therefore, all the rights of married spouses are extended to same

³² *The Act instituting civil unions and establishing new rules of filiation*, 2002, c.6

³³ *The Interpretation Act*, ch. 1-16

sex and opposite sex, common law spouses either automatically after a time qualification period (*de facto* definition) or after registration (civil union definition).

vi) New Brunswick

The province of New Brunswick amended s. 112[3] of *The Family Services Act*, which authorizes family support and maintenance, to include cohabiting couples in support obligations.³⁴ The *Act* defines a cohabiting couple as two persons, not being married to each other, who have lived together either continuously for a period of not less than three years in a family relationship in which one person has been substantially dependent on the other for support or in a family relationship of some permanence where a child is born of whom they are the natural parents. The *Act* specifies that the couple must have lived together in the year preceding the support application.

Under *The Marital Property Act*, a man and woman who are cohabiting together may create a cohabitation agreement in which they agree on their respective rights and obligations during the cohabitation (s. 35[1]).³⁵ However, this provision does not apply to same-sex couples cohabiting in a conjugal relationship. Similarly, *The Adoption Act* does not provide for a same-sex couple to jointly adopt. The *Act* states that any adult, either alone or jointly with his spouse – defined as a married partner – may adopt. This

³⁴ *The Family Services Act*, R.S.N.B., 1980, ch. F-2.2

³⁵ *The Marital Property Act*, R.S.N.B., 1980, ch. M-1.1

excludes partners who are not married. Therefore, in New Brunswick, only spousal support obligations are extended to cohabiting couples.

vii) Prince Edward Island

In response to the *M. v. H.* decision, the provincial legislature in Prince Edward Island assented to *The Act to Amend the Family Law Act* in December, 2002 but it has not yet been proclaimed.³⁶ As it stands now, *The Family Law Act* generally defines cohabit as to live together in a conjugal relationship, whether within or outside marriage.³⁷ The *Act* provides for cohabiting couples to apply under Part III for spousal support, but does not give any right to division of property or the family home. In Part III (Spousal Obligations), the *Act* defines spouse as not only being a married partner but being either of a man and woman who are not married to each other and have cohabited either continuously for a period of not less than three years or in a relationship of some permanence if they are the natural or adoptive parents of a child (s. 29[1]). The *Act* provides for cohabitation agreements, but they may only be between opposite-sex, cohabiting couples.

Pursuant to the amendments of *The Act to Amend the Family Law Act*, s. 29[1] of *The Family Law Act* will be repealed. In addition to the term spouse in the spousal obligations section, common-law partner is included. A common-law partner is one of

³⁶ As of August 19, 2003, the *Act* had yet to be proclaimed by the provincial legislature.

³⁷ *The Family Law Act*, ch. F-2.1

two persons who have cohabited either continuously for a period of not less than three years or in a relationship of some permanence if they are the natural or adoptive parents of a child. Furthermore, the *Act* amends several other pieces of legislation to add “or cohabiting partner” after “spouse” wherever it occurs. *The Act to Amend the Family Law Act* will not come into force until the Lieutenant Governor-in-Council fixes the date.

viii) Nova Scotia

To comply with the Supreme Court of Canada, the provincial legislature in Nova Scotia amended *The Vital Statistics Act* in 2001 to include a domestic partner registration system.³⁸ A domestic partnership is defined as a relationship between two persons who have filed a domestic partnership declaration in accordance with the *Act*. The relationship may be between same-sex or opposite-sex partners. Part II of the *Act* provides that any two individuals who are cohabiting or intend to cohabit can make a declaration (s. 53[1]). The bars to this declaration are one partner is a minor, one partner is married or one partner is not a resident of Nova Scotia. Once the partnership has been declared, each partner has the same rights and obligations as a married spouse under the following statutes (s. 54[2]):

- *The Fatal Injuries Act*
- *The Health Act*
- *The Hospital Act*
- *The Insurance Act*
- *The Intestate Succession Act*

³⁸ *The Vital Statistics Act*, R.S.N.S., 1989, ch. 494

- *The Maintenance and Custody Act*
- *The Matrimonial Property Act*
- *The Members Retirement Allowance Act*
- *The Municipal Government Act*
- *The Pension Benefits Act*
- *The Probate Act*
- *The Provincial Court Act*
- *The Public Service Superannuation Act*
- *The Teachers Pensions Act*
- *The Testator's Family Maintenance Act,*
- *The Wills Act*
- *The Worker's Compensation Act*

The domestic partnership becomes terminated after the earliest of the following events occurs: the couple file with the Registrar an executed statement of termination in the prescribed form; the couple live separate and apart for more than one year and one or both have the intention not to continue the relationship; one marries another, or; the parties have an agreement registered with the court pursuant to s. 52 of *The Maintenance and Custody Act*; that is, an agreement respecting maintenance and support obligations (s. 55[1]). The period of living separate and apart is not considered interrupted or terminated by reason only that either party has become incapable of forming or having the intention that the relationship not continue if it appears to the court that the separation would have continued if that party had not become so incapable. The period of living separate and apart is also not considered interrupted or terminated by reason only that the parties have resumed cohabiting during a period of, or periods totalling, not more than ninety days with reconciliation as their primary purpose (s. 54[2]).

The domestic partner declaration is binding whether or not valuable consideration has been given and whether or not the parties had independent legal advice (s. 56[1]). A person who makes a declaration intending to revoke it is liable in damages (s. 56[3]) to the other partner.

ix) Newfoundland

The legislature in Newfoundland passed Bill 36, *An Act to amend the law to consider same sex cohabiting partners in the same manner as opposite sex cohabiting partners* (*The Same Sex Amendment Act*), in December, 2001 in response to the *M. v. H.* decisions. The *Act* amends various statutes to define a cohabitation partner as any of two persons living with each other in a conjugal relationship outside of marriage.

The amendments create a time qualification period in *The Pensions Benefits Act*: if the person has a married spouse, the cohabitation relationship must be of not less than three years, but if the person does not have a spouse, the relationship must be of not less than one year (s. 2[c.1]).³⁹ This time qualification does not appear in other amended statutes.

Under the Newfoundland *Family Law Act*, which authorizes both family support and maintenance obligations and family property distribution, a common-law partner is

³⁹ *The Pensions Benefit Act*, R.S.N.L., 1997, ch. P-4.01

eligible to apply for spousal support, but not for any property distribution.⁴⁰ A common-law partner is defined as either of two persons who have cohabited in a conjugal relationship outside of marriage for at least two years, or for at least one year where they are, together, the biological or adoptive parents of a child (s. 35[c]). In *The Adoption Act*, any adult alone or two adults jointly may adopt.⁴¹ The only requirement is that the adults have resided in the province for six months and have had the child reside with them for six months prior to the application.

x) Nunavut and The Northwest Territories

Family property law in the Northwest Territories and Nunavut was amended to include common-law couples. *The Family Law Act* of both territories considers the start of a relationship to be either the day of marriage or the day of the commencement of cohabitation outside of marriage for a period or in a relationship sufficient to establish their spousal relationship. Property rights apply to common-law couples that have cohabited outside of marriage for a period of at least two years, or in a relationship of some permanence if they are the adoptive or natural parents of a child. This definition applies to same-sex couples.

⁴⁰ *The Family Law Act*, R.S.N.L., 1990, ch. F-2

⁴¹ *The Adoption Act*, R.S.N.L, 1999, ch. A-2.1

xi) Yukon Territory

In the Yukon Territory, family law is administered through *The Family Property and Support Act*. Only married couples may apply for an accounting and equalization of their family assets. Common-law and same-sex partners may apply for spousal support.

IV. THE RIGHTS OF COMMON-LAW AND SAME-SEX COUPLES IN EUROPEAN JURISDICTIONS

The *European Convention on Human Rights* gives the guaranteed right to marry to all European citizens (Article 12). Recently, the European Court ruled that article 12 extends only to two people of the opposite sex. Therefore, no country is obligated to allow same-sex marriages or recognize same-sex marriages formed in other countries. However, many countries in Europe have reformed their marriage laws to allow the registration of same-sex and opposite-sex cohabitation relationships, with the Netherlands going so far as to legalize same-sex marriage. The following is a brief summary of the laws related to cohabiting couples in various European countries.

A) Hungary

The country of Hungary legally acknowledges common-law relationships. A common-law couple is defined as a man and a woman living together permanently and who are involved in a sexual relationship. This definition provides for the regulation of property acquired by common-law couples. In May, 1996, this legislation was extended to include same-sex couples as well; same-sex couples were granted the same rights as opposite-sex couples except the right to adopt.⁴²

⁴² Online. Available: http://www.lawsoc.org.uk/dcs/fourth_tier.asp

B) Belgium

The national government in Belgium proclaimed *The Statutory Cohabitation Act* in October of 1998. This *Act* will extend certain rights and obligations to opposite-sex and same-sex cohabiting couples. In January, 2000, the legislation was extended to grant certain housing rights, health insurance rights and tax benefits to couples that had previously formed registered, statutory, cohabiting relationship contracts.⁴³

C) The Netherlands

In the Netherlands in 1998, the federal government enacted a registered partnership law, and hinted that they were progressing towards the legalization of same-sex marriage. The rationale for the registration system and the legalization of same-sex marriage was the elimination of discrimination against homosexual couples.

The registered partnership system is available to same-sex and opposite-sex couples. A registered relationship gives same-sex couples several rights, for example the right to support and maintenance from their former partner, and the right not to be forced to give evidence against their partner in a judicial proceeding. In the first ten months of having the system in place, 4000 couples registered their relationships; 1200 were relationships between women, 1500 were relationships between men and 1300 were heterosexual relationships.⁴⁴

⁴³ Online. Available: http://www.lawsoc.org.uk/dcs/fourth_tier.asp

⁴⁴ Online. Available: http://www.lc.gc.ca/en/themes/pr/cpra/bailey/bailey_main.asp

The Dutch government proposed that they were going to take a step even further than a registration system and introduce same-sex marriage. In September of 2000, the legislature presented a Bill that would give citizens in same-sex relationships the right to marry and take on all the rights and obligations of marriage, including the right to divorce and to adopt. The only restriction placed on the adoption provision would be a prohibition on adopting children from overseas because of the rules regulating adoption in other countries where same-sex marriage was not recognized. An already registered couple would have the opportunity to convert their registration into a marriage.

In an apparent response to the law winding through Dutch parliament, the European Parliament passed a resolution in March, 2000 recommending that same-sex relationships be granted the same legal recognition as marriage throughout Europe. In December, 2001, the Bill passed the Upper house in Holland. It became law in April, 2001.

D) Spain

In Spain, although there lacks a federal registration system, almost all regions and cities have their own partnership registration offices. The rights given to registered partners

exclude adoption, pension, tax and social security rights.⁴⁵ In July, 1998, the Spanish autonomous region of Catalonia enacted *The Stable Couples Act*, which granted some of the rights and obligations of marriage to registered same-sex and opposite-sex couples. These rights also went automatically to an opposite-sex couple who had lived together for at least two years, or who had a child together.⁴⁶

The countries that form Scandinavia have consented to jointly acknowledge the registered partnerships of each respective country.

E) Denmark

The government in Denmark favours the “individual principle”, thereby denying rights to common-law, cohabiting couples. This principle holds that every person is only eligible for rights and obligations that will be determined based on their financial circumstances. The principle does not take into account any household or marital relationships because it is based solely on individuality and autonomy. Therefore, unmarried, cohabiting couples have the right to social benefits and taxation in the event of death. For instance, one partner may be compensated for the loss of the partner that supported him.

⁴⁵ Online. Available: http://www.lawsoc.org.uk/dcs/fourth_tier.asp

⁴⁶ Online. Available: http://www.lc.gc.ca/en/themes/pr/cpra/bailey/bailey_main.asp

In October 1998, the country was the first in Europe to enact a registered partnership system for same-sex, cohabiting couples. The objective of this system was to equalize the social status of same-sex couples to that of opposite-sex couples. To achieve this, the system has several intentions. First, the new legal institution is assumed to improve the chances of long-lasting and stable relationships among same-sex couples. Second, the system will provide same-sex couples with the same rights as married couples, thus aiding to socially equalize the two relationships. Third, the system upholds the principle of autonomy by providing couples with the choice to register or not – there is no automatic qualification period. Finally, the system is intended to foster a more positive attitude towards lasting same-sex relationships in an attempt to reduce the number of short-term relationships and the spread of AIDS.⁴⁷

F) Finland

In Finland, there are no registered partnerships. A common-law relationship is recognized, however, and it is defined as either a man and woman living in a marriage-like relationship, or two persons living in a marriage-like relationship. Rights such as pensions and inheritance only apply to common-law couples if they have a child together, because Finland follows the individuality principle. Adoption is also restricted to single or married persons.⁴⁸

⁴⁷ Online. Available: http://www.lc.gc.ca/en/themes/pr/cpra/bailey/bailey_main.asp

⁴⁸ Online. Available: http://www.ilga.org/Information/legal_survey/europe/finland.htm

G) Norway

In Norway, similarly to Denmark, the laws treat cohabiting couples as single individuals. In 1992, Norway enacted *The Joint Households Act*, which administered the rights of any group of people living together for at least two years. The group of people would gain rights automatically if they had a child but had not been living together for at least two years. If the household was terminated by death or the break-up of the relationship, one person might be granted the right to occupy the family home or to use the goods within the household.

In 1993, the Norwegian government proclaimed a registered partnership law that would grant to same-sex, cohabiting couples all the rights and obligations of marriage, except the right to adopt children and to have a church wedding. The objective of this legislation was to recognize the equal resulting economic conditions between marriage and same-sex relationships. Norway's Minister of Children and Family Affairs, Peter Lødrup, summarized the Ministry's reasons:

The economic conditions under which homosexual couples live are of the same nature as those for married couples, apart from those concerning responsibility for children. Gay and lesbian couples have the same emotional and practical reasons for desiring reciprocal rights and obligations, and there is the same need to protect the weaker party⁴⁹

Although the law as it stood before the registration system took effect gave same-sex couples the right to enter into cohabitation contracts, "like cohabiting heterosexual

⁴⁹ Online. Available: http://www.lc.gc.ca/en/themes/pr/cpra/bailey/bailey_main.asp

couples, very few homosexual partners make use of the opportunity to enter into such agreements, partly because they do not foresee the need for them in case of crisis, such as the death of one of the couple or dissolution of the relationship in other ways.⁵⁰

H) Sweden

The Swedish government created a registration system for same-sex, cohabiting couples in January, 1995, which extends to them inheritance rights and entitlement to half of the family property. Opposite-sex, cohabiting couples may gain rights through the domestic partnership system. If a relationship enters a permanent phase, then it will automatically become subject to the rights and obligations of a common-law marriage. The couple must have cohabited for a long period of time and represent themselves as a couple. A long period of time is defined as having a joint domicile home, a joint household and a joint economy. For example, they must have some kind of financial and practical co-operation within the household and the relationship must be of a nature where sexual intercourse is presumed. Couples have the option to opt out of the domestic partnership system by agreement.⁵¹

I) England and Wales

Unmarried cohabiting couples in Britain have some rights under British law. For example, regarding the succession of tenancy, if a couple lived together before 1989,

⁵⁰ Online. Available: http://www.lc.gc.ca/en/themes/pr/cpra/bailey/bailey_main.asp

⁵¹ Online. Available: http://www.ilga.org/Information/legal_survey/europe/sweden.htm

they will fall under the authority of *The Rent Act, 1977* which provides for a spouse to have priority for succession after their partner's death as long as the couple were living together at the time of the death. This law has continued to apply to relationships in the present day. For instance, in October, 1999 the House of Lords decided that a man in a same-sex, cohabiting relationship was entitled to succeed the tenancy of his deceased partner.⁵²

Cohabiting couples are not granted automatic inheritance rights after the death of their partner. However, a surviving partner may make a claim under *The Inheritance (Provision for Family and Dependents) Act, 1975* if they can prove that inadequate provision was made for them in the deceased partner's will. The surviving spouse can only apply if the partners were living together for at least two years before the death. This provision applies only to opposite-sex partners. For same-sex partners to qualify, they must prove to the court that they were a dependent of the deceased partner. However, cohabiting partners do not have any obligation to support each other when the relationship ends.

In response to recommendations by various social interest groups, a Bill was introduced into the British House of Commons in 2001, proposing to create a domestic partnership registration system. The Bill would grant the same rights as married partners to same-sex or opposite-sex couples who registered. The rights would extend to areas such as

⁵² *Fitzpatrick v. Sterling* [2000]: Online. Available: http://www.lawsoc.org.uk/dcs/fourth_tier.asp

housing succession, inheritance, tax benefits, compensation and pensions. The Bill has not yet been passed.

J) Northern Ireland

The Law Reform Advisory Committee of Northern Ireland examined the current legislation as it related to opposite-sex and same-sex cohabiting partners. The law does not currently extend rights to cohabiting couples. The Law Reform Committee published a report advising the government to change the legislation to better suit the needs of cohabiting individuals. The following recommendations were made:

1. Any property transferred from one partner to the other for their joint use or benefit should automatically become joint property. This is a rebuttable presumption only if a contrary intention for the property's use and benefit was expressed to the receiving spouse from the owning spouse.
2. There should be a presumption that certain property is jointly held if either partner is unable to prove the true intentions of the parties to the contrary.
3. There should be a presumption of equal beneficial tenancy of the joint residence unless the parties expressly agree to the contrary.
4. When the situation arises of one party disputing the presumption, the court should be given specific guidelines to determine each party's share. Several factors should be considered, including:
 - the contribution in money or value, direct and indirect, made by the parties towards the cost of acquiring, maintaining, repairing and improving the premises

- the contribution in money or value, direct and indirect, made by the parties towards the costs of discharging any debt secured on the premises
- any agreement, understanding or arrangement, express or implied, made by the parties in respect of their beneficial interest in the premises whether prior to the acquisition of the premises or during the parties' occupation of them or which they might reasonably be expected to have made in the circumstances if they had considered the question of beneficial ownership
- the degree of economic integration of the parties
- the degree of permanence of the relationship between the parties (in the case of parties who are not married)
- the reasonable expectations of the parties in all the circumstances of the case
- any benefit accruing to the party with the legal title from other contributions in money or money's worth, direct or indirect, made by the other party
- any representations, express or implied, made by either party to the other relating to the title or beneficial ownership of the premises before the acquisition of the premises or during the occupation of them

The government of Northern Ireland is aware of these recommendations but has not, as yet, passed any legislation in response.

K) Scotland

Cohabiting couples in Scotland have several statutory rights, but they are not equivalent to those provided for married couples. Opposite-sex, cohabiting couples will be recognized as the next-of-kin to their partner for the purposes of incapacitation or mental health issues. Same-sex couples are only recognized as next-of-kin if their partner becomes incapacitated. An opposite-sex partner may succeed the private or public sector tenancy of a shared home after their partner's death; a same-sex partner

may only succeed the tenancy of a public sector tenancy. And, opposite-sex couples may foster kids jointly, may claim damages against somebody who causes harm to their partner, and may receive protection from domestic violence. There is not provision for any equalization of property or maintenance and support to cohabiting couples after their relationship is terminated.

The Scottish legislation defines a same-sex couple as two people living together in a relationship that has the characteristics, other than that the persons are of the opposite-sex, of the relationship between a husband and a wife.

L) Ireland

Family and property legislation in Ireland extends rights to married couples only, and does not address the needs of same-sex and opposite-sex, cohabiting couples.

V. THE 2002 SUPREME COURT OF CANADA DECISION OF WALSH v. BONA: MANITOBA PROPOSES THE COMMON-LAW PARTNER'S PROPERTY AND RELATED AMENDMENTS ACT

The Manitoba provincial government postponed the proclamation of the property rights portion of *The Charter Compliance Act*, called *The Common-Law Property and Related Amendments Act*, awaiting the decision by the Supreme Court of Canada in *Walsh v. Bona*. It was widely expected that this decision would follow the court's decision in *M. v. H.* and strike down the law regarding the definition of "spouse" under Nova Scotia's *Matrimonial Property Act*. The Supreme Court of Canada decision was rendered in December, 2002; it upheld the law and stated that common-law spouses do not have the same right to an equal division of property that married spouses have after the dissolution of their relationship.

Walsh v. Bona concerned a couple that had cohabited for ten years. One partner applied for spousal and child support, which are legally available to common-law spouses, and also for a property division. The partner claimed that the definition of spouse under Nova Scotia's *Matrimonial Property Act* was unconstitutional because it failed to provide for a presumption of equal distribution of family property to a common-law couple.

The Supreme Court held that this definition of spouse was not discriminatory because it did not affect the dignity of a common-law spouse, nor did it deny them access to a benefit or advantage that was available to married persons. In coming to this

conclusion, the Supreme Court held that many opposite sex, common law couples have chosen to avoid marriage in order to avoid the legal rights and responsibilities associated with marriage. The Court was reluctant to presume a “commonality of intention” of common-law couples to enter into a legal sharing relationship. The court emphasized the right to maintain the individual freedom to choose an alternative family form and to have that choice respected by the state. A decision to live together does not necessarily assume a desire to share assets and liabilities, and the state should not impose that sharing. The majority stated:

“While many unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship, it does not necessarily follow that these same persons would agree to restrict their ability to deal with their own property during the relationship or to share in all of the other’s assets and liabilities following the end of the relationship. People who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties.”

The Court followed precedent and maintained that marriage is an agreement between a man and a woman to enter into an economic partnership; marriage is the consent to be bound by the rights and responsibilities of that economic partnership. Common-law couples have the opportunity to take steps to create their own economic partnership should they so desire. Marriage is a permanent contractual commitment; a common law partnership is not.

Support legislation provides for spousal and child support upon the dissolution of a common law relationship and the Court distinguished spousal support from property

division. The former is a response to dependence that occurs within a common law relationship whereas the latter infers a binding, economic agreement.

Madame Justice L'Heureux-Dubé took the alternative view in her dissent. She held that marriage and heterosexual, common-law relationships are functionally equivalent.

Both create an interdependence that results in a need to redistribute economic resources through both property distribution and spousal support after the relationship ends. She stated that although some couples do make a conscious choice not to marry, others have no choice because they must cater to the wishes of their partner. The law, therefore, exploits some partners by denying them a remedy because of another's choice.

Furthermore, many partners are unaware of the legal rights they have given up by not marrying. It is a common misconception that common-law partners automatically acquire rights, both to support and property distribution, after cohabiting for a certain period of time.

Although there are difficulties in extending property benefits to common-law couples, L'Heureux-Dube says that legislation can be created to implement devices to rebut the presumption of equal sharing. The bottom line, however, is that both married partners and common-law partners feel the need for economic redistribution after their relationships end.

In MAWL Inc. members' experience, most common-law spouses and the populace in general believe that common-law spouses have property rights after living together for a brief period, for example, six months to two years. Most common-law partners have not formalized their rights in an agreement because they mistakenly believed they already have property rights.

According to an informal study of 100 heterosexual women conducted in 2003 by Professor Karen Busby of the University of Manitoba's Faculty of Law, of these 100 women, only one knew that common law couples did not have an automatic presumption of sharing property and that their legal status was not equated with married couples. Notable, the one woman who was aware of her lack of property rights had gone through a separation with her common law partner and had learned the hard way. These findings were reiterated by Jennifer Cooper and the Honourable A.C. Hamilton's report.⁵³ The uninformed public needs the protection of the law.

MAWL Inc. supports the minority view in *Walsh v. Bona* and recommends that property rights be extended to common-law and same-sex couples. The view of the majority is the *laissez faire* view of common-law relationships as they existed in the 1960s and 70s when only a few chose this type of relationship, often specifically to avoid the legal trappings of marriage. The statistics show that common-law families are increasing. Married couples accounted for only 71% of Canadian families in the 2001 Census, a

⁵³ Discussion with Karen Busby, February 27, 2003.

decrease from 83% in 1981. Common-law families accounted for 14% of Canadian families in 2001, up from 6% in 1981.⁵⁴ The increasing trend to live common-law is partially due to the changing view of Canadians on organized religion.

According to Statistics Canada, Canadians claiming they are not affiliated with any religion has increased dramatically from 1981 to 2001. The 1981 Census showed 7.4% of the population selected no religious affiliation; this increased to 12.5% selecting no religious affiliation in 1991.⁵⁵ The results of the 2001 Census show this trend continues. The largest proportion of the population, at 43.2%, selected Roman Catholic as their religion. The second largest proportion of the population, at 16.2% selected no religion. That is an increase of 43.9% in persons choosing no religious affiliation from the 1991 Census. The third and fourth largest percentages were United (9.6%) and Anglican (6.9%). These two religions changed by -8.2% and -7.0% respectively since 1991.⁵⁶ With the significant increase in the number of common-law relationships and the decrease in organized religion, most common-law partners do not make a conscious choice not to marry due to the legal trappings of marriage but instead often drift into the relationship or choose not to marry because they are not actively following a religion.

⁵⁴ "2001 Census: Marital status, common-law status, families, dwellings and households", Oct. 22, 2002. Online. Available: <http://www.statcan.ca/daily/English/021022/d021022a.htm>

⁵⁵ "Population by religion, 1981 and 1991 Censuses, Canada". Online. Available: <http://www.statcan.ca/English/Pgdb/demo32.htm>

⁵⁶ "Selected Regions, Canada, Provinces and Territories – 20% sample data". Online. Available: <http://www12.statcan.ca/english/Census01/products/highlight/religion>

▪ **RECOMMENDATION**

MAWL Inc. calls on all provinces and territories to amend their legislation to give common-law and same-sex couples equal rights to property division upon separation from or upon the death of their partner/spouse.

MAWL Inc. calls on Manitoba to immediately proclaim *The Common-Law Partners' Property and Related Amendments Act* and to consider amending said legislation to adopt MAWL Inc.'s further recommendations set out herein.

In response to an expected Supreme Court decision in the case of *Walsh v. Bona*, the government of Manitoba introduced and passed *The Common-Law Partner's Property and Related Amendments Act* on August 9th, 2002. It was announced that the *Act* would not be proclaimed until the *Walsh v. Bona* decision had been delivered. However, the decision rendered was not what the legislature had assumed and therefore the government has postponed the proclamation of the *Act*.

The *Act* proposes to amend all existing property legislation to include same-sex and common-law couples. The *Act* is to apply to common-law relationships, both same-sex and opposite-sex, which exist on the day that the legislation is proclaimed. The *Act* will establish a registration system that allows unmarried couples to voluntarily register their relationship, and also provides for property rights by time default; common-law spouses will automatically gain property rights after a certain time period. This

provision will bring security of property rights to most couples, including same-sex and opposite-sex, common-law partners.

A) Amendments to *The Marital Property Act*

Under *The Common-Law Partners Property and Related Amendments Act*, the former *Marital Property Act* will be changed to *The Family Property Act*. A definition of common-law partnership will be included, and it will be defined as either a relationship registered in accordance with *The Vital Statistics Act*, or a conjugal relationship of at least three years. The term marital home will be changed to family home. It will be defined as the home that is occupied by the partners or spouses as their family residence.

The *Act* will apply to all marital and common-law relationships, including same-sex relationships. The *Act* will apply to relationships that existed before or after the coming into force of the section as long as the partners' residence is in Manitoba or their last common residence was in Manitoba. The *Act* will not apply to individuals who are living separate and apart on the day the *Act* comes into force.

The court has the authority to determine the period of time the common-law partners cohabited, with the dates that their relationship began and ended, if the parties themselves cannot determine those facts through proof of registration or dissolution of the relationship. A common-law partnership is considered terminated when the

partners have lived separate and apart for at least three years. The partners may also end their relationship by recording the dissolution of a registered relationship, or by agreement. There are restrictions in applying for an accounting and equalization of assets. If the couple has registered their relationship, no application for an accounting and equalization of assets may be made once sixty days have passed after the dissolution of the relationship was registered. If the couple did not register their relationship, no application for an accounting and equalization of assets may be made once three years of living separate and apart has passed.

The purpose of *The Family Property Act* is to recognize that a marriage or common-law relationship is a partnership with equally shared responsibilities, obligations and rights to assets. Therefore, the *Act* will apply to any asset acquired by a partner before the marriage or relationship, with restrictions. The asset must have been acquired while the couple was living in a conjugal relationship immediately before marriage, or where there was a specific contemplation of cohabitation or marriage. The *Act* does not apply to any assets acquired before the commencement of cohabitation, but it does apply to any increase in value of the asset gained during cohabitation. The *Act* does not apply to any assets acquired by a common-law partner while living separate and apart from his/her partner, or while in a common-law relationship with a former partner unless the asset was acquired while living separate and apart and in contemplation of the common-law relationship with the present partner. For example, a car purchased

before the couple began to live together conjugally may be shareable if it was bought specifically for use during the common-law relationship.

Appreciation and depreciation of, and income from an asset that accrues while the common-law partners are cohabiting are also shareable. Dissipation, excessive gifts and transfer for inadequate consideration are applicable in the same fashion as they are applicable to married spouses.

In determining an equalization of the property, the court has the discretion to consider several factors. The court may look at any common-law relationship agreement between the partners. They also may consider the length of time the partners cohabited conjugally, and the length of time the partners lived separate and apart from each other.

The rights of a separated spouse or common-law partner under *The Family Property Act* are paramount to the rights of a new spouse or common-law partner to inherit property under *The Intestate Succession Act*. For example, a separated spouse is entitled to an equal share in the value of the family cottage in an accounting and equalization even if, in his/her will, the deceased spouse gave the cottage to a new common-law spouse.

Likewise, a previous spouse or common-law partner has priority under *The Family Property Act* to the claim of a subsequent spouse or partner under Part IV of *The Family Property Act*. Any entitlement of the most recent spouse or partner will be reduced by the amount due under Part IV of *The Family Property Act* to the previous spouse or partner.

The new *Act* only amends the existing *Marital Property Act* so the current clauses regarding existing agreements will apply to common-law and same-sex relationships (s.5 of *The Marital Property Act*). The new *Act* will not apply to any asset disposed of in a spousal agreement; an agreement may include terms that make the *Act* inapplicable to certain assets. However, if an agreement is silent as to an asset, the *Act* will be as applicable as if the agreement did not exist (s. 5[1]). An agreement may vary one provision of the *Act*, or make a provision inapplicable, but only that one provision will be varied or inapplicable: the rest of the *Act* is still applicable (s. 5[2], [3]).

Although all jurisdictions in Canada have passed some legislation that grants favourable rights to same-sex and opposite-sex, common-law partners, those rights do not always extend to property. Only Saskatchewan and Quebec currently have legislation in place that extends entirely the rights of married partners to common-law partners, including property rights.⁵⁷ Nova Scotia has a registration system in place under *The Vital Statistics Act* whereby common-law partners who register their relationship will receive the same property and support rights as married couples. Nunavut and the Northwest Territories have extended property and spousal support rights to common-law couples who have cohabited outside of marriage for at least two years or in a relationship of some permanence if they are together the natural or adoptive parents of a child.

⁵⁷ The Saskatchewan *Family Property Act*; the Quebec *Act instituting civil unions and establishing new rules of filiation*

B) Amendments to *The Homestead Act* and A Look at Homestead Legislation Across Canada

The Common-Law Partner's Property and Related Amendments Act will make changes to *The Homesteads Act*. The purpose of *The Homesteads Act* is to provide to a non-owning spouse a life interest in the homestead when his/her owning spouse dies without leaving the homestead to the surviving spouse. The surviving spouse is entitled to live in the home rent-free and on up to 320 acres of land surrounding the home for the remainder of his/her life.

The amendments proposed by *The Common-Law Partners Property and Related Amendments Act* will extend the rights currently granted to married persons to common-law and same-sex partners. For example, the words "and common-law partner" will occur after each incidence of the word "spouse", thus giving common-law partners equal homestead rights. The definition of common-law relationship will be a registered relationship or a cohabiting relationship of at least three years.

The amendments provide common-law partners with many new rights, specifically the right to a life estate in the homestead as if it was left in the will of his/her deceased partner. Also, even if the common-law partners change residence, the homestead of the owner continues to be the homestead until the non-owning, common-law partner consents to the change in homestead. This may occur in three ways: the non-owning

partner releases his/her rights in the homestead in favour of the owning partner; the non-owning partner consents to the change in homestead, or; the homestead is sold in accordance with the *Act*.

If the partners have lived in two or more residences, the non-owning partner may elect one residence as the homestead. There is no requirement that you continue to occupy the home, only that the non-owning spouse once lived there with the owning spouse. The non-owning, common-law partner must consent to any disposition of or mortgage of the homestead. This consent must follow three requirements by the non-owning partner:

1. he/she must be aware of his/her life estate rights given by the *Act*
2. he/she must realize the effect of giving up the life estate, and
3. he/she must give consent freely and voluntarily, without any compulsion on the part of the owning partner, including signing the consent separate and apart from the owning spouse.

Further proposed amendments will give homestead rights to a second spouse or common-law partner but only after certain pre-conditions have been met. If the previous spouse/partner had a homestead right in the property, that right must be released or terminated first. Finally, if the previous spouse/partner has a claim under *The Family Property Act* for an accounting and equalization of assets, that claim stands ahead of the new spouse or common-law spouse's homestead rights. The

accounting/equalization claim does not have to be satisfied first in time, but it has priority over the new spouse's homestead rights.

If the partners are living separate and apart at the time of the owning spouse's death, the surviving partner is not entitled to any homestead rights unless the partners had resumed cohabitation for at least ninety days prior to the death of the owning spouse. The court may also terminate homestead rights if the partners did not register their relationship under *The Vital Statistics Act*, if the non-registered partner has rights over a second partner, and if the couple has been living separate and apart for three years or more (s. 10[1.1]). The court may make an order determining homestead rights in those situations, but only if it is fair and reasonable to do so.

The government of Saskatchewan has recently amended its *Homestead Act*. In the amendments, common-law partners have homestead rights if they have cohabited continuously for not less than two years. The property's homestead status is terminated if, at the time of the owning partner's death, the common-law partners had not cohabited in the preceding two years. This reflects the provision that considers a common-law relationship to be ended once the couple has ceased cohabiting for two years.

British Columbia repealed *The Homesteads Act* in 2000 with *The Definition of Spouse Amendment Act*. However, under *The Estate Administration Act*, the equivalent of a

homestead is authorized. The *Act* provides that the parcel of land shown as a separate taxable parcel on a taxation roll and all the improvements on any buildings on that land is to go to the surviving spouse as an estate for life (s. 96). The land will be held in trust for the surviving spouse. The deceased and the surviving spouse had to be ordinarily resident on the land, which had to be owned or jointly owned by the deceased spouse. This provision extends homestead rights to both married spouses and common-law spouses, as the definition of spouse includes a person who lived and cohabited with the deceased in a marriage-like relationship, including a marriage-like relationship between two persons of the same gender, for a period of at least two years ending no earlier than one year before the death.

Homestead rights in Alberta are administered under *The Dower Act*.⁵⁸ These rights only extend to married spouses. A surviving spouse has the right to prevent disposition of the homestead and the right to a life estate in the home and the personal property of the deceased spouse (s. 1). The homestead is defined as a parcel of land on which the dwelling house is occupied by the owner plus not more than four adjoining lots, in a city, town or village, or not more than one-quarter section of land outside of a city, town or village. Homestead rights apply to one homestead only; therefore the surviving spouse must elect one property in writing. The surviving spouse may elect the homestead or, if the surviving spouse refuses or neglects to make an election, the

⁵⁸ *The Dower Act*, R.S.A. 2000, ch. D-15

executor/administrator may, three months after the death of the owning spouse, apply by notice of motion to the court designating one property the homestead (s. 19[4]).

In Prince Edward Island, *The Dependents of a Deceased Person Relief Act* provides for the granting of property to a surviving spouse or common-law partner. A common-law partner is defined as a person of the opposite-sex to the deceased who is not legally married to the deceased who, for a period of at least three years immediately prior to the death, lived and cohabited as the spouse of the deceased and was dependent upon the deceased for maintenance and support. If it is considered fit, the court may make a provision granting any specified property to the spouse or partner absolutely, in trust or for life (s. 6[2]).

The Northwest Territories, Ontario, New Brunswick and Nova Scotia include the equivalent of homestead rights within their intestate succession legislation.

C) Amendments to *The Intestate Succession Act*

In the amendments made to the Manitoba *Intestate Succession Act*, the *Act* will be applicable to both married spouses and common-law partners who have cohabited continuously for at least three years, or for one year if they are the parents of a child.

The spouse or common-law partner who had the most recent relationship with the deceased has priority over any spouse or common-law partner who had a relationship with the deceased previously (s. 3[3]). However, a former spouse or common-law

partner would still have a claim under Part IV of *The Marital Property Act*. The common-law partner will be treated as predeceased to the deceased if the couple had been living separate and apart for at least three years, and had undertaken one or more of the following: registered a dissolution of the relationship under *The Vital Statistics Act*, one partner had made an application under *The Family Property Act* for an accounting and equalization of assets or the couple had already divided their assets among themselves.

In amendments to the Saskatchewan *Intestate Succession Act*, a common-law partner will have the same rights as a married spouse. The definition of spouse includes a person who had cohabited continuously with the deceased for at least two years and, at the time of the death, was continuing to cohabit with the deceased or had ceased to cohabit within the twenty-four months before the death. If the spouse of the intestate left the intestate and was cohabiting with another person in a common-law relationship at the time of the intestate's death, that former spouse can take no part in the intestate's estate (s. 20).

The Alberta *Intestate Succession Act* applies to married spouses and to partners of an adult interdependent relationship. An adult interdependent partner is to be treated as equivalent to a married spouse. S. 3(2) provides that if an intestate dies leaving a surviving spouse and an adult interdependent partner, the surviving spouse shall take

no part in the intestate's estate and the surviving adult interdependent partner shall be treated as the surviving spouse.

In the British Columbia *Estate Administration Act*, intestate rights of a spouse are extended to common-law spouses, both same-sex and opposite-sex. In the case of two or more persons being defined as a spouse, the portions of the estate to be distributed will be determined by the court (s. 85[1]).

The Intestate Succession Act of the Northwest Territories applies both to married partners and to a spouse who was cohabiting with the deceased outside of marriage for a period of at least two years or had cohabited in a relationship of some permanence if they were together the natural or adoptive parents of a child. This definition is only applicable to a partner who died after the coming into force of the *Act*, in 1997. Under the *Act*, a spouse may elect to receive the family home instead of the maximum entitlement of \$50,000 (if the home is valued at more than \$50,000) or to receive the family home as part of the \$50,000 (if the home is valued at less than \$50,000).

The Newfoundland *Intestate Succession Act* applies only to married partners and does not discuss homestead-type rights. The Ontario *Succession Law Reform Act* applies only to married spouses. The *Act* provides that the surviving spouse is absolutely entitled to all real property of the intestate. Similarly, the New Brunswick *Devolution of Estates Act*

only applies to married spouses.⁵⁹ If an owning spouse dies without a will, the surviving spouse receives the estate (s. 24). After the owning spouse's death, all marital property goes to the surviving spouse. The surviving spouse is not entitled to a dower interest in the land of the deceased unless he/she elects within six months from the death not to take the benefits of s. 24.

The Nova Scotia *Intestate Succession Act* also applies only to married spouses. The *Act* defines the spousal home as the dwelling owned and occupied as the principal residence by the intestate at the time of death and includes any land surrounding the dwelling as well as any household furnishing and goods. A surviving spouse is entitled to the intestate's estate up to \$50,000 in value. However, the surviving spouse may elect to receive the spousal home in lieu of the \$50,000 if the home is valued at more than \$50,000; or, the surviving spouse may elect to receive the home as part of the \$50,000 if it is not worth that much. The Attorney General has the authority to determine the requirements of the election (s. 6[1]). Under this *Act*, a surviving spouse is not entitled to dower rights (s. 15).

▪ **RECOMMENDATION**

MAWL Inc. recommends that the government of Manitoba proclaim *The Common Law Partners' Property and Related Amendments Act* as soon as possible. However,

⁵⁹ New Brunswick, *The Devolution of Estates Act*, R.S.N.B. 1997, ch. D-9

MAWL Inc. has concerns and recommends further amendments to *The Common-Law Partners' Property and Related Amendments Act* as set out herein.

D) Pre-Existing Agreements and Independent Legal Advice

The Common Law Partners Property and Related Amendments Act states that pre-existing spousal agreements related to property division will remain valid after the *Act* has been proclaimed. MAWL Inc. argues that there should be a rebuttable presumption against the validity of pre-existing spousal agreements. MAWL Inc. questions how an agreement that consents to waiving rights that did not exist at the time can be legally binding. The difficulty with this section is that common-law and same-sex spouses never had property rights in Manitoba and still do not have them until this *Act* is proclaimed. Therefore, if a common-law or same-sex couple entered into a cohabitation agreement waiving any right to property acquired during the relationship – even with independent legal advice – the lawyer advising them would have told the common-law or same-sex partner that they currently did not have property rights and therefore, they really were not giving up any rights. To allow that agreement to stand to exempt these persons from the protection of the new legislation is unconscionable.

For example: prior to *The Common-Law Partner's Property and Related Amendments Act* being proclaimed, Sam creates a cohabitation agreement with his common-law partner of five years, Coral, that states he has all the rights to the summer cottage and the car that they both use. Sam owns both assets and both were purchased during their

relationship. Coral sees a lawyer and is told that she would not have rights to these assets after the relationship ends because she does not own them and they are not married, so she consents to the agreement. A year after the *Act* has been proclaimed, their relationship ends. Coral now has the right to an accounting and equalization of the car and the cottage, but Sam argues that their spousal agreement remains valid and that Coral has waived these rights. How can an agreement be legally valid when it was created with the knowledge that, at the time, the non-owning, common-law partner had no property rights? MAWL Inc. strongly recommends that there should be a rebuttable presumption against all pre-existing agreements being valid.

▪ **RECOMMENDATION**

MAWL Inc. recommends that any prior agreement be presumed invalid but that the presumption be rebuttable if the parties or a party can show a court that there was valuable consideration given by each spouse for the waiver and that the valuable consideration was of sufficient nature considering the rights being waived. Also, any spousal partner agreement, prenuptial or postnuptial agreement waiving property rights should be presumed invalid unless both spouses obtained independent legal advice.

MAWL Inc. does not support the Saskatchewan legislation regarding pre-existing agreements. The Saskatchewan legislation provides that any written agreements created before the Saskatchewan *Family Property Act* would be given the same weight

and consideration as if they had been considered in proceedings on possession, status, ownership, distribution, etc. of family property between the spouses before the *Act* took force (s. 41[1]).

In addition, MAWL Inc. believes that independent legal advice should be a prerequisite to the validity of any past or future spousal agreement. MAWL Inc. argues that independent legal advice should be required in the Manitoba legislation. Independent legal advice is essential if an existing agreement will be allowed to override the rights given under the new statute. MAWL Inc. questions whether independent legal advice could properly be given in any situation if commonlaw partners did not have property rights previous to the enacting of this new statute. MAWL Inc. believes the only time a pre-existing agreement should be allowed is if adequate consideration has been given. For example, when both spouses/partners waive their rights and they each have approximately equal assets or both have sufficient assets to support themselves through the balance of their lives. An example of such a situation would be a second marriage later in life between two professionals who are both working and neither of the partners has had their income impaired by family responsibilities associated with the relationship.

In its corresponding legislation, the province of Saskatchewan requires independent legal advice in order to render a spousal agreement valid: an agreement is considered an interspousal contract only if independent legal advice has been sought by both

spouses before signing. Also, the agreement must meet specific requirements. For instance, the agreement must be witnessed, each spouse must be aware of the claims within the agreement, and a lawyer other than he who represents the other spouse must be present (s. 38[1], [2]).

▪ **RECOMMENDATION**

MAWL Inc. believes that all spousal or common-law agreements should be worded to ensure the spouses are aware of their rights and obligations. Independent legal advice is essential and must be required for all spousal or common-law agreements..

E) Application of the Proposed Act to Existing Relationships

The new legislation applies to all relationships commenced either before or after coming into force of the *Act*. However, *The Common-Law Partners' Property and Related Amendments Act* does not apply to those living separate and apart before the coming into force of the *Act* unless, after the day the *Act* comes into force, the couple registers their relationship under *The Vital Statistics Act* or resumes cohabitation for at least 90 days. (Saskatchewan's *Family Property Act* applies regardless of whether or not a spousal relationship existed before the *Act* came into effect.) It applies regardless of whether any legal proceedings to determine spousal rights were started before the *Act* came into force.

MAWL Inc. is concerned that those common-law partners that most need protection from the legislation will not be protected because their common-law spouse will either get them to sign an agreement, opting out of the new legislation, or leave the relationship prior to the proclamation of the *Act*. For example, Krista and Charlotte have cohabited for ten years. Krista finds out that Charlotte will be eligible to receive an accounting and equalization of their family property once the *Act* is proclaimed. Krista, who owns all the marital property, may be more apt to leave the relationship with all the assets she considers to be hers prior to proclamation. Although the relationship has lasted ten years, Krista will be able to leave the relationship with all her assets provided she does so before the *Act* is proclaimed. Charlotte is then left with few or no assets, even though she maintained the household and contributed to the value of those assets.

Consider another example, involving Kerri and Wally who have lived together as a common-law couple for twenty years. They have five children together. Kerri did not work outside of the home while raising their children; both Kerri and Wally had agreed Kerri's job would be as housekeeper and caretaker. The assets the family enjoys, such as the house, the car and the trailer, were purchased with Wally's money, as he was the only one earning an income. Wally becomes aware that new Manitoba legislation will enable Kerri to apply for an accounting and equalization of all the assets Wally owns should their relationship end. He is upset that she may become entitled to half of the assets he has purchased with his income. To prevent any equalization, Wally ends his

relationship with Kerri and asks her to leave the house with the children. Although the couple cohabited for twenty years and Kerri sacrificed her own income-earning potential to raise the children and care for the home, she will not be entitled to any of the assets owned by Wally. Kerri and Charlotte are among many who will not have property rights regardless of the extent and circumstances of their common-law relationships.

MAWL Inc. supports the dual registration system because it automatically protects property rights for spouses who do not or cannot register, and also allows for a couple to take active measures to ensure their property rights are shared. However, MAWL Inc. is concerned that the *Act* only applies to relationships that exist on the date the *Act* is proclaimed.

▪ **RECOMMENDATION**

MAWL Inc. recommends that the amendments should apply to all relationships that existed on the date the legislation was introduced into the legislature (August, 2002) so no one is left without protection. This was the procedure followed when the original *Marital Property Act* was enacted and applied to existing marriages. This would ensure protection for all couples, especially those that are the most vulnerable. It would prevent spouses/partners from using the time period between introduction of the *Act* and proclamation to abandon their relationship and avoid the mandatory sharing of the assets acquired during the relationship.

VI. EXEMPT ASSETS UNDER THE MARITAL PROPERTY

ACT: GIFTS AND INHERITANCES

A) Introduction and Background

In the current *Marital Property Act*, some assets are exempt from sharing among spouses after the end of the marriage. These assets include gifts and inheritances received by one spouse from a third party, and the proceeds of any insurance policy where the premiums were paid as a gift in favour of one spouse by a third party (s. 7). This exemption applies to any income from, or appreciation or depreciation in value of a gift/inheritance, unless it can be shown that the gift or inheritance was given to the spouse with the intention that the income or appreciation should benefit both spouses. This is unlike assets acquired prior to marriage where the asset is exempt but the increase or decrease in value of the asset during the period of marriage or cohabitation is shareable. However, if the gifted or inherited asset was used to purchase a family asset, the income from or appreciation of the value of the family asset will be shareable. Furthermore, that family asset itself may become shareable because the exempt asset has been converted into a family asset and has lost its exempt status (s. 7[5]).

The *Act* includes a judicial discretion clause to vary an equalization payment regarding family assets should the payment be grossly unfair or unconscionable to one spouse. In determining what is grossly unfair or unconscionable, the court may examine any

extraordinary financial or other circumstances of both spouses or the extraordinary nature or value of any exempt assets. For the equalization of commercial assets, the court has greater discretion to determine if the equalization would be inequitable. S.14 [2] sets out various factors the court may consider, including unreasonable impoverishment; the amount of debts and liabilities of the spouses and how they were incurred; any extraordinary assets that were acquired through a gift or inheritance; spousal agreements; the length of time the spouses were separated; the nature of assets, and; the extent to which the earning capacity of the spouse is affected by the circumstances and responsibilities of the marriage. However, there is no judicial discretion to make a gift or inheritance or its increase in value shareable under the Act per se only to take it into account in an accounting and division of the assets. The only opportunity to make a gift or inheritance shareable is if it has been conferred on one spouse with the intention of benefiting both spouses, something that is usually very hard to prove.

The blanket exemption from sharing gifts and inheritances is of concern. It raises many questions regarding spousal property rights and fairness. What if the spouse pays something but less than fair market value for an asset – will the asset be considered a gift or not? What considerations are taken into account when determining if a gift/inheritance was intended to benefit both spouses such that the non-owning spouse shares in the asset itself or its appreciation in value? What is considered in determining whether or not a gifted/inherited asset has changed its status to a family asset, such

that its value will be shareable? Is a gift given during an engagement intended to benefit both spouses? Is a gift given prior to marriage or cohabitation an exempt asset under s. 7, such that the increase or decrease in value is also exempt, or; is it considered an exempt asset under s. 4 (acquired prior to marriage) such that the increase or decrease in value is shareable? What if the gifted or inherited asset is a family car or a family home – does it become shareable because it is a family asset used by both or does it remain exempt but the increase or decrease in value of it is shareable under s. 7(5). The current *Act* and proposed amendments give little guidance in answering these questions. This lack of direction reflects the uncertainty in the *Marital Property Act* legislation regarding gifts and inheritances.

In MAWL Inc.'s view, the gifts and inheritances section of *The Marital Property Act* should be amended to create a more egalitarian result. An examination of the relevant case law in Manitoba confirms the lack of certainty in this area. The law needs clarity, and this will only come through a change to s. 7 of *The Marital Property Act*.

The case law in Manitoba is not consistent when determining whether s. 7 of *The Marital Property Act* applies to an asset. Several cases suggest that regardless of its origin, once an asset has been converted into a family asset, it can no longer be exempted pursuant to s. 7. A gift or inheritance must remain clearly separate from the spouse's family assets to retain its exempt status; as long as assets are not mingled, the asset will remain exempt from an accounting. Some cases suggest that the court will consider the role of

a spouse in determining whether or not the property is to be exempted, even if the property was acquired by way of gift. For example, a spouse's role in improvements or maintenance to the property will be taken into account. These cases exist even though there is no judicial discretion allowed if an asset is exempt under s. 7.

In terms of the definition of *gift*, it appears to be left to the court's discretion as to whether or not an asset was gifted to only one spouse. The court must see a clearly identifiable intention to benefit both spouses to determine that a gift is shareable. In order to prove this intention, there needs to be more than just evidence that both spouses used the asset. Some case law suggests that a gift intended for one spouse can never become a shareable family asset, even if it used by the family. The case law in this area suggests that an asset may remain exempt even if it was gifted during an engagement, as it is still intended to benefit only one spouse.

In short, there lacks a clearly defined interpretation of s. 7 of *The Marital Property Act*. The following analysis of the case law in Manitoba demonstrates the uncertainty and unfairness of this section.

B) Case Law Review

The Marital Property Act recognizes that assets acquired during a marriage are a result of the efforts of both spouses. There is thus a presumption of sharing certain assets after the dissolution of the relationship. One provision of the *Act*, however, automatically

exempts certain assets from equalization. S. 7[1] of *The Marital Property Act* exempts from sharing assets acquired by way of a gift from a third party, and s. 7[3] exempts from sharing assets acquired by way of an inheritance. S. 7[4] of the *Act* excludes any income from or appreciation or depreciation in the value of an asset acquired by way of gift or inheritance unless it can be shown that the gift or inheritance was given with the intention that the income/appreciation benefit both spouses. Finally, any income or appreciation in the value of an asset acquired by way of gift or inheritance will be included in the accounting if the income or appreciation was used to purchase a family asset (s. 7[5]).

The only judicial discretion in the *Act* is in s. 14; in s. 14[1], the court may vary the equalization of family assets if to do otherwise would be grossly unfair or unconscionable. No factors are laid out in this section to suggest what may be examined in determining what is grossly unfair or unconscionable. By contrast, s. 14[2] provides for judicial discretion regarding the division of commercial assets. Six factors are laid out for the court to determine whether or not an equalization of commercial assets would be inequitable. These factors are:

- the unreasonable impoverishment of either spouse of the family assets
- the amount of debts and liabilities of each spouse and the circumstances in which they were incurred
- any spousal agreement between the spouses
- the length of time the spouses have cohabited during marriage
- the length of time the spouses had lived separate and apart from each other during their marriage
- whether either spouse has assets of an extraordinary value that were acquired by way of gift or inheritance

- the nature of the assets
- the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and circumstances of the marriage

Moreover, Manitoba's law lacks a definition of gift or inheritance. Therefore, the Manitoba common law and judicial discretion have provided definitions of gift and inheritance and its applicability to these sections. According to the case law, there are circumstances that can exempt an otherwise non-shareable asset from the s. 7[1] and s. 7[3] exclusions.

i) Should gifts and inheritances be non-shareable without judicial discretion? What is a gift? What have the courts considered in determining whether or not a gifted/inherited asset has achieved status as a family asset, such that its income or appreciation in value will be shareable?

S. 7[5] provides that any income from or appreciation in value of an asset will be included in the accounting if the income/appreciation was used to purchase a family asset. However, this section does not address the shareability of the value of the asset itself. S. 4[3] provides that for any asset that is exempt for a reason other than pursuant to s. 7 – for example, the asset was acquire prior to marriage – the appreciation, depreciation and income of the asset is shareable. Three cases suggest that an asset itself is not exempt from sharing once it has been converted into a family asset, regardless of the origin of the asset. These discretionary decisions are discussed below.

In the case of *Boggs v. Boggs*, a Manitoba Court of Queen's Bench decision in 1987 ([1987] M.J. No 381), the court questioned the shareability of an inheritance received by the wife. The wife inherited a sum of money from her mother. S. 7[3] of the *Marital Property Act* states that any asset acquired by way of an inheritance is excluded from the class of shareable assets. S. 6[5] states that this exclusion follows to any asset acquired with that inheritance. However, this section is subject to the situation where the asset acquired with the inheritance is a family asset (s. 7[5]). In the *Boggs* case, the wife used her inheritance monies to purchase a vehicle that was used for family purposes. In his reasons for his decision, the judge stated, "[t]he reference to an asset being acquired in exchange for an asset may smack of barter, but in the context of this *Act* it is quite apt to refer to a purchase and sale." He held that the use of the inheritance to purchase a family car resulted in the creation of a family asset. Therefore, the car was not exempt from sharing. Even if the asset would be non-shareable according to the *Act*, the fact that it was used to purchase a shareable asset negates s. 7(3) and brings the asset within s. 7(5) as a shareable asset.

This case is consistent with the decision in *Wright v. Wright*, a Manitoba Court of Queen's Bench judgment of 2002 ([2002] M.J. No. 17). In that case, the couple bought a car and began to make payments on the car from their joint account. The wife received a gift of \$18,000 from her mother. She used that money to pay off the rest of the car.

The court held that the car was a family asset regardless of the source of income used to purchase it. Therefore, the car was shareable.

The case of *Scharff v. Scharff*, ([1999] M.J. No. 431), also follows this approach. In that case, the husband received land by gift from his father, which included the family home. The father wanted to maintain the tradition of having the farm ownership solely in the husband's name and thus did not include the wife on the land title as an owner. However, the father did not mention any specific intention to exclude the wife. In fact, the father even stated he wanted to see the whole family benefit and succeed from this land. The court held that the land had been used as a family asset as it offered shelter, according to *The Marital Property Act* definition of family asset. The husband had converted the land and premises into a family asset; therefore, the house and real property was subject to equalization even though not all the farmland was used for shelter and even though the asset itself was a gift.

The case of *Kuhr v. Kuhr* examines the use of a gift to purchase property that was placed in joint names, and whether or not that property should be equally shareable.⁶⁰ The couple had been married for thirteen years and the husband claimed there should be an unequal division of the family home because to do otherwise would be grossly unfair, as per s. 14 (then, s. 13(1)). The husband put forth this claim despite the fact that jointly-held property is not applicable under *The Marital Property Act* by virtue of s. 10. The

⁶⁰ *Kuhr v. Kuhr*, [1984] M.J. No. 122 (Manitoba Court of Queen's Bench)

husband's father bought a home for his son, valued at \$12,500, a month before the son was married. The family lived there for nine years, during which time the son made major renovations. The home was sold for \$39,000. The couple then bought another home and the title was placed in both their names. The second home was purchased for \$48,500. This amount was raised through the proceeds from the sale of the first home plus an \$8,000 gift from the husband's mother, plus \$4,000 from the wife. The couple made improvements to the house of \$15,000 - \$20,000; the husband did most of this work. The husband claimed an unequal division of this home based on the fact that \$20,500 of the money put towards the house had come from gifts from his parents.

The court had to determine if the use by the husband of the gifts from his parents to contribute towards the ultimately jointly held home constituted a circumstance that makes an equal division grossly unfair. The court held that it was not grossly unfair and that equal division was appropriate. In coming to this conclusion, the court commented that sometimes one spouse contributes more financially but not all contributions can be measured in a money value. For instance, the wife maintained the household and cared for the children. Furthermore, the husband voluntarily decided to put the gifts towards the family home so he cannot now complain that the equal division is unfair. As per Bowman, J.:

Where a party consciously uses an otherwise exempt asset to purchase an asset which is either shareable under the Marital Property Act or, as in this case, placed in joint tenancy, I cannot find that it is grossly unfair or unconscionable that that asset should then be shared equally between the parties.

ii) How does a court determine that the increase in value of a non-shareable asset should be shareable?

In the Manitoba Court of Appeal case, *Waters v. Waters*, judicial discretion determines that the increase in value of shares that were gifted to a husband is shareable. At the trial level, the shares were found to be a gift owned by the husband in a company co-operated with the husband's father was a gift and held that the husband was not accountable for any appreciation in value of the shares, as per s. 7(4). However, the court said that not every increase in the value of the shares is considered appreciation and included in the exemption of s. 7(4). It is not appreciation where the recipient himself does something to the gift that increases its value. For example,

the recipient of an antique car by way of gift who buys a new engine, installs it and refurbishes the car, must be accountable under the Act for the increase in value due to the investment of family assets and his own effort. In the case of an incorporated family business the same principle applies. If, through the effort of the shareholders, a company's shares increase in value beyond that attributable to an appreciation in their original worth, the increase in value due to the efforts of the shareholders is not appreciation. The increased value of the shares attributable to the efforts of the shareholders should be treated as a commercial asset as between a shareholder and the shareholder's spouse. If it were otherwise, a gift of an interest in a business would enable the recipient to shelter from designation as a divisible asset property acquired by the investment of family assets or the recipient's personal effort.

In *Waters*, the appeal was allowed in part and although the wife was not entitled to an interest in the full value of the shares, she was entitled to an interest in that part of the shares' value that exceeds the total of what they were worth on acquisition plus appreciation. The court fixed an amount that the husband should pay to the wife in lieu of her entitlement to share in the husband's interest in the company because the shares

could not be readily valued. The court cited extraordinary circumstances in reaching this decision.

iii) If the spouse pays less than Fair Market Value for an asset, will the asset be considered a gift or not?

The case of *Dashevsky v. Dashevsky* in 1986 ([1986] M.J. No. 673) suggests that the actual value paid for an asset is irrelevant in considering whether or not the asset is a gift. In 1969, the husband's mother gave the husband some land, with the balance to be paid "on demand", and on the condition that 25% of the value of crops would go to the parents every year. Also, the parents would have the right to reside on the land. The balance would be forgiven if the parents died. In 1976, the husband's father transferred his interest in the land to the husband. The couple was married in 1978, and the court determined that the husband was the legal owner of the property at that time.

The wife admitted that the land itself was not shareable under s. 4(1c), that is, under the section that exempts from sharing assets that were acquired before the marriage.

However, she argued that she is entitled to a sharing in the appreciation of the land that accrued during the marriage, under s. 4(3a). The husband argued that s. 4(1) is inapplicable as the land was a gift, and thus the appreciation in value was exempt under s. 7.

The court looked at the definition of gift. Mr. Justice Carr held that the essence of a gift is the absence of consideration. The court must look at the true intention of the parties, not at what might be inferred by the transaction documents. For tax purposes, the husband and parents had construed their affairs so that the transactions were not gifts. The court held that the husband could not say this characterization was irrelevant because it suits his purposes now to have the property be deemed a gift. Once the husband had characterized the transaction as a sale, it was not open for the husband to argue it was a gift for *Marital Property Act* purposes.

Justice Carr stated that as cash, in the form of the balance, was owing on the property, it was not up to the court to weigh the consideration. Justice Carr held that any consideration paid would eliminate the classification of the asset as a gift. The low price could simply mean the parents wanted to give their son a good deal. Therefore, the result was that the wife was entitled to share in the accrued appreciation in the property from the time of the marriage to the date of their separation. The actual value paid for the asset was irrelevant.

The recent Manitoba Court of Appeal decision of *Fehr v. Fehr*, [2003] M.J. No. 154, also explores the nature of a gift with regard to income tax purposes. The husband and wife had been married for 22 years. The husband had farmed with his father for a number of years on land owned by the father. The husband's father became ill and wanted to gift his land to his son. The father's accountant gave the father two options with regard to

income tax. The first option was to sell land at fair market value, with the father taking responsibility for the tax on the value of the farm. The second option was to roll the land over at 1971 values (that being the date when capital gains tax was enacted).

Under the second option, if the husband ever sold the land, he would have to pay capital gains tax back to 1971. The father chose to transfer the land in the cheapest way possible for him – to roll the land at 1971 values. The accountant erroneously advised the father that it was necessary to sell the land at 1971 values in order to effect the rollover.⁶¹

A written agreement was prepared between the father and the husband with the father's name as vendor and the husband's name as purchaser. The purchase price of \$126,181 was secured with a promissory note and no interest was applied. This agreement was signed before the father's lawyer. The accountant then advised the father and husband to exchange cheques in order to prove the payment. The father wanted to leave \$10,000 to each of his daughters, so he actually wanted \$20,000 to be paid by the son on the land transaction. The son signed a promissory note for \$126,181 without interest, and then issued a cheque to his father for \$106,181. The father also signed a cheque to the son for \$106,181 and the two exchanged these cheques.

Although the cheques were exchanged, they were never presented to the bank and therefore never cleared any bank accounts. The husband signed a promissory note for

⁶¹ This was incorrect advice. The father could have gifted the land to the son and the land would have rolled at the 1971 value to the son under s. 73(3) of *The Income Tax Act* (Canada).

\$20,000 without interest, payable to his father. He paid \$12,000 over time to his father. The accountant testified that the intent of the transfer was to avoid income tax consequences for the father.

Master Harrison's decision of 1999 held that the transaction of land was a sale of land and therefore the land was shareable in a marital accounting.⁶² The Master then held that the cheque from the father to the husband for \$106,181 was a gift. Therefore, the Master held that \$106,181 should be credited against the value of the land in the husband's favour.

The case was appealed to the Court of Queen's Bench.⁶³ Menzies, J. upheld the Master's decision that the transaction was a sale and not a gift. He rejected the Master's decision regarding the credit of \$106,181. Menzies, J. held that "the debt was not secured by or attached to any particular piece of property. Once paid, it ceased to exist."

The case was then appealed to the Manitoba Court of Appeal. The husband asked to have the credit reinstated, but the Court rejected this argument. The Court held that the transaction had the legal effect of a sale and purchase and therefore, was not a gift. The father wanted to avoid tax consequences and "achieving that objective was only possible by fundamentally changing the underlying nature of the transaction as

⁶² *Fehr v. Fehr*, [1999] M.J. No. 505

⁶³ *Fehr v. Fehr*, [2001] M.J. No. 296

originally conceived.” The Court based its decision on the principle that one must take into account what actually occurred.⁶⁴ The case of *Dashevsky* was discussed – the Court agreed with that decision that stated one cannot change the original nature of a transaction to suit their present purposes. Finally, the idea of credit was not supported and was therefore rejected.

⁶⁴ *Waters v. Toronto General Trusts Corporation*, [1956] S.C.R. 889

iv) What considerations are taken into account by the court when determining if a gift/inheritance was intended to benefit both spouses such that the non-owning spouse shares in the appreciation in value of the asset and the asset itself becomes shareable?

Although the *Act* excludes from sharing all gifts and the appreciation in value of the gift, the role played by a spouse appears to exempt certain assets from being non-shareable. The case of *Kreshewski v. Kreshewski*, a 1999 Manitoba decision ([1999] M.J. No. 428), suggests that the circumstances of a wife's role in maintaining and using the gift creates an interest in the gift such that the gift is intended to benefit both spouses. In this case, after eight years of marriage, land valued at \$29,000 was received by the husband from his father by gift. The parties had resided and worked on the land for the entire eight years of the marriage, and continued to do so for the next ten years. When the father gifted the land, he was aware of his daughter-in-law living and working on the land. He also knew she would acquire a dower interest in the land. The court held that the land was not exempt as a gift because of the following circumstances: the wife's active role and extended residence on the land, her dower interest in the land (homestead) and the specification in the conveyance that the land was to go to the son and his heirs, of whom the wife was one. This interpretation of s. 7 was supported by a 1982 decision (*Nykiforuk (Daviduik) v. Daviduik*, (1982) 27 R.F.L. (2d) 356) quoted in the case:

"... the Act has no application to assets acquired by a spouse while unmarried, while married to a former spouse, or while married to but living separate and apart from the other spouse, s. 7 should, I think be interpreted so as to apply to gifts made to a spouse who is married to and living with his or her wife or husband, as the case may be. In view of

the fact that there are in the two sections different provisions respecting the appreciation, depreciation and income of assets, I think it cannot have been the intention of the legislature to have a gift fall within both sections."

In some ways, this reasoning seems correct. If the land was gifted before the marriage, it would fall under s. 4 and the increase or decrease in value would be shareable. But that allows the increase or decrease in value to be shared when the third party who made the gift clearly intended to benefit only their child because the couple was not yet living together. A s. 7 gift during the marriage would either have to be proved to be intended to benefit both spouses or the increase or decrease in value is not shareable. This is not logical, and is a good reason to make the increase or decrease in value of a gifted or inherited asset shareable.

v) What criteria establishes whether or not a gift or inheritance was intended to benefit both spouses, as per s. 7[1] and s. 7[3], thus rendering the asset shareable?

In the case of *Kurchaba v. Kurchaba* ([1994] M.J. No. 312), the husband received real property from his father by way of both a gift and an inheritance. These properties were received before the couple were married. The wife claimed that she was entitled to the increase in value of the property during the marriage, according to s. 4[3a] of *The Marital Property Act*. The court held that because the property was gifted 12 years before the marriage, it could not have been intended to benefit both spouses. It was therefore an inheritance, and exempt from sharing according to s. 7[3] of *The Marital Property Act*. This case also demonstrates the uncertainty in the law; it is the exact opposite to the result in *Kreshewski v. Kreshewski*, *supra* and *Nykiforuk (Daviduik) v. Daviduik*, *supra*.

The case of *Stefaniuk v. Stefaniuk* in 1987 ([1987] M.J. No. 393), follows this same logic. In this case, the wife inherited both a sum of money and a cottage from her father. The cottage was inherited in the form of an interest, where her siblings held the other interests. The wife then bought the remaining interests from her siblings. Regarding the money the wife was gifted, she used some of the inherited money to make improvements on the family home and the cottage. This inherited money was put into a family account from time to time, but primarily rested in its own, independent account with exclusively inherited monies. There was no mingling of family and inherited money in that separate savings account. The court held that any of the inherited money that had been deposited into the general family account lost its “exempt from sharing status” as it became a family asset as per the *Act’s* definition.

The court held that the cottage was not intended to benefit both spouses, and thus it is not a family asset as per s. 7[3], even though the definition of family asset includes an asset used for recreational purposes; this case contradicts the *Boggs* case and the *Scharff* case. The husband argued that the cottage fell under s. 6[5] because the inherited money was used to buy out the interests in the cottage of the wife’s siblings, and to make improvements on the cottage. S. 6[5] states that an inheritance is not exempt if it is used to acquire a family asset. The court rejected this argument. Justice Mullaly held that the wife did not go out and purchase a cottage using the inheritance money, therefore the cottage does not fall under s. 6[5] – proceeds of a sale to purchase a family

asset. Instead, the cottage was a part of the inheritance with an agreement between all beneficiaries. It was not a case of her using estate money to purchase something other than that that was part of the estate itself. Furthermore, because the cottage is not shareable, the court held that any appreciation on it is also not shareable. Because the cottage itself was not intended to benefit anyone but Mrs. Stefaniuk, then any appreciation on that cottage is also not intended to benefit anyone but her. This case seems to conflict with the decision in *Wright v. Wright*, *supra* pg. 22, where a family car was deemed shareable because inherited money was used to pay it off. Overall, these cases show the uncertainty of the current law.

Inherited assets were also considered in the 2001 decision of *Lamont-Daneault v. Daneault* ([2001] M.J. No. 453). Three separate assets were examined to determine their shareability. The first asset was real property that had been in the family for three generations. The property had been gifted by the wife's mother to the wife. It was insured on a joint insurance policy that included the marital home. The rental income from the property was held in a joint account. The court held that because the property had been transferred to the wife's name alone, there was no intention to benefit both spouses and therefore, the property was exempt from sharing as a gift.

The second asset was a bank account that was gifted to the wife from her mother. The facts do not tell us what the account was used for, but the court held that it was not

gifted with the intention to benefit both spouses. Therefore, it was exempt from sharing.

The third asset was shares of a publicly traded corporation purchased through money gifted by the wife's father. The shares were purchased in two different transactions with the funds from the wife's father. They were first purchased in joint names, but the wife later transferred the shares into her name solely, without consent from her husband. Later, she sold some shares and transferred some back into her husband's name. It was intended by all parties (the married couple and the wife's parents) that any profit made from the shares would be used to pay back the money initially gifted to the wife by her father. Any further profit would be divided 50/50 between the parents and the couple. The court held that this asset was not a gift. It was intended by all parties to be shared once the initial investment had been paid off. Therefore, it was shareable.

In the case of *Wilm v. Wilm*, a Manitoba Court of Queen's Bench decision of 1989 ([1989] M.J. No. 693), three assets were considered to determine their status under s. 7 of *The Marital Property Act*. The husband inherited a piece of property, and the wife argued that it was intended to benefit both spouses. She gave evidence of a close relationship with the testators (elderly relatives), involving support and care. She argued that this relationship showed that the testators had intended to have both spouses care for them in their old age in return for benefits in their wills, including the property received as an

inheritance. However, the court held that the property was exempt from sharing because, although there had been ample time for the testators to alter the will to include a benefit to the spouse, no such alteration had been done. The will stated that the property was to the husband absolutely; there was no clear intention to benefit both spouses. In her decision, Senior Master Goldberg, as she then was, stated,

The intention of the donor must be determined in each case. There is no reason why the court cannot look beyond the terms of the Will to ascertain the intention of the person making the devise or bequest. However, in order to remove the exemption for assets acquired by inheritance, the cases indicate that there must be more than a presumption from surrounding circumstances of an intention to benefit, and more than evidence that both spouses used the assets in question. The words of section 7(4) require that the intention be shown.

Thus, to prove an “intention to benefit” as per s. 7[4] of *The Marital Property Act*, there needs to be more than just evidence that the asset was used by both spouses. There also needs to be more than a presumption from the surrounding circumstances. The land itself was thus exempt from sharing.

The second determination was regarding efforts made to improve the property. The court relied on jurisprudence that said increases in the value of excluded assets might be shareable if the increased value is attributable to improvements to the assets rather than appreciation alone.⁶⁵ However, there was insufficient evidence to discern whether the increased value was a result of improvements or merely appreciation.

⁶⁵ *Waters v. Waters* (1986), 44 Man. R. (2d) 109 (C.A.) and *Stefaniuk v. Stefaniuk* (1987), 48 Man. R. (2d) 111 (C.A.). The case of *Stefaniuk v. Stefaniuk* followed the case of *Waters v. Waters*. The wife had received a cottage by inheritance from her father. The court held that the cottage was an exempt asset under s. 7(3), so the husband claimed appreciation in value of the asset under s.

The final determination dealt with bonds and investment certificates. The husband claimed they had been purchased with money from an inheritance. However, a lack of hard evidence to prove that these items had been purchased with inherited money caused the court to rule they were shareable. The onus rested on the husband to prove the assets were exempt from sharing, and he did not satisfy that onus.

In the case of *Isbister v. Isbister* ([1981] M.J. No. 7 (MBCA)), the asset in question was an investment portfolio inherited by the wife from her first husband after his death. The trial judge held the asset was shareable because the spouses intended to incorporate their respective assets into the family estate. For several years, the wife had shared the income of her investment portfolio and some of its capital with her second husband, although the title to the assets in the portfolio remained in the wife's name. On appeal, however, the asset was found to be exempt, as the inheritance was not intended to benefit both parties. The second spouse, the husband, was unknown to both the wife and her first husband when the first husband died. Therefore, the asset could not have been intended to benefit the second husband. The court did not address the

7(4). The court held that there could be no claim for appreciation in value if the inheritance was not intended to benefit both spouses. However, Justice Mullally held that appreciation might be characterized as an improvement to the asset, citing *Waters v. Waters* as authority. The husband was given compensation for his contribution to improvements on the cottage. The court held that the time, labour and money he had put into the cottage had increased the value of the cottage and he was thus entitled to an amount in compensation.

appreciation or depreciation in value of the investment portfolio and whether or not it was shareable.

These varying decisions create uncertainty in the law related to gifts and inheritances within a marriage. The case of *Geddes v. Geddes*, [1991] M.J. No. 421 acknowledges the discrepancies involved with gifts and inheritances. Justice Hamilton remarks,

The conclusion in many cases has been that, after mixing an exempt asset with a family asset, it has been impossible to identify the exempt asset any longer. On the other hand, the cases I have mentioned indicate that the mixing of an exempt asset with a family asset does not necessarily destroy its exempt status. The facts and the intention of the parties must be examined in every case.

The court therefore presented a set of questions to consider in determining whether an asset is shareable.

In this case, the wife received two inheritances from two aunts. She deposited each sum into an account in her name. Some money from this account was used for common purposes such as car payments, vacations and fur coats, although the parties also had a joint account. The wife sought to claim the clearly identifiable (as an inheritance) portion of money as non-shareable. She had put all the money into her account, and then removed some amounts for investments. The money left in the account was used for common purposes. The wife thought she had kept the amounts separate but in reality, the amounts were so intermingled with common, family assets that the original amounts lost their distinct identity; it was impossible to determine what was what. The

court held that the amount in the account in her name was kept with the intention to remain separate, but the investments and reinvestments were not so clear. Therefore, the investments were shareable but the account amounts were not.

Justice Hamilton laid out a set of five questions to determine whether an asset is shareable or not:

1. Was the inheritance intended to benefit both spouses?
2. If there was a mixing of the inheritance with family assets, was the inheritance still clearly identifiable?
3. Was another asset acquired with the proceeds still used as the sole property of the beneficiary?
4. Was it the intent to keep the asset distinct from family assets until the date of separation?
5. Was the inheritance or assets purchased with it, still clearly identifiable at the date of separation?

This case has not yet been followed in Manitoba, although it provides some helpful guidelines in determining the shareability of an asset. It does not address the problems and unfairness that can result from the application of s. 7 of *The Marital Property Act*.

C) Marital Property Legislation (Gifts and Inheritances) in Other Jurisdictions

The gifts and inheritances exception is present in all Canadian provincial legislation, except in British Columbia and the Yukon where family assets are shareable and commercial assets are not. Although the sharing exemptions are similar, many provinces also provide for considerable judicial discretion in determining what is and

what is not shareable. Alberta, Saskatchewan and Prince Edward Island provide for the increase in value of the gift or inheritance during the marriage to be shareable. Ontario requires the donor to explicitly state whether or not the increase or decrease in value is not shareable in order to have it be exempt from sharing. The Northwest Territories and Nunavut include the lesser of the value of a gift or inheritance received after the spousal relationship commenced on the date of acquisition and the date of valuation.

i) British Columbia

The Family Relations Act governs British Columbia's marital property scheme. That *Act* defines a family asset as property owned by one or both spouses and ordinarily used by them, or by their children, for a family purpose (s. 58[2]). This definition includes shares in a corporation owned by a spouse if the property owned by the corporation would be considered a family asset if owned by the spouse. It also includes money of a spouse in a savings account if that account is ordinarily used for a family purpose, and an interest of a spouse in a venture to which money was, directly or indirectly, contributed by or on behalf of the other spouse.

The definition of family asset was addressed in the case of *Grant v. Grant* ([1994] B.C.J. No. 2361). In the British Columbia Supreme Court, Justice Baker stated:

Courts interpreting this section have concluded that the non-owning spouse may establish that a business asset is a family asset by showing that:

1. Family assets were used to acquire the business asset, *Tratch v. Tratch* (1981), 30 B.C.L.R. 98, (B.C.S.C.).
2. Family assets were placed at risk or used as security to acquire the funds to obtain or maintain the business asset, *Burnham v. Burnham* (1982), 28 R.F.L. (2d) 205 (B.C.C.A.) and *Tratch, supra*
3. The spouse claiming the asset made direct or indirect contributions to the acquisition of the business asset. Contribution may be presumed if the claiming spouse establishes that he or she was an effective spouse, parent, and manager of the household; see *Family Relations Act* s. 46(2), *Tratch, supra*, also *Burnham, supra*, *Seymour v. Seymour* (1991), 71 B.C.L.R. (2d) 218, (B.C.S.C.), *Tezcan v. Tezcan* (1990), 44 B.C.L.R. (2d) 343, (B.C.S.C.).
4. Income derived from the business asset was used for family purposes, *Seymour, supra*

The *Act* provides exemptions for certain business assets (s. 59). If property is owned by one spouse to the exclusion of the other and is used primarily for a business purpose, and the non-owning spouse did not make a direct or indirect contribution to the acquisition of the property or the operation of the business, the property is not considered a family asset. This indirect contribution can include savings through effective household management or childcare responsibilities by the non-owning spouse.

There are no direct exemptions in *The Family Relations Act* for assets received through a gift or inheritance. If it is a family asset, it is shareable whether it was gifted or not; if it is a commercial asset, it is non-shareable unless number 1 – 4 of the *Grant* decision occur. To keep a gift or inheritance exempt from sharing, a spouse must not let the asset become defined as a family asset. The spouse receiving the gift or inheritance

should keep the asset separate from use for an “ordinary family purpose” to maintain its status as a non-shareable asset.

ii) Alberta

In Alberta, property acquired by way of a gift or inheritance is considered in s. 7[2] of *The Matrimonial Property Act*. The market value of property that has been acquired by a gift or inheritance from a third party as well as the market value of property that was acquired before marriage is non-shareable. The market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later, is exempted from distribution but the increase or decrease in value of the property during the marriage is shareable. If the asset was transferred or sold, the difference between the original value and the market value of the asset is to be distributed in a just and equitable way. This is the same for any income from the asset.

The court has discretion in determining what is just and equitable (s. 8, (a) – (m)). The court may consider the contribution of each spouse to the welfare of the family and to the acquisition, improvement, conservation, etc. of a business or farm owned or operated by one or both spouses. The court may look at the income, earning capacity and other financial resources of each spouse at the time of the marriage and at the time of the trial. The duration of the marriage and the terms of any written or oral agreement between the spouses may be considered. The court may also look at any gift

made by one spouse to a third party. Finally, the court has the discretion to consider any fact or circumstance that is relevant.

iii) Saskatchewan

The Saskatchewan *Family Property Act* presumes that all family property, including any appreciation, depreciation and income, is shareable until it is proven otherwise. The definition of family property includes any real or personal property, regardless of its source, kind or nature, owned by one or both spouses. Therefore, family property includes commercial assets.

The *Act* does exclude some property from distribution (s. 23). Excluded is the fair market value of any property owned before the spousal relationship, or acquired before the beginning of a spousal relationship as a gift from a third party or as an inheritance unless it can be proven that the property was intended to benefit both parties.

However, the appreciation in value or income received from that property is not exempted. The *Act* specifies that the exempt value is the fair market value at the commencement of the spousal relationship; therefore, any appreciation or depreciation as well as income from the property are included in accounting. The *Act* does not exclude from sharing gifts and inheritances acquired during marriage.

Before any property is exempted, the court must be satisfied that it is not unfair or inequitable to do so. The court must also consider the following factors: the

contribution made to the property and the family before the relationship; contribution (direct or indirect) made to acquire, dispose, preserve, maintain, the operation or management of the property, and; the amount of other property available to distribute to each spouse. The court may also consider any other fact or circumstance it deems relevant.

iv) Ontario

Ontario's *Family Law Act* determines the sharing of marital property. Property acquired by way of gift or inheritance from a third party is non-shareable (s. 2(1)). Income from that property is only excluded if the donor/testator expressly stated that it be excluded (s. 2[2]) from the value of the owning spouse's net family property. Property that can be traced to a gift or inheritance is also not shareable. However, the court may use its discretion to vary the equalization if that equalization would be unconscionable. The court has many factors to consider (s. 6). The court may look at one spouse's failure to disclose debts or liabilities at the time of marriage, any debts claimed in the equalization reduction that were incurred recklessly or in bad faith, and also any intentional or reckless depletion of net family property. The court may also look at whether or not a disproportionately large equalization, in relation to a cohabitation of less than five years, was awarded. Another factor is whether one spouse incurred a disproportionately large amount of debts and liabilities in support of the family. Finally, the court may look at any other circumstances relating to the acquisition, disposition, preservation, maintenance or improvement of the property.

In 1993, the Ontario Law Reform Commission submitted a report on family property law regarding marital property legislation, entitled "*Report on Family Law*". The report was intended to address changing social traditions that impacted family life, the most significant being the different family forms in which individuals lived.

The Report found that the Ontario *Family Law Act* provides judicial discretion in varying the equalization of property if to do otherwise would be grossly unconscionable. The Commission recommended that little judicial discretion be given, stating that discretion should be exercised only when it was absolutely necessary to prevent gross injustice. The discretion should not be available to create inequity or be used as a punitive measure towards one spouse.

Regarding the exemptions for gifts and inheritances, the Commission's view was that spouses should only share property that was considered to be "of the marriage". Their philosophy was that the gift/inheritance exclusions are provided for because those assets are not a part of the marital relationship, they are extraneous to it. However, any increase in the capital value should be included because that appreciation is part of the relationship. The maintenance and preservation of the asset is a result of the joint work of both spouses.⁶⁶ The *Act* provides, in s. 2(2), that the income from a gift/inheritance is

⁶⁶ "Report on Family Law", Ontario Law Reform Commission (Nov. 3, 1993), pg. 91. Online. Available: <http://>

to be included unless it is expressly stated by the donor that it is to be excluded from that spouse's net family property. MAWL Inc. agrees with this report and its rationale for sharing the increase and decrease in value of exempt assets.

The *Act* includes a purposive statement that indicates household and family responsibilities are equally important in assessing the division of marital property. S. 7 provides:

The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6). *R.S.O. 1990, c. F.3, s. 5 (7)*.

v) New Brunswick

New Brunswick regulates marital property distribution with *The Marital Property Act*.

The *Act* defines family assets as any property acquired before or after marriage and ordinarily used by both spouses for household, educational, recreational, etc. purposes while the spouses lived together. Marital property is defined as any family asset, or any asset acquired by either spouse while the spouses cohabited or contemplated marriage (s. 1(a), (b)). However, there are exceptions. Business assets are excluded from family assets. Property gifted either by one spouse or by a third party to the other spouse, property that represents the proceeds or exchange from a non-family asset and property acquired after cohabitation had ceased are also excluded under the family asset

definition. The court may use its discretion to define an asset as a family asset under s. 6 or s. 7. The *Act* does not address the appreciation or depreciation in value of excluded assets.

Any asset that was acquired before the spouses married or was a gift from one spouse to the other may be excluded from the division of family property if it would be unfair or unreasonable to the owner of that property to have it included in the division. In determining what is unfair and unreasonable, the court may examine various factors (s. 6). These factors are a lack of substantial contribution by the non-owning spouse to the acquisition, management, etc. of the asset; a cohabitation of short duration, and; an agreement between the spouses that use of the asset as a family asset would not prejudice the rights of the owning spouse to the asset.

Furthermore, and notwithstanding the above provisions, the court may use its discretion to order an unequal division of assets if equality would be inequitable (s. 7). These factors include an agreement other than a domestic contract, the duration of cohabitation during marriage and the length of time spent separate and apart. The court may also consider the date the property was acquired, and the extent to which the property was acquired by inheritance or gift. Finally, the court may look at any other circumstances relating to the acquisition, disposition, preservation, etc. of the property rendering it inequitable for the division of marital property to be in equal shares.

vi) Prince Edward Island

In Prince Edward Island, the *Family Law Act* considers the division of marital property. The value of an asset received by one spouse by gift or inheritance from a third party is excluded from the net family property, which determines the value to be divided (s. 4[1](b)[iii](1)). Property that can be traced to the above source is also excluded. The net family property, however, does include the appreciation in value of the asset received by gift or inheritance.

vii) Nova Scotia

In Nova Scotia, *The Matrimonial Property Act* defines shareable and non-shareable marital assets. The definition of matrimonial assets includes the marital home and any property acquired by either spouse before or during the marriage, with exceptions. These exceptions include gifts, inheritances, trusts or settlements received by one spouse from a third party except to the extent the assets were used for the benefit of the family (s. 4.1(a)). Business assets are exempt from sharing, although a spouse may apply when that spouse has contributed work, money or money's worth in respect of acquisition, management, maintenance or improvement of a business asset (s. 18). The court may then order the owning spouse to pay an amount or a share in the business' interest to the non-owning spouse.

The court has the discretion to make an unequal division of assets to avoid an unfair or unconscionable result; the *Act* outlines thirteen factors (s. 13 (a) – (m)). These include

the unreasonable impoverishment of one spouse, the amount of liabilities and debts of each spouse and the way they were incurred and the length of time the couple cohabitated during the marriage. The court may also look at 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, etc. a business asset. The court may consider each spouse's contribution to the welfare of the family and to the education and career potential of one spouse. Also, the court may look at the amount of appreciation of an asset during the marriage. The appreciation in value of a gift or inheritance is not automatically shareable or excluded; it is simply a factor to be looked at by the court in each case to determine whether or not an unequal division should be ordered.

The Law Reform Commission of Nova Scotia submitted suggestions to the Nova Scotia government for a new family law statute in a discussion paper (1996) and final report (1997). This report addressed the concerns with gift/inheritance legislation, and recommended changes to the existing law.

The report asked the question: if the intention of the legislation is to recognize the equal contribution of each spouse to an economic partnership, why are there exclusions? This question specifically related to excluding the appreciation in value of gifted and inherited assets.

Nova Scotia property law currently provides that all property owned by each spouse on the wedding day is shareable upon dissolution of the marriage (s. 4[1]). Shareable matrimonial assets include the matrimonial home - which can be acquired before the marriage or by gift, settlement or inheritance - as well as any other real and personal property acquired by either or both spouses before or during their marriage. The exceptions to this definition include gifts, inheritances, trusts or settlements, reasonable personal effects of one spouse and real or personal property acquired after separation.

In examining the intentions of the *Act* relating to gift/inheritance legislation, the Commission made several suggestions. First, the Commission considered the “economic partnership model”. That model provides that an economic partnership, the marriage, begins on the wedding day or the start of cohabitation for a common-law couple. Property owned separately before the relationship is excluded from sharing when the relationship ends. However, each partner is to get an equal share of all the assets that were acquired and accumulated during the partnership. The value of the assets should be shared, not the assets themselves, as should the increase and decrease in value. This concept is beneficial because it has “the advantage of eliminating a great deal of judicial discretion and providing for more uniformity, consistency and predictability for members of the public.”⁶⁷

⁶⁷ “Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act”, Law Reform Commission of Nova Scotia (April, 1996; 1997). Online. Available: <http://www.Lawreform.ns.ca>

The second model considered was the “integrated model”. This concept combines the economic partnership idea with the unique characteristics of each family. Economic interdependence is recognized so that all property acquired even before the marriage is also included in the final equalization. However, judicial discretion for varying equalization remains. In contrast to the “economic partnership model”, the assets themselves are shared, not the value of the assets.

The Commission’s conclusion in this area reflected the views of the public and they recommended that the “economic partnership model” be followed.

The Commission also examined the specific gift and inheritance exemptions. In the discussion paper, the Commission provided suggestions amending the existing gifting sections. The first proposal was to maintain the exemption; the purpose of the section was to maintain the sense of separation that a gift or inheritance was meant to bring. A gift or inheritance is extraneous to the relationship and not a result of the economic benefits of the relationship. This proposal maintains the intention of the donor that only the recipient of the gift/inheritance is meant to benefit. The second proposal was to end the gift/inheritance section altogether, specifically because the origin of the asset is irrelevant. If the relationship is to be treated as an economic partnership, not an individual association, the source of the asset is beside the point. This second proposal provides for a removal of the exemption and an addition of a provision under the discretion to vary section.

In its recommendation, the Commission recommended what was consistent with the public replies regarding this section. They proposed “that the exemption be construed broadly and the exception to the exemption should be construed narrowly. A new provision dealing with gifts and inheritances should state clearly that such property is exempt and will be considered shareable only to the extent that it is actually used for domestic purposes. A share in an otherwise exempt gift or inheritance could still be awarded pursuant to the court’s power to divide property which is not a shareable asset, now contained in s. 13.”⁶⁸

The specific recommendation was,

Gifts and inheritances should remain in principle excluded from division, and the exemption should be strengthened. In particular, it should be stated that gifts and inheritances used by the parties or their children for domestic purposes will lose the exemption only to the extent that they are actually used for such purposes.⁶⁹

viii) Newfoundland

Newfoundland regulates marital assets through the *Family Law Act*. The *Act* excludes business assets from sharing; that is, those assets used primarily for or in connection with a business (s. 18[1](a)). Matrimonial assets are defined as all real or personal

⁶⁸ “Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act”, Law Reform Commission of Nova Scotia (April, 1996; 1997). Online. Available: <http://www.Lawreform.ns.ca>

⁶⁹ “Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act”, Law Reform Commission of Nova Scotia (April, 1996; 1997). Online. Available: <http://www.Lawreform.ns.ca>

property acquired by either spouse during the marriage with several exceptions. The *Act* excludes from sharing assets received by one spouse by way of a gift, inheritance, trust or settlement from a third party, and also the appreciation in value of those assets during the marriage. However, the court may use discretion to vary the equal distribution of assets if it would be grossly unjust or unconscionable not to (s. 22). The factors to consider include the financial resources available to each spouse, the financial needs of each spouse in the near future and the standard of living of each spouse before the marriage breakdown. The court may also look at the age of the parties, the length of their marriage and the amount of time they have spent separate and apart. As well, the court may consider the contribution of each spouse to the welfare of the family, including any contribution in the form of caring for the home and family.

ix) Nunavut and the Northwest Territories

The Family Law Act governs family property law in the Northwest Territories. The same *Act* governs family law in Nunavut (*The Family Law Act (Nunavut)*). Under Part III of the statute, a relationship is considered commenced on the day of marriage or the day of the commencement of cohabitation outside of marriage for a period or in a relationship sufficient to establish their spousal relationship. Property rights apply to common-law couples that have cohabited outside of marriage for a period of at least two years, or in a relationship of some permanence if they are the adoptive or natural parents of a child. This definition applies to same-sex couples.

Net family property is shareable; it is defined as the value of all property a spouse owns on valuation day deducting the value of debts and liabilities. This net family property includes the lesser of the value of property on the day of acquisition and valuation that a spouse acquired after the commencement of the spousal relationship and owns on valuation day, that was given by way of a gift or inheritance from a third party, or that can be traced to that source (s. 35[1c]). Therefore, the appreciation in value of a gift or inheritance is not shareable, but the value of the gift or inheritance itself is.

The court is authorized to vary the entitlement of one spouse and grant an unequal property distribution if it is not unconscionable (s. 36[6]). The court should have regard to the following factors:

- One spouse's failure to disclose debts or liabilities to the other spouse
- Debts/liabilities incurred recklessly or in bad faith
- Intentional or reckless depletion of one spouse's net family property
- The fact that the amount one spouse would receive is disproportionate to the length of the spousal relationship
- One spouse has disproportionately larger portion of debts/liabilities incurred for the support of the family or the spouse
- Written agreement that is not a domestic contract
- Needs of children and financial responsibility related to their care and upbringing
- Any substantial change after the valuation day in net family property of either spouse and the circumstances of the change
- Any other circumstances regarding the acquisition, disposition, preservation, maintenance, improvement of property or debts

x) Yukon Territory

In the Yukon Territory, family law is administered through *The Family Property and Support Act*. Only married couples may apply for an accounting and equalization of

their family assets. Under the *Act*, family assets are defined as the family home and any property ordinarily enjoyed by both spouses for household, educational, recreational, etc. purposes. Commercial assets appear to be exempt from sharing if they do not meet the definition of family asset. The court may take into consideration any work, money or money's worth put into a family asset (s. 7). The court has the discretion to order an unequal distribution if not to do so would be inequitable. The court is to examine several factors: any agreement other than a marriage contract or domestic agreement; the duration of the period of cohabitation under the marriage; the duration of living separate and apart; the date the property was acquired; the extent to which the property was acquired by way of a gift or inheritance; any other circumstances related to the acquisition, disposition, preservation, maintenance, improvement or use of property, and; the date of valuation (s. 13). The *Act* does not specifically exempt property acquired by way of gift or inheritance. Instead, the court may examine the means of acquisition to determine an unequal distribution of property (s. 13[e]).

The *Act* also administers support obligations. The *Act* provides for the mandatory support of married spouses only. However, under s. 35, that *Act* states that either of a man and a woman who, not being married to each other, have cohabited in a relationship of some permanence may, during cohabitation or not later than three months after the end of cohabitation, apply to the court for a support order. The court must be satisfied that the support order is needed, having regard to the applicant's need

and the ability of the respondent to provide support. The court may then make an order in the same way it would for a married couple.

xi) Australia

In Australia, a system of absolute judicial discretion decides which assets are exempt from accounting. The court factors in: the financial contribution to acquisition, conservation, etc. of property whether or not the property has ceased to belong to either party; the contribution (other than financial) to the acquisition, conservation, etc. of property; the contribution made by a party to the welfare of the family, including any capacity as homemaker/parent; the effect of any order upon the earning capacity or either party; and/or child support. In this legislation, there is no specific section that exempts property acquired by virtue of being gifted or received through an inheritance.

xii) England

The division of marital property is administered by s. 25 of *The Matrimonial Causes Act*. In that *Act*, there is no recognition of marriage being an equal partnership. The division of marital assets is called “ancillary relief” because it is seen as ancillary, or secondary, to the divorce itself. Property division is purely discretionary, based on a set of criterion and there are no specific exemptions.

S. 25 of *The Matrimonial Causes Act* sets out the principles guiding the court's decision in marital property distribution. The court must decide whether to exercise its powers; in doing this, the court must have regard to achieving a clean break between the parties as well as to have regard to all circumstances of the case including the following matters:

- The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future including;
- The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- The standard of living enjoyed by the family before the breakdown of the marriage
- The age of each party to the marriage and the duration of the marriage;
- Any physical or mental disability of either of the parties to the marriage;
- The contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- The value to either of the parties to the marriage of any benefit (this can include pension arrangements) that (as a result of the divorce) the party will lose the chance of acquiring.

On June 5, 2000 a new process was introduced giving the court greater control over deciding ancillary relief. *Statutory Instrument 1999 (No. 3491)* requires that court's deal with cases "justly", by actively managing each case and having regard to:

- ensuring that the parties are on an equal footing
- saving expense;
- dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues and to the financial position of each party
- ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Case law has held that the distribution of ancillary relief under *The Matrimonial Causes Act* depends on each case.⁷⁰ There is no determined order of priority in the interpretation of s. 25 of the *Act*. The case of *Cowan v. Cowan* examined the impact of recent jurisprudence, including *White v. White*, on ancillary relief. The court held that there is a need for new legislation because the only current yardstick for determining property distribution is a subjective judicial perception of fairness after a careful appraisal of s. 25 criterion

xiii) Ireland

The division of marital property in Ireland is only applicable to married spouses. *The Family Law (Divorce) Act, 1996* and *The Family Law Act, 1995*, administer this division. Either spouse may apply for a property adjustment order to transfer property from one spouse to the other and the court may also order that one spouse may have a life interest in the family home, but there is no required sharing of family assets.

▪ RECOMMENDATION

MAWL Inc. recommends a fine-tuning of our present *Marital Property Act* to ensure that loopholes that create inequality are closed. MAWL Inc. recommends that s. 7 of *The Marital Property Act* be amended so that gifts and inheritances are presumed exempt unless:

- 1. The gift or inheritance was intended to benefit both parties**

⁷⁰ *White v. White*, 1999 (House of Lords)

- 2. the gift or inheritance was used as a family asset instead of only to purchase a family asset**
- 3. the gift or inheritance was used to purchase or improve a family asset**

There should be more specific discretion given to the courts to encourage judges to alter the equal sharing of assets where the exemption in the marital property divisions having regard to all the circumstances, including the efforts of both spouses towards that property.

PART TWO: Community of Property

I. INTRODUCTION

“...there was no true freedom for women without the possession of all her property rights and...these could be obtained through legislation only...”

Susan B. Anthony Diary, 1854⁷¹

A) Background

In 1977, MAWL Inc. supported the Manitoban New Democratic Party government’s proposal to implement a full instantaneous community property system for family assets and a deferred community property system for commercial assets. In fact, MAWL Inc. argued for a full instantaneous sharing of both commercial and family assets. Instantaneous community property was seen to ensure that the non-earning spouse, usually the female, received a one-half interest in all community property with management rights regardless of whose name is officially on the title.⁷² Deferred community property means that one spouse may control the asset but its actual value is determined and split between the spouses at the dissolution of marriage. Community property systems differ from common law property systems because the community property presumes that each item of property acquired during marriage is shareable upon marital breakdown, or in some cases is shareable through management during the relationship. The former University of Manitoba Faculty of Law Professor, and now

⁷¹ Quoted in Berenice B. Sisler, *A Partnership of Equals: The Struggle for the Reform of Family Law in Manitoba*. (Canada: Hignell Printing Ltd., 1995). 47.

⁷² Note that the exact wording used in Manitoba in the 1970s was “community of property.” However, the more widespread term throughout American jurisprudence is now “community property.”

Manitoba Court of Appeal Justice, Freda Steel has categorized property systems to fall into three general types:

1. Instantaneous community property, which is shareable immediately with the presumption being irrefutable.
2. Deferred community property, which means that the property is shareable upon the dissolution of marriage. This type may or may not have judicial discretion.
3. Separate property system as is found in common law, which is always subject to judicial discretion where unconscionable conduct is found.⁷³

Several American states, some European jurisdictions, and a few other regions have various community property systems in place. The European jurisdictions include all the Scandinavian countries, former West Germany, Holland, France, and Spain. The Philippines, the Commonwealth of Puerto Rico, the Republic of South Africa and Mexico also have types of community property systems in place. However, the common law system is much more prevalent. The common law system allocates property according to the titleholder and there is no automatic presumption that acquiring property or chattels during marriage makes them shareable. Historically, women were not the income earner and were rarely listed as joint or co-owners of property and businesses. Their work in the home as a homemaker was not valued in this system, and at the point of marriage dissolution, if the wife had none of the family property in her name, she was left propertyless and often penniless. Thus, the common law system created systemic hardship for women.

⁷³ Freda M. Steel. "The Ideal Marital Property Regime—What Would It Be?" *Family Law in Canada: New Directions*. (Ottawa: Canadian Advisory Council on the Status of Women, 1985) 130.

Due to the systemic barriers created by the common law, separate property system, women demanded legislative changes to marital property statutes in the 1970s. One of the highest profile cases that exemplified the hardship faced by women was *Murdoch v. Murdoch* (1975); *Murdoch* was the catalyst to push for legislative change.⁷⁴ *Murdoch*, a Supreme Court of Canada divorce case, upheld that Mrs. Murdoch, as the trial judge stated, did “just about what the ordinary rancher’s wife does.” Mrs. Murdoch wanted to share in the value of half of the property accumulated over her marriage of twenty-five years. She argued that she deserved this right since she and her husband were partners in their ranching business. She brought forward evidence that she worked primarily as a homemaker. In addition, she cooked for the workers on the family ranches, she ran one of the dude ranches for a period of time, and she was shown to have also contributed through branding, vaccinating and dehorning the cattle. In terms of the financial investment, her father had supplied some funding to the property and Mrs. Murdoch even put part of her inheritance into the farms. There was also evidence of violence in the marital relationship resulting in Mrs. Murdoch having her jaw broken by her husband. Nonetheless, the Supreme Court of Canada upheld that she was to receive only maintenance and support, and not a share in the property. Only the minority judgment, by Justice Bora Laskin, commented on her contribution financially and physically to their ranches. With this consideration in mind, Laskin J. would have given her a property interest.

⁷⁴ *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

It was obvious that the court system and judicial discretion was not working. For this reason, many, including MAWL Inc., heralded the instantaneous community property system as the solution to ensuring fairness.

The law has advanced dramatically since *Murdoch*. In Manitoba, it could have gone much further. Manitoba's law, like other common law jurisdictions in the mid 1970s, neither recognized marriage as a partnership nor questioned the perception that the wife needed protection and the husband was there to provide for his family. This perception and the law that supported it created a number of tensions as women were achieving a greater role in the workforce. For instance, wives were discovering that they needed their husband's permission to obtain credit. Banks failed to treat women as competent adults.⁷⁵ This situation also created financial hardship: even if the marital home was jointly used, if the husband owned the home and wished to sign ownership over to the wife, she was subject to gift tax. There were also succession taxes if the titleholder of an asset died and the title had to be transferred into the surviving spouse's name.

⁷⁵ Ottawa Women's Credit Union Website: <http://www.owcu.on.ca/herstory.htm>. This Ottawa Women's Credit Union was formed to help access fair treatment to financial services in the early 1980s and late 1970s when women were not garnering the respect or the requisite services from traditional banks. Today, it remains a woman run financial institution with a particular focus on helping low income-women and helping them retrain for entry into the labour force.

Changes to implement a partial instantaneous community property system were proposed, drafted, and approved in the Legislature, but they were not proclaimed before the October, 1977 election removed the NDP Government from power. Once the Conservatives gained power, the legislation was not proclaimed. The Conservative Government introduced changes to *The Marital Property Act*, including our present deferred sharing. A hybrid of the common law separate property system and community property, was implemented in 1978 as Manitoba's *Marital Property Act*.

It is interesting to explore the history of our current *Marital Property Act* and wonder where Manitoban women would be today if the original NDP legislation would have become and remained the law in 1977. The legislative proposals started when then-NDP Attorney General, the Honourable Howard Pawley, promised a working paper on the topic of marital property for October 1974. The actual document was dated January 1975 and was distributed the following month.⁷⁶ The Chairman of the Manitoba Law Reform Commission was lawyer Frank Muldon. In stating the Law Reform Commission's intention to create the working paper for Pawley, Muldon said in reference to the *Murdoch* decision that the decision was "contrary to the expectations and sense of justice of many people who considered that the law should require spouses to endow each other with all or at least half of their worldly goods."⁷⁷ Once the working paper was released, it showed a preference for the deferred community

⁷⁶ Sisler. 47.

⁷⁷ Sisler. 48.

property system. The Law Reform Commission held a series of public hearings between November 1976 and March 1977 that reflected the public, and particularly women's, demand for fairness.

MAWL Inc. submitted its position opposing the high level of judicial discretion in family law matters. MAWL Inc. was concerned that the focus on marital property was misguided. MAWL Inc. felt that what was most important to Manitoban women was spousal support obligations. Most families would only have a heavily mortgaged home to share and the 50:50 deferred property division would be meaningless to many women. MAWL Inc. argued vehemently for an instantaneous community of property regime. Some of the advantages of community of property enunciated by MAWL Inc. were that such a system would be more likely to keep spouses out of the court system than with a deferred regime since from the outset partners would know they would have to share 50:50. In addition, the instant community property's shared management provisions for both spouses would give protection from a squandering spouse or from one who mismanaged their assets.

Opposition to the instantaneous community property proposal was fierce, especially from the Conservative party. One of the primary concerns was that if the non-earner spouse was able to control the management of the earning spouse's business, this interference would create a virtual gridlock with the business and stifle investment and business growth in the province. Such a view was expressly stated in the Manitoba

Law Reform Commission's Working Paper as a rationale for the deferred community property system through a quote by the highly influential Lord Denning:

"The wife cannot claim a share in the business as such. She did not give any active help in it. She did not work in it herself. All she did was what a good wife does do. She gave moral support to her husband by looking after the house. If he was depressed or in difficulty she would encourage him to keep going. ***That does not give her a share***" (MAWL Inc.'s emphasis).

Side issues about who had signing authority for cheques arose: did it have to be one or the other, or did both spouses have to agree beforehand? Other complications such as what would happen if one spouse bought a gift for another person and the other spouse disagreed exemplified the difficulty leading to gridlock in spouses' financial affairs.

MAWL Inc. and other women groups countered that the system appeared to be working in American and European jurisdictions where the community property system was already in place without many problems and without business failures or lack of investment.

MAWL Inc., together with the vocal NDP Status of Women Committee, stressed that the instantaneous community property system would lead to greater equality. In effect, the message the full instantaneous community property system sent, according to its proponents, was that it valued women's work, and that women could have a say in what happened to the property throughout the marriage. The deferred community property regime, on the other hand, favoured the income earner since, in that system, the management throughout the marriage stayed with the property owner, and men

owned most property. In this case, only upon marriage breakdown was the non-earning spouse able to claim the equalized property value. With much lobbying, the instantaneous property system became favoured as a way of removing the psychological oppression faced by women in relationships where they were unable to control their own finances and affairs.

The 1977 NDP legislative amendment included the full community property measures for family assets, as was lobbied for by MAWL Inc., and deferred community of property for commercial assets. Support was widespread. Even the Liberal Party, led by Izzy Asper, supported Pawley's proposal for the amendments. *MacLean's* magazine called the legislative change "two giant leaps for womenkind."⁷⁸ The key points of the legislation were that there was an immediate equal sharing of family assets, including the family home. Deferred sharing would exist for commercial assets unless there was evidence to satisfy a judge that the commercial property be shared instantaneously. The facts of the *Murdoch* case, for example, would arguably call for immediate sharing since normal business partners are afforded this right and because Mrs. Murdoch took an active part in the farm and ranches. These two legislative changes were considered the "standard marital regime" and couples could opt out if they wished.

After the 1977 election, the Conservative government refused to proclaim the NDP law. Instead, the government passed a new *Marital Property Act* that eliminated

⁷⁸ Quoted in Sisler. 117. from *MacLeans*, 26 December 1977.

instantaneous community of property for family assets and gave judges more judicial discretion to vary the equal sharing of commercial assets. All property would be in a deferred community property system, except property acquired before marriage and in contemplation of marriage.⁷⁹ The only exceptions, which still exist today in our present law as section 7 of *The Marital Property Act*, were gifts, inheritances, and damage awards for personal injuries. In terms of protections for the marital home, the Conservative response was that such protection was found in *The Dower Act's* provisions (now *The Homesteads Act*), which prevented the owning spouse from selling or mortgaging the marital home without the other spouse's consent.

B) Community of Property in Other Jurisdictions

Since there is no present community property system in Canada, we will explore the present state of community property in American jurisdictions. Community property exists in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. The regime varies between each jurisdiction. The only states with instantaneous community property systems are California, Louisiana and New Mexico. All others have a deferred community property system with judicial discretionary power.⁸⁰ For our purposes, we will particularly focus on California, Louisiana and Wisconsin. We will look primarily at how these states characterize separate property and gifts, deal with appreciation of community and separate

⁷⁹ As quoted in then Conservative Attorney-General's Gerry Mercier, Q.C., Department of the Attorney-General Publication, *Family Law in Manitoba* (Government of Manitoba, 1978).

⁸⁰ Steel. 137-142.

property, and other special considerations particular to each respective state. We will also examine how states such as Massachusetts and New York, which are predominantly common law states, have integrated many community property ideas to lessen the harsh impact of the common law division of property upon marriage breakdown. We will then turn to whether or not Manitoba should implement a community property system and we will examine the dynamics unique to our common law property system.

We must keep in mind that there used to be a sharp division between American states that followed the common law principles of division of property at the time of divorce, and those states that followed community property principles. This division was reinforced by a historic backdrop, which led to the creation of each respective system. In this section, we will examine the historic rationale behind the common law property system and contrast that with the details of the community property system.

II. HISTORICAL OVERVIEW

A) History of the Common Law Property System

The starting point of the traditional common law property system is that a wife's legal existence was conflated into the husband's by marriage. This principle was best expressed by Sir William Blackstone, a prominent eighteenth century jurist and legal writer, who stated that marital unity "by marriage [made] the husband and wife one person in the law: that is, the very being or legal existence of woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection and cover she performs everything."⁸¹ For women of the time, the implications were that they could not hold title in real property and rarely in personal property. This system created a number of hardships because wives were not afforded any protections to retain property in their husband's names even though the property was bought for both of them or for use by their family.

There were some loopholes, however. Common law property division upon marital breakdown has traditionally treated property as separate unless the spouse asserting an equitable ownership can prove that she/he contributed to the property through joint labour. This onus was hard to prove. Most often, the titleholder of the property at divorce would remain intact. Given that a husband was almost always the income-

⁸¹ Sir William Blackstone as quoted in Lori Chambers, *Married Women and Property Law in Victorian Ontario*. (Toronto: University of Toronto Press, 1997, 14).

earner for the family, most real and personal property was purchased with his earnings and in his name. The wife would be excluded from claiming her share of the property at divorce. For instance, if the husband bought the home with a mortgage in his name, and he ran a business on the adjacent property, would he own both at the time of marriage dissolution? If the husband paid for the home with his earnings, in the traditional common law system he would retain the title and his wife would receive alimony or spousal support. However, many wives would have done housework and other activities that allowed the income-earner, most often the husband, to earn money outside the home. This situation followed the rigid gender roles of the time. Women's organizations pushed to gain recognition of the contribution women made through their domestic and child-rearing role in the family. Using this line of reasoning, women's groups argued that the non-earner, most often the wife, should have a proprietary share in the home listed in the husband's name due to the fact that the work done inside the home was equivalent to the work done outside the home. The monetary value of the women's domestic work has only been recognized very recently and still is not considered equally.

Again, returning to our earlier example, it must be pointed out that wives frequently played a role in family-run businesses and farms. In some cases the wife may have done some accounting work and decision-making in the business. In other cases, the non-earning spouse played a larger role as a partner, as was argued in the *Murdoch* case. Yet in this traditional system, despite being virtual joint-partners, the norm was that

upon divorce, a wife did not share in the wealth her husband had accumulated during the course of the marriage.

The common law system recognized and continues to recognize that a husband has a duty to provide for his children and his wife. However, the system seemed to allow a husband to have a despotic control over his wife and children. In many respects, a wife, too, was treated like a child. She was at her husband's mercy in terms of how much money he would allocate to her for spending and for providing food and other basic necessities. Under the common law primogeniture system, a wife was not an automatic heir when her husband died. The dower laws were thus created to protect widows. Through dower, the widow was conferred a life estate from the lands of her deceased husband, regardless of what the husband left her in the will. In Manitoba, *The Homestead Act* is a modernized version of the traditional dower statute. Section 1 outlines the life estate allotment to widows: (a) for city residents they are allotted not more than six lots or not more than one acre, and (b) rural residents are allotted no more than 320 acres including the family residence. Although the dower laws were meant to protect women from the rigid rules of primogeniture, it was not a solution as many women were still not getting their fair share of property acquired during the marriage and their work during the marriage remained unrecognized.

At divorce, the common law system's dower rights were ineffective to provide much protection, but as it was the only way for a wife to assert a property claim, it did give

her limited rights. Alimony, on the other hand, was the *only* way to receive some compensation and to enforce a husband's duty to support his wife. After all, prior to the 18th century, divorce was illegal and the only option was legal separation. The English ecclesiastical courts created alimony as an equitable remedy to ensure that a husband's duty to support continued. As the modern sense of divorce, which gave finality to a marriage, arose in the 18th and 19th centuries, alimony remained a remedy and was increasingly being used in part as a duty to support. Occasionally it is also seen as a way of compensating for an inequitable division of marital property. However, alimony would only continue to be paid if the wife remained chaste: *dum casta* clauses in separation agreements terminated support when the wife started having relationships with another man. Surprisingly, such laws were in effect up to 1977.

B) History of the Community of Property System

Generally, community property is categorized as any intangible or tangible property and real or personal property acquired or made by a married couple in a community property jurisdiction. The property must be acquired with spousal earnings during the course of the marriage; each item is owned equally by the spouses, regardless of who purchased it or whose funds were used in the purchase. In some instances, if the new property was acquired with money that was earned prior to marriage, it is possible for the property to retain a separate character and remain out of the community property pool. However, if the property was purchased with separate funds but the intended use was for both partners or their family during the course of their marriage, it is

possible that the character of the property will switch from the separate to the community pool. Technically, this is called transmutation. The character of separate property and money may also change through commingling, which is when separate property becomes community property by making it untraceable back to its original form. Most often, commingling is seen when one spouse puts inheritance or pre-acquired monies into a joint bank account that is used for family expenses. The character of this separate property is changed to community property since it is now used for family purposes.

Every American community property system treats all property earned during marriage as community property. There is no distinction, for example, between the family home and a business.⁸² Each state shares the overarching automatic presumption that property acquired during marriage is shareable property but each also has its own variations.

The origins of the community property system are based in civil law from both the Spanish and Roman-Dutch systems. The Spanish form, otherwise called the Ganancial system, does not change the property owned prior to marriage. Only properties acquired after marriage are in the pool of divisible assets. The implications of this are quite wide. For instance, if you marry a millionaire, that will not make you wealthy.

⁸² This is very similar to Manitoba where our *Marital Property Act* includes both family and business assets the grounds for varying an equal division are less onerous for commercial assets than for family assets.

Only future gifts over the course of the marriage will make you rich. There may be a division of any appreciation of assets owned prior to marriage, but the original monetary value of the asset stays with the titleholder. States such as Louisiana use this type of community property.

Louisiana is the oldest community property state in North America where the system was put into place with the Custom of Paris, 1769. France adopted this Ganancial community property system in 1965 after it went through a series of modernizing reforms that updated its traditional community property legislation. Included in France's legislative modernization was the expanding role of the wife in management even though the husband remained the legal titleholder.⁸³ On the other hand, the Roman-Dutch system is more all encompassing; this system converts pre-marriage property into community property. This is rarely used outside of Europe.

Despite all the hype that community property systems are more egalitarian, they are not immune to discriminatory treatment of women. The Spanish law considered married women *imbecilitas sexus* or imbeciles by nature. This was similar to the treatment of women as children by the common law but still it was seen as more progressive since the community property system did not conflate a wife's identity into her husband's.⁸⁴ Like the common law system, the same primogeniture system that failed to consider the

⁸³ Steel. 137.

⁸⁴ Hon. Bea Ann Smith, "Keynote Address: Why the Community Property System Fails Divorced Women and Children" *Texas Journal of Women & the Law*. Spring, 1998, 135 (Lexis).

wife an automatic heir when her husband died was in place in the civil law system. However, given that any assets acquired after marriage were presumed to be shareable, the community property system has been seen as more equitable for women than the common law system. In the community property system, there is a presumption of equal sharing. The onus was that one spouse asserting that the property was non-shareable had to prove that the asset was theirs separately because it was acquired before marriage. Some states, such as California, were historically much more willing to characterize an asset as shareable because of transmutation and/or commingling.⁸⁵ Small activities in California, such as an expression to share, or a practice of using an account to pay family bills, have been interpreted by the courts as enough to signify a change of character. This allowed women to have interest in community property and lessened some of the hardships faced by women at divorce.

Aside from the experience of Louisiana, the state that inherited the practice of community property from the Spanish, the American development of the community property system has gone hand-in-hand with the western expansionist movement.⁸⁶ The community property system is seen as conducive to the North American democratic system rather than a top down aristocratic or feudal approach. Western expansion and the associated farming lifestyle that pushed migration into the western

⁸⁵ Kim M. Seavey. "Formalizing Interspousal Transfers of Real and Personal Property in California, 30, San Diego Law Review, Rev. 425. (Lexis)

⁸⁶ Vaughn "The Policy of Community Property and Interspousal Transactions, 19 Baylor L. Rev. 20 (1967), as quoted in William A. Reppy, Jr. Community Property in California: Cases, Statutes, Problems, 2nd Ed. (Virginia: Michie Co., 1988) 2-8.

agricultural belt meant that women and their husbands had to work in tandem to ensure that the farm worked smoothly. Women and men had to work together to tend crops, feed livestock, and raise their children.

In the United States, the states that chose the community property system were states that arose from western expansion, namely, Nevada, Texas, Arizona, Idaho, New Mexico, Washington and California. The legislation of these states recognized that the common law system, which presumed that a woman was incompetent and needed a guardian, was ideologically inappropriate for quickly expanding societies where the husband and wife had to work together to ensure their success. Yet, despite the supposed progressive ideological underpinnings of the community property system, the management of the joint property most often vested in the husband. The husband had the power as the “manager” to sell the property or use it as collateral in debts during the marriage. For instance, if he lost money or earning potential by not renting out an apartment due to his own negligence, he was not responsible to the wife since he was acting for both of them as the manager. Thus, in practice, the workings of the community property system were not that different from the common law system except that in legal theory, the wife could have the joint benefit of the community property.

However, throughout the late 1960s and the early 1980s, community property states recognized this problem and amended their statutes to provide allowances for equal

management and control. The extent of equal management differed from state to state. The legislative reforms started with Texas in 1967 and ended with Louisiana in 1980. Such rules reformed the traditional community property paradigm that the husband controlled the property unilaterally, and was more reflective of modern marriages where husbands and wives may choose to be their own managers of their own respective properties or businesses. Such amendments were also gender-neutral and allowed either spouse to control and manage the property. Wisconsin, the most recent community property state as of 1985, was very careful in implementing gender-neutral legislation dealing with the management and control issue.

Therefore, although in the past both the common law and the community property systems systemically discriminated against women, many of these problems have been ironed out through relatively recent legislative changes. Judicial discretion, moreover, has alleviated the inequality faced by women at the time of divorce, especially in areas where the black letter law fell short. Yet despite this, deferring to the courts has created much uncertainty in the interpretation of the statutes and the black letter law of the various jurisdictions offers limited guidance as to how the law works in practice.⁸⁷

Most of the disparity between different jurisdictions and the use of judicial discretion seems to fall in the area of recharacterized assets, gifts and inheritance, and the division of business property and related appreciation.

⁸⁷ Justice Smith in her aforementioned speech gives a scathing attack of judicial discretion in property matters. She states that judicial discretion creates an arbitrary nature of deciding divorce cases in community property jurisdictions, and stresses that this comes from an over-reliance on discretionary principles.

III. EXEMPLARY COMMUNITY OF PROPERTY JURISDICTIONS

A) California

California is the most liberal community property state. Its origins as a community property state originate from the western expansionist movement and from the mixed Spanish influences that ended when California was acquired by the United States by the Treaty of Guadalupe Hidalgo, 1848, at the end of the Mexican-American War. As mentioned earlier, California embraced the full instantaneous community property system and assumes common ownership on all property acquired during the course of marriage. Other states look at California as the “experimental workshop” for community property states.⁸⁸ This is in part due to their judiciary, which is also considered to be the most liberal, especially in transmutations and in characterizing separate property. The basic principles of California’s community property laws were the foundation for *The Uniform Marital Property Act (UMPA)*, by the Uniform Law Commissioners, which, in turn, became the model for Wisconsin’s community property system.⁸⁹

Transmutations occur when separate property becomes community property because one spouse has given it to the other spouse or the property has become a family asset.

⁸⁸ Robert Mennell and Thomas M. Boykoff, *Community Property in a Nutshell*. 2nd Ed. Minnesota, West Publishing Company, 1988. 15.

⁸⁹ For more information on the Uniform Law Commission please refer to the following web site: http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-umpas.asp

In 1956, for example, in the case of *Wood v. Security First Nation Bank*, a mere utterance of words to show the intention to make property shareable was sufficient to transmute the property into the community.⁹⁰ Conduct also has been held to be sufficient to prove transmutation.⁹¹ In the case of *In Re Nelson's Estate*, the husband owned a building where his wife worked as a secretary. His action of putting the building on their joint tax return was held to be enough to signify this was community property. These loose judicial interpretations were overruled when a requirement of writing to transmute became codified in January 1, 1985, and are now found in *The California Family Code*, § 852 (2003). This section states:

§ 852. Form of transmutation

(a) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.

(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

(c) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewellery, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.

(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.

(e) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to apply.

Legal analyst Kim M. Seavey stated that although the legislation was changed to make the rules stricter since 1985, she points out that the newer legislation is exactly the same

⁹⁰ *Woods v. Security-First Nat'l Bank* 46 Cal. 2d 697, 299 P.2d 657 (1956) (Lexis).

⁹¹ *In Re Nelson's Estate*, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964) (Lexis).

in form and intent as the present section.⁹² For the transmutation to take place, certain formalities had to be in place such as “recording” the transaction. Forms were originally enforced with the 1985 amendment but according to Seavey, when the first challenge came about the forms, the court in the case of *Estate of MacDonald (1990)* held that even if the wrong forms were used, the intention was clear because the transaction was in writing.⁹³ The effect of the Supreme Court of California’s decision in this case gutted the legislature’s intent to tighten up the loose use of transmutations. Now, writing is set as the minimum standard. The problem with any form of writing, as the courts have interpreted the new legislation, is that often transactions between spouses are informal and are simply understood to have occurred. For instance, if one spouse gave the other spouse a gift of expensive jewellery, the one giving may have no intention that this gift be part of the community since it was given unilaterally. For such gifts, writing a little note is too onerous. This may result, as Seavey points out, in more litigation and could result in harming those in marital situations since the strict requirements of a written contract will have to be found to imply intent. This may have the counter-effect of harming women who statistically have less access to litigation, especially since the costs of litigation are so high.

⁹² Kim M. Seavey. “Formalizing Interspousal Transfers of Real and Personal Property in California, 30, San Diego Law Review, Rev. 425. (Lexis).

⁹³ *Estate of MacDonald*, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

In California, inter-spousal gifts are usually held as part of the community property, but there are some exceptions.⁹⁴ In the case of *In Re Marriage of Sullivan* (1982), the wife had claimed that her husband's medical education was part of the community property and that she should receive a higher portion in value of his earning capacity to recognize the community's financial interest in his degree. The California Court of Appeal stated that the husband's medical degree was a gift and gifts, even those purchased with shareable funds, are not returnable upon the dissolution of marriage. The Court of Appeal's position is in keeping with the general view that an absolute gift of property is irrevocable.⁹⁵ However, many women groups would argue that professional degrees or training should be valued and accounted in marital property.

Gifts between spouses and gifts to third parties must be made pursuant to the fiduciary relationship between the husband and wife, according to *The California Family Code* § 721 (2003). S. 721 (a) states that "either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried." This means effectually that either spouse may gift or donate the funds as long as the funds are either their own property to control, or the funds are in the community. S. 721 (b) specifically outlines that the fiduciary standard is applicable by stating:

...in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential

⁹⁴ Exemplary case is *In re Marriage of Sullivan*, 134 Cal. App. 3d 634 (1982) (Lexis).

⁹⁵ For more information on gifting law and the concept of possession, refer to Bruce Ziff, *Principles of Property Law*. (Toronto: Carswell, 1993). 108-111.

relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other....

This fiduciary duty, however, is not a high threshold and is not at the high level found in business relationships. For example, *In re Marriage of Duffy*, the issue was whether the husband breached his fiduciary duty because he failed to disclose to his wife that he received cash for his interest in a profit-sharing plan and from his investment stocks upon his retirement.⁹⁶ With this money, he made poor investment choices without his wife's input and lost the funds. The lower level held that his breach made him liable to pay his wife damages. But the California Court of Appeal found that the wife had not requested any information about this money and that he was not entitled to disclose it to her unless she had asked. Thus, he was not in a breach of fiduciary duty by failing to disclose to her. In addition, the Court of Appeal rejected the idea that he needed to act as a prudent investor, respecting the standard of care. In effect, this decision erodes the higher threshold expected by implementing shared management in the instantaneous community property system. If Manitoba were to adopt a community property system similar to California, the highest standard of fiduciary duty would need to be specifically outlined in the legislation.

California is also particularly interesting because it was the first state to go against the general Ganancial system's understanding that all rents and income from property made during marriage are part of the community even though the rent or income

⁹⁶ Exemplary case is *In re Marriage of Duffy*, 91 Cal. App. 4th 923; 111 Cal. Rptr. 2d 160; 2001 Cal. App. LEXIS 658).

derives from a premarital asset.⁹⁷ As early as 1860 in the case of *George v. Ransom*, the wife's pre-acquired property made a profit, and the California court held that she maintained the profit as her own and that it was not part of the community.⁹⁸ It may have been that the court was trying to shield her property from her husband's creditors, but nonetheless, the decision in the case had widespread implications. This has been dubbed the *California Rule* or the *American Rule* since almost all American community property states now follow it. Given the time frame of this decision, and the fact that the wife retained her property separately from her husbands, this is quite an astounding decision. This law is now articulated in *The California Family Code* § 770 (2003):

§ 770. Separate property of married person

- a) Separate property of a married person includes all of the following:
 - a. All property owned by the person before marriage
 - b. All property acquired by the person after marriage by gift, bequest, devise, or descent
 - c. The rents, issues, and profits of the property described in this section
- b) A married person may, without the consent of the person's spouse, convey the person's separate property.

This section allows for all pre-acquired property, inheritances and the appreciation and profits of separate property to remain separate. Moreover, the strength of this section is confirmed in s. 3(b) since the owner of the separate property may decide unilaterally to dispose of the property.

⁹⁷ Ganancial system is sometimes referred to as the Spanish system.

⁹⁸ Supreme Court of California, 15 Cal. 322; 1860 Cal. LEXIS 112, April 1860 (Lexis).

B) Louisiana

Louisiana is the oldest community property jurisdiction in North America. In many respects, it is the purest form of community property found in the United States. Like California, Louisiana is an instantaneous community property state. Historically, many Louisiana women have considered their system to be an equitable system that favours their interests. This sentiment was nicely expressed by one author: “the women of Louisiana owe a special debt of gratitude to Spain for placing them in a legal status far superior to that of their sisters in most of the other states in America.”⁹⁹ Sentiments such as this are reasons why many believe that a community property system would be more beneficial for women in common law jurisdictions.

The major difference between Louisiana and most of the other community property states is that the Louisiana system allows sharing of gifts made to the spouses jointly, even if the gift was made before the wedding. Most often, this includes wedding gifts given before the wedding ceremony. Other states view the marriage ceremony as the point that crystallizes the sharing of the gifts between the spouses.

Louisiana also differs because it strictly follows the Ganancial system and not the

American Rule In Louisiana, a spouse must share the profits or, as it is called in *The*

⁹⁹ Nina Nichols Pugh, “The Evolving Role of Women in the Louisiana Law: Recent Legislative and Judicial Changes,” 42 *Louisiana Law Review*. 1571, 1571 (1982), as quoted in Neely S. Griffith “When Civilian Principles Clash with the Federal Law: An Examination of the Interplay Between Louisiana’s Family Law and Federal Statutory and Constitutional Law *Tulane Law Review*.” (December, 2001 76) *Tulane Law Review*. 519 (Lexis).

Louisiana Civil Code, “fruits”, of all pre-acquired assets. Fruits are divided into two kinds: natural and civil fruits. Natural fruits are products made from the earth or by an animal. They belong to the person entitled to the usufruct (the right to use another’s property for a time without damaging or diminishing it). But at the moment of severance, the product is in the community. For example, hay growing on a wife’s separate property is hers until severed. At severance, the crop is community property. Civil fruits are revenues made by interest or rentals, and these like the natural fruits, are apportioned to each spouse equally.

On the other hand, Louisiana’s law is clear that gifts made to the individual remain separate property pursuant to Article 2341 of *The Louisiana Civil Code*:

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime. ¹⁰⁰

If such individual gifts increase, the appreciation remains with the owner, as the gifts are separate from the community. If the other spouse wishes to claim a portion of the appreciation, he or she must prove Article 2368, which states that if the separate

¹⁰⁰ La. C.C. Art. 2341 (2003)

property of a spouse has increased in value as a result of the *uncompensated labour* of the spouses, the other spouse is entitled to one-half of the increase attributed to the common labour. Recently, the Louisiana Court of Appeal ruled in *Salley v. Salley* (1995) that a gift of one-third of the stocks in the family chain of food stores received by a husband remained his separate property.¹⁰¹ Mrs. Salley claimed that the appreciation was community property and that she had been uncompensated for labour. Her counsel brought forward evidence that she was paid \$500 each week from her husband's interest in these investments and she used this money to pay community debts. Thus, although the stocks were a gift to her husband alone initially, she opined that she was owed a one-half interest of the appreciation pursuant to Article 2368 because of his practice of giving her an allowance. However, the Court of Appeal found that the husband's work, first as a stock boy in 1972, later as a cashier, and eventually as president of the company, proved that he had worked to achieve the increase alone. Moreover, the Court of Appeal focused on the fact that the husband always kept the investment monies separate from the community. Thus, the Court of Appeal concluded that the wife failed in her burden to prove that she laboured in the store. It appears that the Court of Appeal set a very high burden for the spouse asserting a claim of uncompensated labour. *Salley* exemplifies that even though the couple was married in 1973 and divorced in 1992, and that the wife undoubtedly contributed to the running of the home and made it possible for the husband to work

¹⁰¹ *Salley v. Salley*, 661 So. 2d 437; 1995 La. LEXIS 2544

outside the home, she is not entitled to any of the appreciation in value of his gifted stocks.

Louisiana also allows an owner of separate property to unilaterally declare the income as separate by filing a statement with the “conveyance records”.¹⁰² This unilateral action has the potential of creating hardship for the other spouse, especially if the spouse filing the conveyance record does so to exclude his or her partner from sharing in the community property. In such scenarios, the black letter law may be softened by judicial discretion. For instance, in the case of *Kyson v. Kyson*, the wife’s counsel argued that the wife should be entitled to some of the profits from her husband’s rental properties even though he had filed the conveyance record as per the legislation because the husband derived most of his income from the rents and not from his contract job.¹⁰³ Mrs. Kyson’s counsel continued with this line of reasoning and stated that the majority of Mr. Kyson’s earnings should be in the community. This view, Mrs. Kyson’s counsel argued, was strengthened by the fact that Mr. Kyson’s earnings originated from his properties and Mrs. Kyson benefited from them with the allowance. Although the Louisiana Court of Appeal entertained Mrs. Kyson’s arguments, and possibly would have ruled that the properties would have been a community property if her husband had done active labour to make the money, they decided the opposite after questioning the husband and discovering that the rental properties income was

¹⁰² Louisiana Civil Code Ann. Art. 2339 (2000)

¹⁰³ *Kyson v. Kyson* 596 So. 2d 1308; 1992 La. App. LEXIS 1243

made passively. All that Mrs. Kyson was able to maintain as part of the community property was the income made on the properties prior to her husband filing the conveyance record. MAWL Inc. believes that part of the reason why the Court of Appeal maintained the separate property was because to do otherwise would have gutted the intent of the conveyance record and would have circumvented the legislature's authority.

C) Wisconsin

Wisconsin is the most recent American state to switch from a common law property system to a community property system in 1986. Because of this relatively recent switch, although they are now a community property state, Wisconsin has retained the common law wording and refers to all community property as *marital property* in *The Marital Property Act (WMPA)*. The impetus for the changes started with the 1974 Governor's Commission on the Status of Women called the "Homemaking and the Family: Changing Values and Concerns" and was based on the view that marriage should be seen as a partnership. This was a view shared with proponents including the Wisconsin Women's Network, an umbrella organization of various Wisconsin organizations and individuals. Most have seen this legislative change as progressive. Some have gone as far as calling this switch revolutionary, while others have stated that

there have been a number of draw backs that have impacted estate planning, debt collection, probate and bankruptcy.¹⁰⁴

The central starting point of the system is expressed in *WMPA* § 766.15 (1) (2003):

- (1) Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement.
- (2) Management and control by a spouse of that spouse's property that is not marital property in a manner that limits, diminishes or fails to produce income from that property does not violate sub. (1).

Clearly, the *Act* states that each spouse is responsible to the other for all community property. In terms of management and control, either spouse may manage it if they have agreed that one may do so. This recognizes the right of a spouse who is managing a business to have the control of it so that he or she will be able to make day to day decisions and be free of potential gridlock if the other spouse either did not have the knowledge to make a decision or was unwilling to make a decision that would be in the best interest of the business. Otherwise, if there is no agreement, both may exercise management and control under the standard regime. The abovementioned s. 766.15, subsection (2) upholds that non-marital property is separate. However, the same section puts the other spouse in a quasi-fiduciary situation but not at the high level equivalent to a trustee, where operating separate, non-community property still must act considering the impact on the marital property. Thus, although individual property

¹⁰⁴ Howard S. Erlanger and June M. Weisberger, "From Common law Property to Community Property: Wisconsin's Marital Property Act Four Years Later," *University of Wisconsin Law Review*, University of Wisconsin (May 1990) Rev. 769

remains for the sole benefit of the title owner, Wisconsin's legislature has carefully considered that if that ownership of property is in bad faith, or if it jeopardizes the marital property, it may lose its separate characteristics. The best example of this is found in *Gardner v. Gardner*, where the wife alleged intentional misrepresentation by her spouse whom she claimed hid properties in Florida and elsewhere when she signed their marital property agreement.¹⁰⁵ The Wisconsin Court of Appeal found that this was not the case but held that had intentional misrepresentation been found, it would have been a breach of the duty of good faith involving marital property.

Wisconsin shares with Louisiana the ability of one spouse to declare unilaterally through a written statement that he or she wishes to make income or property individual property rather than marital property.¹⁰⁶ However, the Wisconsin statute goes one step farther and allows a person intending to marry to also fill out this declaration to keep individual property separate. The statute is also clear in *WMPA* § 766.59 (2)(b) that five days after the written statement is signed, the executing spouse must deliver this to the other spouse or the soon-to-be bride or groom. A failure to do so breaches the duty of good faith imposed by *WMPA* § 766.15 and would result in a return to the standard regime where that property is included.

¹⁰⁵ 175 Wis. 2d 420; 499 N.W.2d 266; 1993 Wisc. App. LEXIS 757

¹⁰⁶ *WMPA* s. 766.59 (2002): "(1) A spouse may unilaterally execute a written statement which classifies the income attributable to all or certain of that spouses property other than marital property as individual property."

In addition, *WMPA* also adopts the “Louisiana Fruits” rule and states that all non-community property that appreciates, such as interest on bank accounts, dividends from stocks, and rents from real estate, is community property. Although some may argue that this is an overly onerous responsibility, the ability to unilaterally opt out of sharing individual property through § 766.59 tempers the potential unfairness of this section.

Issues relating to management and control are very succinctly laid out in the *WMPA*, which states that:

766.51.

- (1) A spouse acting alone may manage and control:
 - a. That spouses property that is not marital property
 - b. Marital property held in the names of both spouses in the alternative, including marital property held in a form designating the holder by the words "(name of one spouse) or (name of other spouse)".

Either spouse may have the management or control. From this flows legal consequences that allow for one spouse to act as the manager and entirely control the rights to use, transfer, assign, sell, create a security interest in, mortgage, consume, exchange, buy, encumber, donate or gift the property. Ordinarily, having a singular manager is considered the most workable solution to modern relationships. For instance, if two spouses each have their own business, each is in a better position to manage their respective business. However, if one spouse’s acts breach the duty of good faith, § 766.15 (1) would kick in to rectify the situation. This was the situation in an appeal of the Circuit Court of Green Lake County, *In Re the Matter of the Estate of*

Wesley Lloyd.¹⁰⁷ In that case, the husband transferred almost all his marital property and individual property into twenty-nine joint accounts with his nephew. The transfer to a joint account was an attempt by the husband to transfer the right of survivorship to the nephew, thus allowing the nephew to gain ownership of the properties at the time of his death. Most of the funds in the joint account with the nephew originally were part of joint accounts the husband held in his and his wife's name. Mrs. Lloyd argued that her husband's actions were inappropriate since she was entitled to half of the property that was valued at over \$330,000. The Court held that the property that was traceable to the marital component must be returned to the wife. The court rejected an accounting based on the spouses' contributions to the account. As a result, Mrs. Lloyd was awarded the funds in twenty-three of the twenty-nine accounts. In theory, she had control of the accounts since they were joint but from the facts, this was not the spouses' practice and the court upheld Mrs. Lloyd's rights in the marital property.

¹⁰⁷ *In re the Matter of the Estate of Wesley Lloyd*, Wis. 2d 240; 487 N.W.2d 647; 1992 Wisc. App. LEXIS 536

IV. THE INTEGRATION OF THE COMMUNITY OF PROPERTY SYSTEM WITH THE COMMON LAW PROPERTY SYSTEM

Across North America, the changing dynamics of civil society meant that there were substantial changes in the family, which encouraged numerous proposals for legislative change. Women were increasingly in the workforce and not solely at home tending to the children. For instance, in Canada in 1941, female participation in the labour force was a mere 20%. In 1976, only 42% of all women age 15 and over were in the labour force.¹⁰⁸ By 1980, approximately 5 million women earners were in the labour market, equalling roughly 50% of the workforce. As of 2000, 56% of all women 15 and over were participating in the workforce.¹⁰⁹ To put these numbers into perspective, it is important to note that the proportion of men 15 years and older in the workforce equals 68%.¹¹⁰ In addition, women with higher education rates tend to be more readily employed than those who have not finished high school. For instance, 76% of female university graduates are employed whereas only 14% of women who have only completed grade eight were employed.¹¹¹ The heavy influx of women workers in Canada paralleled developments in the United States. Other developments that also contributed to significant shifts in civil society were the increased rate of divorce, the growth of single-parent families and the greater acceptance of non-marital unions.

¹⁰⁸ Statistics Canada, "Women in the Workplace." Government of Canada Website: <http://www.statcan.ca/english/freepub/89F0133XIE/89F0133XIE00001.pdf>

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

Legislators across North America were facing pressure to reform laws that no longer ideologically fit the changing family dynamics. To address these changes in the family, many common law jurisdictions turned to the community property system believing that its presumption of equal assignment of property interests would be more appropriate. With this backdrop giving the impetus for change during the late 1970s and early 1980s, Wisconsin is the only state that fully accepted a seismic shift to a full community property state. Most common law states opted to integrate some community property principles to alleviate perceived and actual injustices in their marital property laws. For the purposes of our discussion, we will be exploring the effect of such partial legislative amendments in Massachusetts and New York, states that both accepted some community property principles.

A) Massachusetts

Massachusetts enacted the recommendations found in *The Uniform Marriage and Divorce Act* first proposed in 1970. *The Uniform Marriage and Divorce Act* proposals served as models to help legislators across America update their laws. The 1973 version of *The Uniform Marriage and Divorce Act* included two alternative proposals in s. 307: *Alternative A* focused on giving the courts mandatory equitable factors with the courts apportioning the property, and; *Alternative B*, which was the adoption of the community property system. *Alternative A* is based on the theory of community property insofar as it allows sharing of property assets and alters the common law that

traditionally only allowed for alimony payments between the spouses. Property sharing or the presumption of it was unheard of in common law jurisdictions. Therefore, the legal community often considered these Uniform models radical. Even the American Bar Association's Family Law Section was hesitant to embrace the ideas, as they were not flexible enough.¹¹²

In 1974, the Massachusetts government opted to use *Alternative A*. This was a compromise position as it allowed for a right for an equitable distribution of all property - those acquired during marriage, pre-acquired property, gifts and inheritances - but left the actual portions up to judicial discretion unlike the both instantaneous and deferred community property system that tries to have a perfect 50:50 allocation of marital property. The 1974 amendment to *The Massachusetts General Laws*, Chapter 208, s. 34, was specific on the equitable factors for consideration:

Upon a divorce or upon petition at any time after a divorce, the court may order either of the parties to pay alimony to the other. In addition to or in lieu of an order to pay alimony, the court may assign to either the husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, ***shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates*** (our emphasis).

¹¹² Charles P. Kindregan, Jr. and Monroe L. Inker, "A Quarter Century of Allocating Spousal Property Interests: The Massachusetts Experience." *33 Suffolk University Law Review* 11(Lexis).

The overall intent of this original amendment has remained the same, but some of the specific wording has been altered in subsequent amendments. Such amendments include making it mandatory for the judiciary to consider the present and future needs of children in the division of property (1989) and considering homemaking a contribution to the marital pool (1977). To what degree homemaking was to be factored into the equation, if it was equal or was just one of many factors, was left unclear.

The effect of the 1977 amendment was tested early in *Bianco v. Bianco* (1976) where the wife was paid alimony and the husband kept the marital home after she transferred title to him.¹¹³ The couple was married for only three years and the wife worked throughout. She kept her money separate except for \$2000. The husband, on the other hand, supported them both and he put \$3500 down on their home. The court ruled that it was equitable for him to keep the home using the factors expressed in the aforementioned section, but he did have to pay her a lump sum payment of \$2500 in lieu of alimony. From this decision, we can extrapolate that the court was not as willing to interpret the amendment to mean equitable sharing from the “get go” as in community property states. The factors allowed them to start from a different presumption and the court willingly used their discretion to do so.

Alimony was never eliminated from the Massachusetts common law but its use was restricted to keeping the non-earning spouse or the spouse with less income at the same

¹¹³ *Joseph R. Bianco v. Marianne Kenney Bianco*, 371 Mass. 420; 358 N.E.2d 243; 1976 Mass. LEXIS 1187

standard of living as during the marriage. Sometimes alimony was seen as completely inappropriate. For instance, in *Richman v. Richman*, the court used its discretion to award the wife two lump sum payments equalling one million dollars rather than awarding her alimony as her husband was a wealthy individual with the means to pay.¹¹⁴ His money during the course of their marriage was also made by natural increase rather than any of his or her efforts. The wife tried to appeal so that she would also receive alimony but the appeal level found that she had no need for rehabilitative alimony.

Massachusetts also considers the origin of the property interests as one of the factors that may preclude equitable distribution, but it is not one of the states that keep gifts, premarital property, and inheritances automatically out of the marital pool. This means that inheritances, gifts and pre-acquired property may be shareable.¹¹⁵ This has the potential of leaving the law quite uncertain since it is subject to judicial discretion. Legal analysts Kindregan and Inker in their article (supra) discuss this in detail and state that the courts “ought to give weight to the fact that property originated from sources outside the marital partnership, an interest in such property may be divided or assigned when supported by good family policies.” In *Bacon v. Bacon*, the court held that the bulk of appreciated assets from a parent’s inheritance to the wife were the wife’s separately since she used this money to support the family while her husband

¹¹⁴ *Richman v. Richman*, 28 Mass. App. Ct. 655; 555 N.E.2d 243; 1990 Mass. App. LEXIS 299.

¹¹⁵ *Zeh v. Zeh*, 35 Mass. App. Ct. 260; 618 N.E.2d 1376; 1993 Mass. App. LEXIS 857.

kept his salary separate for himself¹¹⁶. In another case, *Johnson v. Johnson*, the court awarded the wife separate assets originating from a gift from her mother and stated that this was because of the husband's abuse of her, her needs, and her investments.¹¹⁷ Such judgments demonstrate that Massachusetts will not award abusive spouses or those who do not work towards maintaining a strong family together. This, in essence, exemplifies what the court sees as "bad family" actions. Some would be concerned about the "fault finding" aspect of this decision.

Notably, the Massachusetts courts are also clear that inheritance expectancies are not property subject to division, but it may be considered as future acquisition of capital assets and property, and would then go into the accounting to decide the allocation of property.¹¹⁸

B) New York

New York enacted its 1980 *Equitable Distribution* law and embraced the compromise position of equitable division rather than the community property's presumption of equal division. New York's rationale had the same underlying legislative intent as Massachusetts when it amended its marital property statute. Both states shared the goal of softening the hardships of divorce created by the common law. New York, like

¹¹⁶ *Bacon v. Bacon*, 524 N.E. 2d 401, 401-03 (Mass. App. Ct.), as quoted in Kindregan and Inker.

¹¹⁷ *Johnson v. Johnson*, 494 N.E. 2d 423 (Mass. App. Ct. 1986) as quoted in Kindregan and Inker.

¹¹⁸ *Zeh v. Zeh*, *supra*.

Massachusetts, allowed for property dispositions based on equitable distribution not solely by title, and it changed the state's alimony laws. However, although the legislative intent was to benefit wives by making it possible for them to share in property from the marriage, some believe that the lofty goals of the New York amendment were never attained. For instance, one University of California professor of law said that the results of the amendments have been counterintuitive.¹¹⁹ Abandoning title has created "virtually no effect in most cases, essentially because of the meagre amounts of property available for distribution" and alimony rates have dropped after the legislative changes.¹²⁰

The 2003 *Domestic Relations Law* of New York, Part B, sis. 1 (c) and (d) outline the New York definition of marital property:

- c. The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined
- d. The term separate property shall mean:
 - (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
 - (2) compensation for personal injuries;
 - (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
 - (4) property described as separate property by written

¹¹⁹ Professor Jennings from the University of California, Berkeley School of Law said this in a 1991 speech to a Symposium on Equitable Distribution in New York. See below.

¹²⁰ Jennings, Symposium: Equitable Distribution in New York: Results and Reform, Commentary: Towards a Theory of Fair Distribution. 57 *Brooklyn Law Review* 755 (Fall, 1991) Lexis.

agreement of the parties pursuant to subdivision three of this part.¹²¹

New York is clearly different from Massachusetts insofar as gifts, inheritances, and pre-acquired property are concerned. In New York, these assets are property statutorily outside the marital pool and are not subject to property division. All other family assets acquired during marriage are shareable. Shareable assets are outlined in *The Domestic Relations Law* § 236B(5)(d) that states that a court must consider the following thirteen factors in making decisions on the equitable distribution of marital property:

- 1) income and property,
- 2) duration of the marriage and age and health of the parties,
- 3) need of the custodial parent to occupy or own the marital residence,
- 4) the loss of inheritance and pension rights,
- 5) an award of maintenance,
- 6) direct and indirect contributions,
- 7) liquid or nonliquid character of the property,
- 8) future financial circumstances of the parties,
- 9) the difficulty of valuing marital assets,
- 10) the tax consequences to each party,
- 11) the wasteful dissipation of assets,
- 12) transfer in contemplation of action, and
- 13) any other factor the court deems appropriate to take into consideration.

¹²¹ NY CLS Dom Rel § 236 (2003), Lexis.

The "other factors" that may be considered show that the court has a great amount of judicial discretion in deciding the outcome. From the case law, it appears that the courts have held that subsection 13 is used most often for premeditated conduct in causing hardship or purposely fostering an environment of marital misconduct that results in a finding against the badly acting spouse.¹²² Again, the fact that New York, a common law state, has implemented allowances to assign property interests is quite revolutionary since thirty years ago, only community property states allowed for such property division.

One area of particular interest in New York is the characterization of professional degrees and licenses: New York's judiciary has held that when earned during marriage, these are marital property. This characterization even surpasses the stance taken by the so-called "liberal" California courts since California does not classify degrees, even those earned during marriage, as shareable. In California, a non-student spouse is conferring an absolute gift to the other spouse by helping the other spouse earn the degree. The contributions towards ordinary living and educational expenses are all a part of this absolute gift and are irrevocable.¹²³ New York courts, in the leading case of *O'Brien v. O'Brien*, consider the professional degree to be a "valuable property right" and its value is seen by the enhanced earning capacity it affords the holder.¹²⁴ The *O'Brien* case is exemplary. Mr. O'Brien and his wife were married in 1971. During this

¹²² *Safah v. Safah*, N.Y.L.J. 1/8/92 (Sup. Ct., Suffolk Cty.) (Lexis).

¹²³ Raj Rajan, *Marital Property: Medical Degree in Divorce: New York versus California*. Journal of Contemporary Legal Issues. (University of San Diego School of Law, 2000) Lexis.

¹²⁴ *O'Brien v. O'Brien*, 66 N.Y. 2d 576, 583, 489 N.E. 2d 712, 498 N.Y.S. 2d 743 (1985) (Lexis).

time period, he completed his baccalaureate degree and then went to medical school. Two months after he received his license to practice in 1980, he filed for divorce. Mrs. O'Brien was awarded \$188,000 payable in eleven annual instalments because this amount represented her equitable interest in his degree. The goal of this policy is to eliminate injustice. It recognizes the partnership between the spouses: when one is studying, the other spouse may be thwarting her or his own educational plans or career aspirations for advancement. When one spouse is in school, it is difficult for the other spouse to move to attain a better job. For the typical young couple who lacks financial stability, it is also difficult for both of them to be in school at the same time. That means that one likely would have to support the other in order for one of them to finish studying successfully. New York's judiciary recognizes this reality and affords a proprietary interest in the educational degree.

V. SUGGESTIONS ON COMMUNITY OF PROPERTY FOR MANITOBA: SHOULD WE IMPLEMENT AN INSTANTANEOUS COMMUNITY OF PROPERTY SYSTEM?

Should we take the plunge and revive proposals to change our *Marital Property Act* to an instantaneous community property system, as was found in the unproclaimed 1977 NDP legislation, or a full instantaneous community of property system for all assets?

MAWL Inc. recognizes the equality provisions and the psychological benefits of instantaneously sharing all property from the beginning of a relationship.

Notwithstanding the benefits MAWL Inc. does not recommend to move to a full community of property system. Past legislative amendments and societal changes have greatly improved the status of women in Manitoba's family law. MAWL Inc. believes it would be preferable to focus our attention on strengthening the system that we presently have. With the adopting of the recommendations proposed herein, Manitoba's marital property system could be a leading example to the world of equal treatment of men and women in a marriage relationship and in dividing assets at the time of marital dissolution. MAWL Inc.'s review of the community of property jurisdictions suggests there is much in our system that is preferable.

Currently, our legislative system is essentially a deferred community property system.¹²⁵ The hardships originating from the traditional common law system have been ironed out through the fusion of community property ideals into the common law

¹²⁵ Steel, Freda. 130.

system. Our system now allows for a sharing of all family and business assets acquired during marriage through the Manitoba *Marital Property Act*.¹²⁶ The presumption to share upon the dissolution of the marriage is spelled out in the Act's preamble:

WHEREAS marriage is an institution of shared responsibilities and obligations between parties recognized as enjoying equal rights;

WHEREAS it is advisable to provide for a presumption, in the event of the breakdown of the marriage or the death of a party to the marriage, of equal sharing of the family and commercial assets of the parties to the marriage acquired by them during the marriage.

Like community property systems, Manitoba's legislation allows for the allocation of proprietary interests at marriage dissolution. In effect, our law is very similar many of the community property principles from California and Louisiana. For example, as discussed earlier, California's listed exceptions to sharing include pre-acquired property, inheritances, and the appreciation and profits of separate property.

S.4 (2) of *The Marital Property Act* is a positive section that states what is a shareable asset in the family pool or in the community. These include gifts acquired before marriage given in specific contemplation of the marriage to the other spouse. The last point, which is in lay terms interpreted as wedding gifts given to both spouses before the wedding ceremony or from one spouse to the other for the marriage, is identical in meaning as Louisiana's legislation.

¹²⁶ *Marital Property Act*, C.C.S.M. c. M45.

Appreciation, depreciation and income from assets are shareable in Manitoba.

Similarly, in many of the community of property systems, assets acquired prior to marriage and the increase or decrease in value of separate property is shareable.

Manitoba's *Marital Property Act*, s.4 (3) states:

s. 4(3) Where by reason of any provision of subsection (1) this Act does not apply to an asset of a spouse, then, with respect to all assets other than those exempted from the application of this Act by section 7...

(a) any appreciation in the value of the asset that occurred while the spouse was married to and cohabiting with the other spouse shall be added to the inventory of assets of that spouse;

(b) any depreciation in the value of the asset that occurred while the spouse was married and cohabiting with the other spouse shall be deducted from the inventory of assets of that spouse; and

(c) any income from the asset earned while the spouse was married to and cohabiting with the other spouse shall be treated in the same way as income from an asset to which this act applies.

Manitoba's law also recognizes that there may be a need for a division of property before the actual marital breakdown. This is found in s. 21(1) (a), which states that the court may make a receiving order against all or any of the assets through an order for preservation of assets. In Canada, only Manitoba and Saskatchewan allow for the division of marital property before marital breakdown. Therefore, in effect, Manitoba's legislation encompasses an understanding that there is instantaneous property sharing within the marital consortium and within the deferred community property framework in place in Manitoba and Saskatchewan. Justice Steel is sceptical, though, on how effective s. 21 (1) (a) has been since, although it is on the books, there is little evidence to

show it has been used.¹²⁷ University of Manitoba Law Professor Lisa Fainstein has commented about this section in her Family Law Class: she said that the use of this section while still married likely would be to the detriment of that relationship!

Some of the advantages to Manitoba's deferred community property system include its less restrictive nature, allowing spouses to act independently of each other. Spouses in Manitoba will not face the gridlock in either their familial affairs or in business assets that would have to be controlled dually through community property joint-management measures. Also, overall, many believe that Manitoba's present system, and generally all deferred community property systems, are less complex.¹²⁸ Many, if not all, community property systems have the opting-out provisions as was discussed earlier through the example of Wisconsin. Adding the additional step of opting out of a community property system adds a burden on soon-to-be married couples. To write an effective agreement to opt out, many couples would have to seek legal assistance. That would add expenses and stress at a time when couples are least likely to be concerned about a future break-up. It is for these reasons that MAWL Inc. believes that we should not need to implement a full instantaneous community property system at this time, provided our other recommendations herein are implemented.

¹²⁷ Steel. 145.

¹²⁸ Justice Steel expressed this very point in her article. 142.

MAWL Inc. further believes that a statutory fiduciary duty between spouses should exist. The problem with our present system is that many people have little or no property and the deferred system of sharing allows the owning spouse to squander what assets they have foolishly.¹²⁹ Although there is a provision in the *Act* to prevent dissipation of an asset, if a spouse does not have knowledge of what his/her spouse is doing with the asset, this right is of little effect. Each spouse should be accountable to the other for all property. This means each spouse should have a duty to the other for the responsible management of all property.

▪ **RECOMMENDATION**

MAWL Inc. recommends taking an approach similar to that of Wisconsin. The spouses may agree that one spouse holds the responsibility for management and control of the shared property. This eliminates the “gridlock” previously discussed. If no agreement is made, both spouses have the equal right and obligation of exercising control and management over the property. MAWL Inc. recommends the owning spouse undertakes a fiduciary duty towards the non-owning spouse. Although the property is owned strictly by one spouse, that spouse’s actions towards the non-shareable property must have regard to the marital property situation as a whole.

¹²⁹ For a fuller discussion of women’s poverty rates, please refer to the Manitoba Association of Women and the Law’s recent publication regarding the need for more legal aid funding. This paper is available online: <http://www.nawl.ca/affil/publist.htm>.

Spouses should hold all marital property in a fiduciary capacity for both spouses' benefit regardless of who is the owner. The spouses should have a legal duty to keep the other spouse informed and to discuss with the other spouse decisions that affect the property. The failure to keep the other spouse informed or the failure to act prudently with the assets should be a factor in awarding an unequal sharing of marital property. This fiduciary duty cannot be altered by any marital property agreement. This recommendation is similar to many jurisdictions in the United States. For instance, following Wisconsin's example, the spouse may not manage or control the non-shareable property in a way that limits, diminishes or fails to produce income from that property.

VI. THE VALUE OF PROFESSIONAL DEGREES

MAWL Inc. recognizes that when one spouse earns an academic degree while the other spouse supports him or her, that translates into one spouse having a higher future earning potential and a resulting higher standard of living. In such situations, usually one spouse is supporting the other to finish schooling and in the process is thwarting career or educational advancement. The supporting spouse may be seen as “gifting” money to the spouse pursuing the professional degree, but with the view that marriage is a partnership, MAWL Inc. recognizes that the supporting spouse is also investing into a future higher standard of living since the rewards of the professional degree are meant to be shared as was found in New York’s leading case, *O’Brien v. O’Brien*. New York’s case is the typical example where the woman supports her husband early in his career to attain educational advancement in the hopes that she will either return to school after or she will be able to take care of their children at a higher standard of living. Once he attains the full benefit of the education or close to the time the degree is conferred, he files for divorce and upon divorce the supporting spouse loses her investment into their future lifestyle. Some may say that career assets, if it is correct to dub a professional degree as “career assets,” are not shareable, as they are not based on financial contributions alone. This line of reasoning stresses that the one spouse who attended school used his or her own intellectual ability to succeed.¹³⁰ But MAWL Inc.

¹³⁰ Claudia Wendrich, “Who Should Profit from an Academic Degree Upon Marital Breakdown? Comparing Manitoba Common Law and the German Civil Code.” *Manitoba Law Journal*, v. 25 (University of Manitoba: 1998) 267.

stresses that divorcing after attaining an educational degree, in situations similar to the facts in *O'Brien*, is a particularly acute problem - one that is growing. Recent studies show that young couples are divorcing in increasing numbers.¹³¹ Usually younger couples are the ones in situations parallel to *O'Brien*.

▪ **RECOMMENDATION**

MAWL Inc. recommends that professional degrees earned entirely during marriage should be classified as shareable property upon the dissolution of marriage. MAWL Inc. recommends implementing statutorily mandatory sharing of this asset based on the increased earning potential when working out a marital property division when the professional degree(s) were earned entirely during the course of marriage. The effect of this would be to alleviate hardship and the loss of expected higher standards of living faced by the non-degree holder spouse.

¹³¹ A recent study in the United States shows that young couples are divorcing after a short period of marriage. These marriages have been dubbed "starter marriages." Although MAWL Inc. does not have statistical evidence to show that there are a higher percentage of younger couples divorcing in Canada, we expect that the Canadian experience mirrors the United States. Please see ABC Web site for more information on the phenomena of "starter marriages": http://abcnews.go.com/sections/GMA/GoodMorningAmerica/GMA020125Feature_starter_marriage.html

MAWL Inc.'s Recommendations

- **In *The Marital Property Act*, there should be more specific discretion given to the courts to encourage judges to alter the equal sharing of assets where the exemption in the marital property divisions having regard to all the circumstances, including the efforts of both spouses towards that property.**
- ***The Marital Property Act* should be changed to include jointly held assets in an accounting and equalization of assets.**
- ***The Marital Property Act* should be amended to allow the estate of a deceased spouse to make an application under the *Act* if the parties were living separate and apart at the time of the death of one party**
- **The exemption in s. 7(4) of *The Marital Property Act* to the sharing of the increase or decrease in value of a gift or inheritance should be abolished. In all cases, the increase or decrease in value and the income from the gift or inheritance during the time of cohabitation or marriage should be shareable unless the court considers it grossly unfair or unconscionable. This recommendation brings Manitoba in line with provisions available in Alberta, Saskatchewan, Prince Edward Island, The Northwest Territories and Nunavut.**
- **The government of Manitoba should adopt detailed regulations to *The Marital Property Act* (*The Family Property Act*) to address the uncertainties present in**

the gifts and inheritances provisions of this legislation. These regulations should include making gifts and inheritances acquired prior to the marriage s. 4 assets so the increase or decrease in value during the marriage is shareable.

- **S. 31 of *The Marital Property Act* should be amended to require independent legal advice of the spouse releasing the estate and to make clear that a notice be served in every instance where the spouse does not receive the entire estate.**
- **A revision should be made to the statements respecting the election of a homestead filed at the Land Titles Office, as per *The Homesteads Act*. The statement should be revised to say**
 - 1) **I have never lived on this property with my spouse or common law spouse (opposite-sex and same-sex), or**
 - 2) **My spouse, common-law spouse or same-sex partner has filed an election to elect a different property as the homestead, or**
 - 3) **The person who consents to this transfer is my spouse, common-law/same-sex partner.**
- **The homestead consent or any other election of a spouse or document required to be signed by a spouse under *The Homesteads Act* must be accompanied by a declaration of independent legal advice.**
- ***The Court of Queen's Bench Surrogate Practices Act* should be amended to require the executor or administrator of an estate to make an investigation of**

the deceased's affairs and to list any persons the executor/administrator thinks may be a potential dependent of the deceased in their application for probate or administration. The executor/administrator should be made to serve these potential dependents with a notice (similar to s. 31 of *The Marital Property Act*) notifying the potential dependents of their right to make a claim under *The Dependents Relief Act*

- Personal liability should be imposed upon the executor/administrator if they fail to serve notice and distribute the estate when they know or ought to have known that a person was a dependent and might have a claim pursuant to *The Dependent's Relief Act*

- *The Court of Queen's Bench Surrogate Practices Act* should be amended to require all executors/administrators to make applications for probate/administration notwithstanding that third party financial institutions may agree to transfer the estate assets without probate. The *Act* should make third party institutions that deal with estate assets without probate or administration liable to any potential dependents for their claims under *The Dependent's Relief Act* to potential spouses or same sex partners for their potential claims under Part IV of *The Marital Property Act* or homestead election under *The Homesteads Act*.

- **A compensatory model for spousal support determination should be adopted. This means that lawyers and judges must place equal emphasis on all obligations under s. 15 and s. 17 of *The Divorce Act*, rather than emphasizing self-sufficiency by the recipient spouse. Furthermore, there must be recognition of the economic realities of women and the decision they make within the context of a marriage. Judges must ask more questions and demand more information from counsel. Support orders should not be time limited or for fixed terms where the marriage is long-term and the recipient spouse has not been fully compensated for the past and ongoing effects of marriage and childrearing. Judges must compensate the stay-at-home spouse or spouse who has sacrificed career advancements to accommodate the other spouse's career for their loss of income-earning capacity.**

- ***The Common-Law Partners' Property and Related Amendments Act* should be proclaimed immediately with the suggested amendments recommended herein.**

- **Further revision to the *Charter Compliance Act* is needed to ensure a consistent definition of "spouse" in all Acts with the exception of *The Adoption Act*. *The Adoption Act* should be amended to ensure that judicial discretion is only available to shorten the qualifying period and not to increase it.**

- **All provinces and territories should amend their legislation to give common-law and same-sex couples equal rights to property division upon separation from or upon the death of their partner/spouse.**

- **Any spousal agreement made prior to the proclamation of *The Common Law Partners' Property and Related Amendments Act* should be presumed invalid but that presumption should be rebuttable if the parties or a party can show a court that there was valuable consideration given by each spouse for the waiver and that the valuable consideration was of sufficient nature considering the rights being waived.**

- **Any spousal partner agreement, prenuptial or postnuptial agreement waiving property rights that was made prior to the proclamation of *The Common Law Partners' Property and Related Amendments Act* should be presumed invalid unless both spouses obtained independent legal advice and all future spousal agreements should require independent legal advice.**

- **The amendments provided for in *The Common Law Partners' Property and Related Amendments Act* should apply to all relationships that existed on the date the legislation was introduced into the legislature (August, 2002) so no one is left without protection. This was the procedure followed when the original *Marital Property Act* was enacted and applied to existing marriages.**

This would ensure protection for all couples, especially those that are the most vulnerable. It would prevent spouses/partners from using the time period between introduction of the *Act* and proclamation to abandon their relationship and avoid the mandatory sharing of the assets acquired during the relationship.

- **The present *Marital Property Act* should be reviewed to ensure that loopholes that create inequality are closed. S. 7 of *The Marital Property Act* should be amended so that gifts and inheritances are presumed exempt unless:
 - i. **The gift or inheritance was intended to benefit both parties;**
 - ii. **The gift or inheritance was used as a family asset instead of only to purchase a family asset;**
 - iii. **The gift or inheritance was used to purchase or improve a family asset.****

- **A specific discretion should be available to the court to make the gift or inheritance shareable if the court considers it fair having regard to any of the circumstances outlined in s. 14. In all cases, the increase or decrease in value of the gift or inheritance during the time of cohabitation or marriage should be shareable unless the court considers it grossly unfair or unconscionable.**

- **The appreciation and depreciation of all assets, including pre-acquired assets, gifts and inheritances, should be shareable. The market value of the property at the time of the marriage or when it is gifted/inherited should be exempt, but any increase or decrease in value of the property during the marriage should be shareable, unless a court considers the sharing to be grossly unfair or unconscionable.**

- **Spouses should hold all marital property in a fiduciary capacity for both spouses' benefit. The spouses have a legal duty to keep the other spouse informed and to discuss with the other spouse decisions that affect the property. The failure to keep the other spouse informed or the failure to act prudently with the assets should be a factor in awarding an unequal sharing of marital property. The fiduciary duty cannot be altered by *The Marital Property Act*.**

- **The spouses should agree that one spouse holds the responsibility for the management and control of shared property. If no agreement is made, both spouses should have the equal right and obligation to exercise control and management over the property.**

- **Professional degrees earned entirely during marriage should be classified as shareable property upon the dissolution of marriage. The government should implement statutorily mandatory sharing of this asset based on the increased earning potential when working out a marital property division when the professional degree(s) were earned entirely during the course of marriage. The effect of this would be to alleviate hardship and the loss of expected higher standards of living faced by the non-degree holder spouse.**