THE MATRIMONIAL PROPERTY ACT, ONE YEAR OF OPERATION

It is now just over a year since the Matrimonial Property Act was proclaimed in force on January 1, 1979. In that time the Act has been amended once, and is almost certain to be amended a second time in another respect in the very near future. It is timely, therefore, to review both the effect of the Act and the judicial attitudes to it during the first year of its being in force. As one might expect with any new legislation of such proportions, the practice with respect to the requirements of the Act has suffered from a certain degree of confusion.

In the first place, an action is to be commenced by way of Statement of Claim.[1] Where the pleadings merely ask for a distribution by the court, in the expectation that the presumption of equality provided for in section 7(4) will be applied, the drafter of the pleadings is not required to exercise any great skill or art in putting the case before the court. On the other hand, where no presumption of equal sharing is available, or where such a presumption is to be rebutted, the task of the drafter is much more arduous. He must attempt to assess the manner in which the court is likely to exercise its discretion and draft his prayer for relief accordingly. Similarly, the drafter of the Statement of Defence may merely acquiesce in the request for a distribution of property by the court, even though it may be expected that the distribution will turn out to be in proportions quite different from those contemplated in the Statement of Claim.

At the present time, it would appear that the pleadings may be little more than a formal method of engaging the parties in litigation, and will contain few, if any clues as to the basis on which the litigation will be fought. Moreover, the uncertainty of the content of the pleadings has caused more emphasis to be placed on the accompanying Statement of Property which each party must prepare.[2] It would be an understatement to suggest that the Statement of Property has caused a great deal of confusion and perplexity. In an attempt to follow what might be thought to be a layman's conception of property holdings, by detailing real property, investments and bonds and personal property, the Statement serves to obscure the necessary classifications which must be made in accordance with section 7(1), (2), (3) and (4). Furthermore, the summary, to which conclusions from all other calculations are transferred, is essentially misleading in respect of the value of matrimonial property capable of distribution, since it lumps together all the classifications of property detailed in section 7, despite the different onuses which should apply to each category.[3]

One must expect, however, that an astute bar will be capable of resolving the idiosyncrasies of the drafting of pleadings and accompanying documents, and that, if necessary, some practice advice from the courts may determine any disagreements. It is only through the decisions of the courts, however, that any guidance may be obtained in respect of the fundamental purposes and uses of the Act. The purpose of this

1. Matrimonial Property Act, S.A. 1978, c. 22, s. 4.
2. S. 31 and O.C. 1352/78.
3. Note the importance of these categories in *Augart* v. *Augart* and *Marquardson* v. *Marquardson*, *infra* at n. 13 and n. 24.

comment, therefore, is to review the decided cases in which written judgments have been pronounced. The present writer has already suggested in this *Review*,[4] that a number of general issues must necessarily be decided in the initial jurisprudence, and one may question whether or not those issues have been addressed, and whether any general trends are emerging.

The cases of *Husted* v. *Husted*[5] and *Rimer* v. *Rimer*[6] may conveniently be discussed together since both cases raise precisely the same issue. In each case an application was made under the Act for a distribution of property in respect of a marriage terminated by a decree of divorce granted prior to the coming into force of the Act on January 1, 1979. In each case, the application was made within the time period prescribed for the launching of an action in accordance with section 6. The issue before the court was whether the Act should apply to a marriage which had ceased to exist prior to the Act coming into force. At trial, it was stated that the Act should not be given a retrospective view which would have the effect of affecting rights and property in a manner which was not within the knowledge and comprehension of the parties, their counsel and the court at the time of the decree. Only in the clearest of cases, it was suggested, should the court recognize such retrospective legislation.[7] The argument that the Act should be given a retrospective application by necessary implication from the language of the Act, was met with little sympathy on appeal. McDermid J.A., speaking for the court, stated, with reference to the conditions precedent for application (section 5) and the time limits for application (section 6):

> The wording of these sections is equally as consistent with the intention that the legislation was only to operate prospectively as retrospectively.

He went on, further, to agree with the comment of Stevenson J., in *Rimer* v. *Rimer*, where the latter pointed to the fact that the provisions allowing parties to contract out of the statute would be denied to anyone divorced prior to the coming into force of the Act.

In neither case does the court acknowledge having been directed to the provisions of section 1(e) which defines a spouse as including a former spouse. Of all the provisions of the Act, that definition might be most capable of carrying a retrospective application.

It is submitted, however, that the decisions are technically correct. On the basis of conventional rules of statutory interpretation, the decisions are clearly supportable. One might be tempted to argue, by reference to the underlying policy of the Act and to the mischief which the legislation was intended to cure, that the court ought to have reached a different decision. Certainly, by reference to statements by those responsible for the drafting and for the implementation of the Act, one would be driven to a different conclusion from that reached by the court. However, such statements do not even form part of the "travaux preparatoire" which the court may, arguably, be capable of considering. The comment of McDonald J., at trial, is well taken, that if the legislature had intended the Act to be retroactive it could have followed the similar Ontario legislation which provided an excellent example.[8]

4. (1979) 17 *Alta. L. Rev.*, 372 at 403.
5. (1980) 10 A.L.R. (2d) 284, affirmed on appeal, unreported, December 28, 1979.
6. Unreported, Edmonton, August 23, 1979 *per* Stevenson J.
7. *Supra* n. 5 at 288.
8. *Supra* n. 5 at 287, with reference to s. 9, Ontario Family Law Reform Act 1978.

If for no other reason than that it is politic, it is anticipated that the spring session of the legislature will see the introduction of an amendment which will effectively reverse the decision of the Court of Appeal in *Husted*. It is anticipated that the Act will be amended to allow applications to be made within the two year time frame contemplated in section 6, despite the fact that a decree of divorce was granted prior to January 1, 1979. It is probable that an overall prescriptive period will be set up so that all applications in respect of marriages terminated prior to January 1, 1979 must be launched prior to a date fixed by the amendment. For example, the amendment may require that all applications to which the decision in *Husted* applies must be launched within one year of the amendment coming into effect, or two years from the date of the decree, whichever first occurs.

These two decisions would not appear to preclude an application where the parties were separated but not divorced prior to January 1, 1979. Such parties could still petition for divorce and fall within the time limit of section 6(1)(a). Some question may be raised as to whether the parties to such a marriage could apply under the Act without the commencement of a Divorce Petition. Similarly, one might question the right to apply of the innocent party to a void marriage where that party had become aware of the nature of the marriage prior to January 1, 1979.

Perhaps more important in terms of trends or general principles, are those cases where the court has been called upon to make an actual distribution under the Act. The first such case was argued before Kirby J. in *Hominuke* v. *Hominuke*.[9] The facts of the case, however, were hardly typical in that the plaintiff wife sought a distribution based on the fulfillment of the condition precedent in section 5(1)(c)(1), one year separation. The defendant husband had suffered a stroke in 1977 and had become mentally incapacitated. At the time of the action the parties had been married for twenty-eight years, during which time the defendant engaged in farming operations and the plaintiff worked at a number of jobs, using the income to support her family. In particular, much of the plaintiff's income was used to allow two children to become professional figure skaters. Much of this information was contained in an agreed statement of facts presented to the court. The two issues presented to the court consisted, first, of the question of whether the plaintiff came within the scope of the Act and if so, second, to what proportion of the matrimonial property was the plaintiff entitled. The first issue was dealt with in an extremely perfunctory fashion. After citing the provisions of sections 3, 5 and 6 the court stated: "These prerequisites have been met."[10] The court must have determined that the parties were living "separate and apart" in the sense of geographic separation and in the sense that the normal relationship of husband and wife was absent. In doing so, the court appears to have accepted the agreed statement of facts which recited the defendant's incurable condition, the need for permanent institutionalized care, and the plaintiff's realization that the marriage was at an end. It would appear that the effective cause of the fact of living separate and apart was the defendant's condition and the plaintiff could not be said to be in desertion. Even if that were the case, it would not be relevant to a finding under section 5(1)(c), since no distinction is drawn by that subsection between the deserting or deserted spouse. The court is

9. (1980) 10 A.L.R. (2d) 226.
10. *Id.* at 229.

directed to consider the state of affairs and the length of time for which that state of affairs has existed. It is not relevant to enquire as to who caused or is responsible for the state of affairs.

The court then proceeded to consider the facts presented to it under the different subsections of section 8, in order to determine what might constitute a just and equitable distribution. In summary, it might be said that the position of the plaintiff typified that which would justify an equal division of property. She had made substantial contributions to the family and to its economic life. Moreover, she had done so in such a way that she was not able to build any personal capital. The facts which the court determined were relevant under subsection (m) consisted of the plaintiff feeling a strong moral obligation to assist her children in furthering their education. It is not surprising, therefore, that the court should award a half interest in all the matrimonial property. It should be noted, however, that the needs of the defendant were met from sources other than the matrimonial property. There was, therefore, no real contest between the parties in respect of entitlement.

One perplexing aspect of the judgment is that the total estate of the defendant is described as being distributable under section 7(3). It is, however, expressly stated that the property was acquired by the parties when they were living together.[11] The property should have been distributed under section 7(4), unless it could be categorized as falling within the enumerated subjects in section 7(3). Without such a classification the court cannot determine the appropriate onus to be satisfied. With respect to property falling within subsection (3), the section 8 factors are to be used to determine what the distribution should be, whereas, in respect of property falling within subsection (4), the factors are to be used to rebut the presumption of equal sharing. In the latter category, the plaintiff was entitled to an equal share without further evidence, whereas in the former, the plaintiff had the onus of showing that a one-half distribution would be just and equitable.

Further, the court was not in a position to apply that proportionate distribution to the actual property of the parties until certain claims on the defendant's property had been determined.[12] It would appear that the plaintiff was capable of being reasonably well provided for, at least on an interim basis, by the transfer of assets other than real property. Some question remained as to what the court might have done if the bulk of the estate had consisted of real property which the plaintiff could not have made use of while it remained in that form.

In *Marquardson* v. *Marquardson*,[13] in which judgment was given on July 17, 1979, the court heard argument in respect of a Petition for Divorce, a claim for maintenance for the wife and child, a claim for custody of the child, a claim for an interest in the property of the husband by way of a constructive trust, and a claim for a distribution of property under the Matrimonial Property Act. All of these claims were con-

11. The property is described as "Other Real Property" with a value of $676,500.00. Deducted from that amount is the sum of $6,519.00, being the value of the real property owned by the defendant at the time of the marriage. No details are provided of other property acquired during the marriage.

12. The defendant's brother had commenced an action asserting that certain of the land listed in the Statement of Property of the defendant was held by the defendant as a resulting trustee for his brother.

13. (1980) 10 A.L.R. (2d) 247.

solidated. At the time of the action the parties had been married for twenty-six years, although they had been living separate and apart for the last six years. The husband began in the farming business, gradually accumulating several properties, all of which were registered in the name of the husband. It is specifically stated by McDonald J. that the placing of the title in the husband's name was not significant since "he [the husband] made it clear to his wife that that made no difference—that all holdings were 'ours'."[14] The property holdings and business interests of the husband are summarized at pages 251 and 252 of the Report. They appear to be complicated somewhat by the facts that the husband entered into certain ventures in association with another businessman, that he had set up an investment company to provide for the orderly transition of assets to his children, and that he had operated his affairs through interlocking company arrangements with a view to minimizing personal taxation. Reference is made by the court to a statement of net worth which was filed, as an exhibit, but the judgment does not disclose the figures contained in that statement. Moreover, there was little if any evidence describing the matrimonial property as it stood in 1972 when the parties separated.

The ultimate award made by the court is based on an attempt to create as little disruption as possible in the affairs of the husband, while attempting to provide for the wife. In this light an attempt was made to avoid filling the coffers of the Income Tax Department, supposedly a loss to both spouses, and further to maximize the benefit to the wife, while minimizing the effect on the husband.[15] Thus the court elected to provide relief under the Divorce Act by providing a lump sum of $20,000.00 and periodic maintenance of $1,000.00 per month for the wife and $100.00 per month for the daughter. Further, the court ordered that clear title to the family residence be conveyed to the wife. It is clear that the court had no power whatsoever to order such a conveyance under the provisions of the Divorce Act, under which the court is restricted to periodic and/or lump sum awards of maintenance.[16]

Whether or not one agrees with the relief ultimately granted, there are a number of instructive implications which may be drawn from the judgment. First, the court expressed a reluctance to put the wife into joint management with her husband. Nor was the court anxious to take action which might result in a viable business entity being wound up. One can hardly take issue with such sentiments. One might, however, take issue with the conclusions drawn from the evidence and with the priorities established. The lack of any hard evidence as to the tax liability which might be incurred by the husband was expressly referred to by the court.[17] So too was the lack of evidence with respect to any property acquired since the time of separation.[18] However, both of these factors are mentioned in section 8. Thus, property which is distributable under section 7(4) should be distributed equally unless, having regard to the factors enumerated in section 8, it would not be just and equitable to do so. One would expect, therefore, that a deficiency with respect to evidence in relation to these two factors would strengthen the presumption created

14. *Id.* at 249.
15. *Id.* at 256.
16. R.S.C. 1970, c. D. 8, ss. 10-12.
17. *Supra* n. 13 at 250.
18. *Id.*

by section 7(4). By contrast, the court seems to have regarded such a deficiency as a reason for not applying the section 7(4) presumption.

Further, there appears to be some doubt as to the priority between the plaintiff wife and the children of the spouses for whom provision had been made by the placing of shares in the name of the children. The judgment is totally inconsistent in this respect. At one stage, it is said that the plan "was not designed to alter or prejudice the rights or entitlement of the wife in any way".[19] At another stage it is stated: "To do anything that would destroy the viability of this company would not be to take from the husband, but actually to take from the family of the spouses".[20] If it is once determined that the wife is entitled to a certain proportion of the matrimonial property, then that entitlement should not be set aside merely because the property has been dealt with in a particular way with a view to benefitting the children of the parties. There is no guarantee that the property could exist in that form at the date of the husband's death and, in any event, the wife, whose entitlement has been established, should not be precluded from making similar decisions if she so wishes.

It is suggested, further, that there are two identifiable stages in an action under the Matrimonial Property Act. The first is to determine the entitlement of the applicant. The second is to distribute the available property in such a way as to give effect to that entitlement in the most efficient manner possible. The difficulties of the latter should not blind the court to its duty to determine the entitlement of the plaintiff spouse. It is submitted that that is precisely what happened in the instant case. Such difficulties, combined with the alternative relief available under different statutory enactments, enabled the court to sidestep the particularly difficult question of entitlement. It should be borne in mind that the Divorce Act and the Matrimonial Property Act serve entirely different purposes, even though the time of operation of each Act is similarly related to marriage breakdown. The availability of maintenance can hardly be regarded as an adequate substitute for an earned share of the matrimonial property. The wife appeared to have suffered from the consolidation of actions in this case, rather than to have benefitted thereby.

The decision in *Helstein* v. *Helstein*[21] is quite instructive both for the approach to the Act taken by the court, and in respect of a misconception which appeared to form part of the basis of the court's decision. That case concerned a relatively short marriage of four years, and of that time the parties lived together for slightly under three years. The parties petitioned and counter-petitioned on the basis of cruelty, and the wife brought action under the Matrimonial Property Act. That the Act should be viewed as a remedial measure was clearly stated by the court by contrasting the powers under the Divorce Act and under the Matrimonial Property Act thus:[22]

> Again, it is also clear that the Matrimonial Property Act fills a void, if it can be called that, in the Divorce Act in that it allows this court power to direct particularly the distribution of property acquired by the spouses subsequent to the marriage.

19. *Id.* at 249.
20. *Id.* at 251.
21. Action Number 116323, unreported, October 14, 1979, Edmonton.
22. *Id.*

While one may agree with the description of the Act as remedial, it should be apparent that the mischief which the legislation was intended to cure was hardly the absence of distributive powers under the Divorce Act, where it is arguable that such powers might be beyond the competence of the federal Parliament in any event. Surely, one may suggest, the void which the Act was intended to fill was the apparent injustice caused particularly to non-working women by the common law rules of separation of property.

The facts of *Helstein* are comparatively simple and are well canvassed in the judgment. At the time of the marriage the wife owned one property which had later increased in value by $13,000.00. At the same time, the husband owned four properties, the incremental value of which was $122,800.00. This figure was reduced, however, by the existence of encumbrances which had been placed to finance the building of a residence and the supply of services to it. Hence the value of the husband's property was $79,800.00. Two other factors were of interest. A loan of $10,000.00 was taken out in the wife's name so as to provide for furniture and fittings. Further, the contribution of the wife and her daughters, by a previous marriage, was viewed as substantial in respect of the erection of the residence and particularly by way of the jobs of insulation and the application of siding. No value is given for any property acquired by the parties since the date of the marriage, if, indeed, there was any such property.

After enumerating the factors in section 8, the court referred particularly to the contribution of the wife to the improvement of the property (subsection c) and to the relative shortness of the marriage (subsection e). The court then made reference to the potential tax liability of the husband, if an order were made directing the transfer of property. The court stated that no evidence of any such liability was provided by either counsel. Perhaps this omission on the part of counsel for the husband might have been more serious had the property fallen within section 7(4), in which case there would be a presumption of equal sharing which the husband would, no doubt, have attempted to rebut. However, the court was prepared to infer that the husband would be liable to tax on a capital gain and that such a tax "would be detrimental to the husband". The court then concludes:

> Under the circumstances as they are here and with regard to the tax problem it would appear to the court to be most proper to direct a payment of money.

How the court could labour under such a misconception is inexplicable. The timing of the proclamation of the Matrimonial Property Act was clearly linked to amendments to the Income Tax Act[23] which would alleviate the normal effects of a distribution under the Act. Thus, section 73(1.1) and (1.2) provide that a transfer of property pursuant to an order under the Act to a spouse or former spouse, shall be viewed as an internal interspousal transfer. The significance of the term "transfer" is that the transferee receives the property at the adjusted cost base of the transferor, thus deferring the incidence of a capital gain until actual or deemed disposal by the transferee. Indeed, in that situation, the transferee would be liable, upon disposal, to be taxed on all the gains since the property

23. Income Tax Act, s. 73(1.1) and 73(1.2).

was acquired by the transferor.[23a] By contrast with the view of Mr. Justice Bowen, a transfer would ultimately attract a tax which would be "detrimental" to the wife.

It may well be that it was proper not to order the transfer of property which fell within section 7(3), especially in the light of the short duration of the marriage, but the inference of a tax liability erroneously thought to be levied against the husband can hardly be used as a basic reason for doing so. Perhaps if this judgment is to be taken as indicative of a trend, then that trend will be to require a substantial contribution over a lengthy period of time before the wife will be awarded a direct share in the property of the husband, the value of which has increased. Moreover, as was the case in *Marquardson*, a paucity of evidence relating to the husband's tax position was used by the court to reason against any award but a lump sum payment. If these cases are to be relied upon, then a wife must not only prove an entitlement to an award, but must also show that the transfer of specific property to her will not prejudice her husband's tax position. That position seems to deny common sense. Surely the onus should be on the husband-transferor to show that any alleged prejudice he may suffer would be undue and unreasonable.

The next decision, in chronological order, was that of MacDonald J. in *Augart* v. *Augart*,[24] in early November, 1979. The parties were married in 1968, each for the second time, at which time the husband owned land on the outskirts of Calgary ("the Sarcee Trail property") and a section of land near Innisfail. From 1968 until 1970 the parties carried on a mixed farming operation, including an egg packing plant. In the words of MacDonald J.:[25]

> A major part of his work was in delivering eggs to his customers throughout the city. While he was absent from home, the plaintiff cared for the home and children, pastured the horses, fed the livestock and did chores related to the defendant's 'mixed farming' business.

After a nervous breakdown in 1970, the plaintiff was more careful of her health and some hired help was used to take up the slack. Despite that help, the court described the situation in 1974 and 1975 thus: "The defendant continued his labours and the plaintiff looked after the children, the house and the horses."[26] Despite problems, reconciliations and discontinued Petitions for Divorce, the marriage did not break down permanently until March, 1977. It appears to be the opinion of the court that the work habits of the husband placed an undue strain on the wife thereby rendering continued cohabitation intolerable.

The judgment discloses that the "Sarcee Trail" property had appreciated in value by the sum of $749,925.00 between the date of the marriage and the date of the action. At this point it becomes difficult to follow any train of thought in the judgment. After summarizing the factors in section 8, describing the marriage as lasting "less than 10 years" and stating that the plaintiff contributed to the matrimonial property in the sense of caring for the home and the family and doing some chores, the court concludes that during the period of this

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23a. Note the proposed amendments in the Budget of December 1979, which, if passed, would have created an election allowing the spouse to acquire at fair market value, thus protecting the transferee from a gain prior to the time of transfer.

24. Unreported, Calgary, November 9, 1979.

25. *Id.*

26. *Supra* n. 24.

cohabitation the property rose in value by $286,000.00. [This figure must be assumed to be a misprint. In fact, it was earlier stated that the property appreciated by $786,000.00.] It is then stated:[27]

> A fair and equitable distribution in favour of the plaintiff, would be to give her a one-fifth interest in this property.

No explanation is given for the choice of this proportion. Moreover, the other property located near Innisfail is left out of the distribution supposedly on the basis that its value of $200,000.00 is approximately equal to the extent of the husband's liabilities. If that is the case, then the property available for distribution should properly have been valued as the sum of the incremental value of both properties, less the amount of liabilities.

A further curious paragraph appears in the judgment to the effect that the wife did not contribute to the acquisition of other properties owned by the husband. These are described as being either owned by the husband at the date of the marriage, or acquired since the marriage breakdown. It should be noted, however, that the value of property owned prior to the marriage would be exempt and the incremental value of such property would fall within section 7(3). On the other hand, property acquired subsequent to the marriage breakdown falls within section 7(4) and is subject to a presumption of equal sharing. The niceties of such a distinction appear to have been lost in the afterglow of awarding to the wife a one-fifth interest in property worth approximately three-quarters of a million dollars. Such an undivided interest, it should be pointed out, was yet to be reduced to any form of cash, or appropriated to the wife in a specific form.

One would expect that the approach to new legislation such as this Act, would be to describe each necessary step in the application of the provisions and the conclusion reached. In fact, it appears, that the reader may be left to conjecture as to why a particular conclusion was reached, and may well be left in the dark as to the functioning of the judicial mind. Many questions are left unanswered. Why was not all the property valued and totalled under section 7(3)? Why was no distinction drawn between the onus in section 7(3) and section 7(4)? What was the significance of the length of the marriage? Why was the one-fifth proportion chosen?

A second application to be heard by the Court of Appeal, was the case of *Gabriel* v. *Gabriel and Keith of London Boutique Limited*.[28] Although ostensibly involving as narrow an issue as that raised in *Husted* v. *Husted*,[29] the former decision may have far broader consequences. The appeal arose by way of a trial judgment to the effect that the appellant company was properly joined as a party to the proceedings.

The company in question was incorporated prior to the marriage of the parties, but since approximately the time of the marriage, the husband and wife had been the directors and only shareholders holding respectively 95 and 5 shares.

After a review of a number of authorities commenting upon the nature of corporate personality, the court suggested that the issue which it had to decide was whether or not the court could deal with the assets of the

27. *Supra* n. 24.
28. Unreported, Edmonton, January 15, 1980.
29. *Supra* n. 5.

company, represented by the shares, or merely the shares themselves. In essence, the question posed to the court concerned the ability to pierce the corporate veil in order to further an application under the Matrimonial Property Act. In reviewing examples of such actions, the court could find only examples in which the shareholder was guilty of some fraud or concealment. Indeed, the court specifically stated that "on the facts of this case, no attempt to conceal is alleged".[30] Moreover, the court pointed to the position of the wife, as director and shareholder, as one which would provide her with the means of ascertaining the assets of the company and of putting that information before the court.

It is suggested that there were, in fact, two aspects to this particular case. In the first place, the object of joining the company as a party might be to provide a means of acquiring further information as to the husband's property, and of evaluating the worth of corporate shares held by him. It must be admitted that there is little point in adding a co-defendant for informational purposes, where the information is already available. In that sense, the judgment makes eminently good sense. Moreover, the decision leaves open the possibility of joining a company if there is any possibility of fraud[31] or concealment of the corporate assets.

A second aspect was clearly argued before the court, but is hardly addressed in the judgment. It may be that the court might wish to pierce the corporate veil in order to deal directly with corporate assets. It would appear from the tenor of the judgment that the court would be reluctant to take such action unless the corporate status were being used in an improper or fraudulent manner. The question is still open as to whether the court would be similarly reluctant where the company is a "one-man company". The concluding sentence of the penultimate paragraph of the judgment discloses the reluctance of the court to interfere with the sanctity of the corporate status. It is stated:[32]

> . . . that I can find no provision which would allow the court to compel the company in the circumstances disclosed here to transfer any of its assets to the wife.

It is suggested that the reluctance is likely to lessen in future cases and, especially in respect of one-man companies, the barriers to piercing the corporate veil will gradually be removed. At least this appears to have been the case in other provinces where similar questions appear to have arisen.[33]

There are, however, further reasons why it might be desirable to join a company as a co-defendant. It is not clear from the powers enumerated in section 9 whether or not the court may address an order for distribution to a person other than one of the spouses. The argument can be made that such a power could be included in the last subsection, which empowers the court to make any order which, in the opinion of the court, is necessary. However, even if the court does not pierce the corporate veil and deal directly with corporate assets, and even if the court merely deals

30. *Supra* n. 28.

31. Section 10 specifically provides for the possibility of recapture of assets fraudulently conveyed. It should be noted that the *mala fides* of the transferee is also important, and that the time limit for an application under the section is one year from the date of the conveyance.

32. *Supra* n. 28.

33. Consider the trend as disclosed through three Saskatchewan cases: *Lindberg* v. *Lindberg* (1976) 30 R.F.L. 180 (Sask. Q.B.); *Boardman* v. *Boardman* [1977] 2 R.F.L. (2d) 156 (Sask. Q.B.); *Re Butzelaar* [1978] 1 R.F.L. (2d) 124.

with the transfer of shares, the co-operation of a private company will nevertheless be necessary. Such a transfer involves a number of steps which can only be carried out by the company. Thus, even if the transfer of shares is ordered by the court, and even if the directors of the company approve the transfer, the company *qua* company must register the transfer and direct the issuance of a new share certificate. In respect of those two specific functions, the company, and only the company, is a necessary party to the action.

Moreover, it may be necessary to involve the company so as to prevent the value of the shares from being altered or varied to the detriment of the applicant-spouse under the Matrimonial Property Act. It cannot be assumed that the evaluation given to shares by way of a consideration of the balance sheet or asset position of the company, will remain static. Thus, in order to deal with such fluctuations, and in order to deal with the activities of the officers of the company which might cause such fluctuations, it might be wise to join the company as a party to the action. Thus, the applicant-spouse would have available to him or her the remedies of interim orders which could be used to prevent the company being reduced to a shell without substantial assets. In addition, it would also be preferable to have such remedies available rather than to force the applicant-spouse to return to the court for further varying orders if and when circumstances change.

It would appear that there might be four basic reasons why an attempt might be made to join a company as a defendant in an action under the Matrimonial Property Act. These are: to gain information concerning the company's assets and affairs; to enable the court to pierce the corporate veil and to deal directly with the company's assets; to enable the court to order the company to carry out the terms of the order; to subject the company to the control of the court during the pendency of the claim.

It would appear that, for the time being at least, it may be necessary to employ a combination of these reasons in order to persuade the court to join a company in the action. At the present time, it would appear that the priority is to preserve the corporate status rather than to emphasize the entitlement of a spouse under the system of deferred sharing of property. This can be contrasted with the clear provisions of the Ontario legislation, which stipulates that the form of holding of property which ought properly to be an issue between the spouses, should not be an impediment to a distribution of that property.[34] It will certainly be interesting to follow any shifts in emphasis as more cases are litigated. Without specific statutory amendment, it is doubtful that the court would join a company *pro forma*, but it can hardly be denied that there are good reasons why, in a specific case, the court should order that a company be joined in an action. It should also be borne in mind that there are reasons which the court will and should reject. Thus, for example, an application to join a company designed to hinder the normal operations of the company, or to create difficulties and thus promote a settlement, is likely to be given particularly short shrift. It may well be that a successful attempt to join a company must include evidence that the operations of the company will not be hampered unduly as a result.

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34. Family Law Reform Act, S.O. 1978, c. 2, as amended, s. 3(b)(ii). While this definition does not automatically allow the court to pierce the corporate veil, it clearly contemplates the possibility of the corporation being joined and instructed to consent to a transfer of shares.

One might be tempted to suggest that there is a simple solution to the presence of a corporation. Could one not argue that the corporation is a resulting or constructive trustee of alleged matrimonial property. That argument is not precluded by section 36, which merely rebuts the presumption of advancement between the spouses. However, the result of such an argument, if successful, does not materially enhance the applicant's cause. A contribution to a company will either create an indebtedness owed by the company to the individual, or, at best, create an entitlement to a proportion of the issued shares of the corporation. Success does not necessarily mean that the applicant has an entitlement to the actual assets of the company, and he or she must still pierce the corporate veil for that purpose. However, it may, perhaps, be more easy to join the company in the action if it is possible to allege that the company is a trustee for one or both spouses.

Thus, the first year during which the Martimonial Property Act has been in force, has witnessed a rather cautious approach to the Act in the few cases in which reported judgments had been rendered. One might have expected a certain degree of reluctance on the part of the courts when faced by such novel legislation, but one could hardly have expected the courts to be so reluctant to order the distribution of specific property, and to be so content to order the payment of a lump sum. When there was no Matrimonial Property Act the court used all the indirect means available to it, by way of trusts or secured payments, to create a transfer of specific property. Once the court was specifically empowered to order such transfers directly, there arose a reluctance to exercise that power.

Similarly, the court has been unusually silent with respect to comments concerning the strength of the presumption of equal sharing created by section 7(4). It is almost as though there was no such presumption, as though the Act created a system of total judicial discretion without any starting point or presumption.

Very little can be gleaned from comments with respect to the factors enumerated in section 8. It would appear that the court is reluctant to move too far from the accepted contributions which were appropriate in previous decisions dealing with trusts and partnerships. It is clear from the pattern of settlements that a wife must first earn her entitlement to a distribution, and, if successful on that score, will most likely be awarded a one-third share rather than a one-half share—a far cry, indeed, from the philosophy espoused by the Institute of Law Research and Reform and by the legislators who passed the Act.[35]

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35. Since the writing of this comment, the case of *Majurenko* v. *Majurenko* has been decided by Chief Justice Sinclair. In that case, the presumption of equal sharing is applied much more strongly than in previous cases. Further, the onus of proving that property is exempt under section 7(2) is placed clearly upon the person so arguing.

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