Editor's Note:

Due to the recent controversy aroused by Bill 102, the Alberta Government's proposed matrimonial property legislation, and the Supreme Court of Canada's momentous decision of Rathwell *v.* Rathwell, *the Editor considered it worthwhile to publish the following two articles. Mr. Pollock is a family law practitioner and law professor at the University of Alberta, with extensive experience in divorce cases and property settlements. His comments on the new legislation thus stem from a thorough knowledge of the practical problems in this area. Dr. Stone, presently with the Alberta Institute of Law Research and Reform, is a former Reader in Law to the University of London at the London School of Economics and Political Science, Past President of the International Society on Family Law, and author of* Family Law, *(Macmillan) 1977.*

MATRIMONIAL PROPERTY AND TRUSTS: THE SITUATION FROM MURDOCH TO RATHWELL

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Matrimonial property law in Alberta today is examined, focusing on the Canadian decisions which followed the Murdoch *decisions, with particular emphasis on the use of the 'trust' as a tool in judicial reasoning. The recent* Rathwell *decision is considered at some length. In conclusion, the author prays for a legislative response in a confused area of the law.*

I. INTRODUCTION

The study of biological evolution would seem to indicate that nature proceeds in fits and starts, and that many of her attempts to achieve a "higher" form of the species have been sporadic and often abortive. The development of legal rights in the family is fraught with an equally checkered pattern.

At Roman law, the wife, with some minor exceptions, was not for legal purposes a member of the family.[1] Indeed, the law held that even the status of marriage did not make the husband and wife relatives, and accordingly, their property was separate. One can perhaps see some resemblance to the present law in Alberta.

The early developments of the English legal system did not seem to take cognizance of the relative emancipation of the woman under Roman law. Indeed, the ecclesiastical courts, holding to the tenet that marriage was a sacrament, pronounced that the fact of marriage itself made the spouses one flesh: being that of the husband. Since the ecclesiastical courts determined matrimonial causes, it was not unnatural that the common law of the Middle Ages reflected this concept. Blackstone in his *Commentaries* wrote:[2]

> . . . the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and

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1. Buckland and McNair, *Roman Law and Common Law*, 38.

2. Book 1, c. 15.

> consolidated into that of the husband; under whose wing, protection and cover she performs everything.

The wife, under this particular regime, was put in an impossible situation with regard to property. She was treated in the same manner as a child or an idiot. The husband had the right to control and manage her property and to alienate it, if he so desired. If she predeceased him, her property became his absolutely. A gift from the husband to the wife was ineffectual. A gift from the wife to any other person was also ineffectual.

Shakespeare had Petruchio sum it up rather succinctly:[3]

> I will be master of what is mine own;
> She is my goods, my chattels; she is my house,
> My household stuff, my field, my barn,
> My horse, my ox, my ass, my anything.

In the 16th century, the Courts of Chancery allowed the wife to enjoy property 'to her sole and separate use'. After this time a husband attempting to assert his right to her property would be met by equity saying that he was merely a trustee on her behalf. However, equity was aware that this restraint on the law might not have the desired effect of dissuading a persuasive husband who was determined to acquire his wife's property. Accordingly, Chancery provided that the wife could not alienate her property (and thereby give her husband the proceeds). Thus, this 'restraint upon anticipation' protected the wife's property from the husband. The wife, however, could take the income which such property might generate.

The foregoing is but a cursory outline of the evolution of the law up to 1857; when the Matrimonial Causes Act[4] allowed a wife to acquire her own property to deal with as she saw fit after judicial separation or desertion. The Married Woman's Property Act of 1870[5] allowed the wife to retain her own earnings up to £200. Although, at this time, the direction of judicial evolution in this area was becoming apparent, the parliamentarians, not content to allow for slow development, passed the Married Woman's Property Act[6] in 1882, providing that all property of a married woman was her own and could be dealt with by her as if she were single.

The inferior position at law of the wife was thus eventually removed, so today we have the outward appearance of equality. However, certain appendages of the old concept of male supremacy have remained, but they have turned out to be advantageous to the wife.

For the purpose of this paper it might be useful to outline the various types of trusts that are relevant to the marital relationship.

(a) Express Trust

This is the obvious situation where the settlor of a trust *res* intentionally creates the trust. This usually is done by deed or will, or some sort of writing *inter vivos*. In a proper case it may be done by word of mouth.[7] An example of this type of trust is *Brown* v. *Storoschuk*,[8] where the defendant purchased land with his own funds, agreeing later to convey it to the plaintiff when the plaintiff paid him the purchase price.

3. *The Taming of the Shrew*, Act III, Scene 2.
4. (1857), 20 & 21 Vict., c. 85.
5. (1870), 33 & 34 Vict., c. 93.
6. (1882), 45 & 46 Vict., c. 75.
7. *Scheurman* v. *Scheurman* (1919) 52 S.C.R. 625, 10 W.W.R. 379.
8. [1946] 3 W.W.R. 641.

The court held that the defendant immediately became a trustee of the land. Thus, it can be seen that an express trust arises out of the intention of the settlor.[9]

(b) Constructive Trust

The attempt to clearly define the nature of the constructive trust has not, at least in the writer's research, been successfully achieved. This is not the fault of the various authors on trust or of the courts. The very nature of the concept covers a wide variety of different relationships, through which it is difficult, if not impossible, to draw a common thread. However, in simplistic terms, it can be said that it is a trust that can be construed in favour of a *cestui que trust* or one that can be imposed by operation of the law regardless of the intention of the parties. It can, therefore, be used to enforce an express trust or provide a remedial vehicle.[10] There can be no general example of a constructive trust and, indeed, the highest court in this land has shied away from grappling with the definition, at least in matrimonial law.[11]

(c) Resulting or Implied Trust

Again, it is a futile exercise to play definition games. The present confusion between a constructive and resulting trust (if indeed there ever was a time when there was clarity) makes a real distinction almost impossible to achieve.

If a constructive trust can be imposed without regard for or contrary to the intention of the parties, then it may be said that a resulting or implied trust (and they really are similar terms) is one that gives effect to the presumed intentions of the parties or the settlor. Does this really differ from an express trust? If there is a difference, it is only in the way the existence of the trust is determined. An express trust is one where words are clear. A resulting trust deals with unclear, confusing or indirect acts or words; the trust, if any, must be detected or unearthed. The familiar example of a resulting trust is where two people, usually husband and wife, both put up money to buy property, which is then registered in the name of one. In the absence of express agreement, and ignoring any presumptions, a trust usually arises between the parties.

Having tried to define each of the relevant categories, it is perhaps useful to now disregard the fine legal distinctions and look at the present day situation. In order to attempt to analyze the modern position concerning matrimonial property, the writer has considered two alternatives: firstly, a discussion of the law as it now exists; secondly, the discussion of some recent decisions with suggestions for legislative changes. Because of the inability to draw a common thread through this area of the law, a general discussion cannot be very useful, except as a textbook approach. Thus, the second method has been adopted and it remains to be seen whether any general principles or trends can be extracted from the recent cases. The paper is concluded by a consideration of recent legislative response to the controversy in the area of matrimonial property law.

9. Waters, *Law of Trusts in Canada*, 344.

10. Waters, *id.* at 339.

11. *Murdoch* v. *Murdoch* (1974) 13 R.F.L. 185 at 196, [1974] 1 W.W.R. 61.

II. DISCUSSION OF THE CASES

(A) Murdoch *v.* Murdoch[12]

The writer has taken the starting point for discussion to be the *Murdoch* decision. The facts of *Murdoch* are so well known that it is unnecessary to repeat them here. Suffice it to say that the plaintiff wife failed in her claim to the farm property, which was held in the name of her husband, for two reasons. Firstly, there was no agreement between the parties either direct or implied, by act, word or deed as to the ownership of the property which was taken in the husband's name. Secondly, the Supreme Court of Canada found that there was no direct contribution of money or other intangibles such as work, so as to enable the court to construe a trust in favour of the wife. A resulting trust did not arise (although the court declined to distinguish between the various categories) because there was no common agreement or direct contribution by Mrs. Murdoch.

The only possible method by which Mrs. Murdoch could have succeeded, under the present law, was on the principle of constructive trust. Mr. Justice Martland found no such trust. Mr. Justice Laskin (as he then was), in his lone dissenting judgment, would have found a constructive trust by finding facts contrary to the trial judge: work contributed beyond that of an ordinary ranch wife. That work, he contended, allowed the husband to acquire funds with which to acquire land. Laskin C.J. (as he now is) went further and suggested that the doctrine of unjust enrichment, well known to American jurisprudence in this area, would have been a proper vehicle by which Mrs. Murdoch could have achieved success.

Since *Murdoch*, one would have thought the law to have been reasonably settled. However, several of the provincial courts have found the harshness of *Murdoch* distasteful and have tried, with some success, to modify the sting of *Murdoch*.

The writer proposes to look at the reported cases since *Murdoch* as well as at several unreported Alberta decisions.

(B) Fiedler *v.* Fiedler[13]

This was a twenty-two year marriage. The parties divorced in 1971, at which time the wife was not present in court or represented. The wife sued in 1974 asking for a half interest in the farm land which was registered in the husband's name on the basis that the husband held one-half of the farmland in trust for her. She claimed she contributed $51,000.00 to living expenses which enabled her husband to acquire the farm assets. There was no allegation of an express agreement made at the time of acquisition.

At trial,[14] the wife's claim was allowed based on the English authorities of *Pettitt* v. *Pettitt*,[15] *Gissing* v. *Gissing*,[16] and *Falconer* v. *Falconer*.[17] Mr. Justice Moore valiantly tried to distinguish *Murdoch* on its facts:[18]

12. *Id.*
13. (1976) 20 R.F.L. 84.
14. (1975) 16 R.F.L. 67.
15. [1970] A.C. 77, [1969] 2 All E.R. 385.
16. [1971] A.C. 886, [1970] 2 All E.R. 780.
17. [1970] 3 All E.R. 449, [1970] 1 W.L.R. 1333.
18. *Supra*, n. 14 at 76.

> Regrettably the Supreme Court of Canada in the *Murdoch* case did not discuss the *Falconer* case at any great length. It is obvious that the House of Lords in the *Pettitt* case and the *Gissing* case were attempting to clarify the earlier decisions of the English courts on matrimonial property law when a dispute arose between the husband and the wife. Lord Denning clearly has set forth a concise statement of the general principle after reviewing both *Pettitt* and *Gissing*.
>
> It seems clear from a reading of the *Falconer* decision that the key word is 'substantial'. In *Pettit* and *Gissing*, as I have stated, the contribution was not substantial. In the case at Bar, the contribution of Mrs. Fiedler appears to me to be very, very substantial. The contributions of Mrs. Fiedler in the case at Bar exceeded by a wide margin the contributions of Mrs. Murdoch in the *Murdoch* case. In *Murdoch* Laskin J., as he then was, referred briefly in his dissenting judgment to the *Falconer* case and at the same time reviewed the Canadian and English authorities extensively.

Having found the contributions of Mrs. Fiedler well beyond those of Mrs. Murdoch, Moore J. then felt at ease to proceed to discuss the trust concept and find that a trust (unspecified) did in fact exist. It was necessary for him to determine the amount of Mrs. Fiedler's interest and he found that she was entitled to one-half of the farmlands.

The Alberta Court of Appeal reversed the findings of the trial judge and held that no trust existed.[19]

> The vital question in the present case is whether in doing these things [teaching and devoting her money to the family] she acted in the reasonable belief that she was obtaining a beneficial interest in the lands.

With respect, the court failed to draw any distinction between the various types of trusts. Albeit, the distinctions between the various types of trusts may vary only as to degree, they are vital in this particular area. Certainly there was no express trust in *Fiedler*. Could a trust be construed in favour of Mrs. Fiedler? Did the parties act in such a manner that a trust could be found from their acts, even if contrary to the intention of one or both of them? The writer suggests that this is perhaps the proper question. Mr. Justice McDermid, in his dissenting judgment, quotes from *Trueman* v. *Trueman*, a judgment of the Alberta Court of Appeal, where he reproduces the quotation of Johnson J.A. in quoting *Gissing*:[20]

> I take a common case where a husband and wife agreed when acquiring the family home that the wife should make a financial contribution and the title to the house was taken in the husband's name. That contribution could take one or other of two forms: the wife might pay part of the deposit in instalments or she might relieve the husband of some of his obligations, *e.g.*, by paying household bills so as to enable him to pay for the house. The latter is often the more convenient way.

Mr. Justice McDermid would have allowed the appeal based on the reasoning of Laskin J. (as he then was) in *Murdoch*: unjust enrichment—that it would be inequitable to deny the wife's interest if such denial would result in the husband becoming enriched as a result of her work.

What should have been the court's desision in *Fiedler*? On the facts found by Moore J., the writer suggests that *Murdoch* was effectively distinguished and that the Court of Appeal was in error in not accepting those facts as taking that case beyond *Murdoch*.

In addition to the property claim, Mrs. Fiedler also claimed maintenance. The trial judge found it unnecessary to fix that amount, but he stated that if the wife had been unsuccessful in her property action he

19. *Supra*, n. 13 at 105 (*per* Sinclair J.).

20. (1972) 5 R.F.L. 54 at 86.

21. Purely as a matter of irrelevant interest, it is perhaps worth noting that within eleven months of the decision in *Fiedler*, the Alberta Court of Appeal, in no uncertain terms, stated that the "discretion [of the trial judge] cannot go so far as to divide up capital". *Krause* v. *Krause* (1976) 23 R.F.L. 219 at 228.

would have given her a lump sum equal to one-half the value of the land. Mr. Justice Sinclair, in reversing the decision, would have allowed maintenance as recommended by the trial judge and did not seem to balk at this "back-door" method of dividing up the capital assets. He did direct that certain factors, such as the value of the property, pension rights and health of the parties should be considered in assessing the amount of the lump sum. Before Moore J. could make a determination as to maintenance, the parties settled, but the writer is advised settlement followed the suggestion of the trial judge.

In reaching its decision in *Fiedler*, the Alberta Court of Appeal seemed to turn its back on its precocious child conceived in *Trueman*, and allowed what seemed to be the start of a miscarriage in *Murdoch* to become an abrupt abortion in *Fiedler*.

(C) Gerk *v.* Gerk[22]

In a case decided some seven months after *Fiedler*, Feehan L.J.S.C. found in *Gerk*, on facts similar to *Fiedler* and *Murdoch*, that a farm wife was entitled to one-half interest in lands, not because of her extra work or devotion, but because there was an express trust that the land should belong to both the husband and wife. The wife had also claimed a one-half interest in the business operation being carried out on the farm lands and an unrelated business in which she said that she participated. Having found that particular and crucial fact of an express trust in the farm lands, the trial judge then went on to dismiss the wife's claim as to an interest in the farming operation and the related business. The justification for this rather remarkable division was based on the trial judge's invocation of the *Murdoch* principle and the finding that the contribution of the wife was not as great as in *Trueman*. There was no reference to *Fiedler*. One might well ask how there could be an express trust as to the acquisition of the farm land, but no concurrent express agreement that the farm land so acquired should be used for the business of farming?

There is no question that Feehan L.J.S.C. was indeed cognizant of the problem in *Murdoch* when he stated:[23]

> Although *Murdoch* gave rise to a great deal of social concern, there is absolutely no doubt that I as a District Court Judge am bound by it.

However, there are absolutely no reasons given as to why the judgment on the farmland was not carried to its logical conclusion with regard to the business carried out on the farm lands itself. *Gerk* was appealed and the Alberta Court of Appeal dismissed the appeal without written reasons. Could this failure to give reasons have been a tacit recognition of the defect in *Fiedler*?

(D) Spears *v.* Levy[24]

This is an interesting estate case from Nova Scotia. The husband purportedly married the wife in 1947. He died in 1968. It was then discovered, by the husband's surviving relatives, that the wife's previous marriage had not been properly dissolved, although she had every reason to believe that she was properly free to marry the husband. His relatives then demanded the estate. The probate judge allowed the wife compensa-

22. (1977) 25 R.F.L. 32.
23. *Id.* at 40.
24. (1975) 19 R.F.L. 101.

tion on a *quantum meruit* basis. The Court of Appeal reversed this finding, holding that the solution to the problem was by way of a constructive trust. Indeed, the court quotes the dissenting judgment of Laskin J. in *Murdoch* as to unjust enrichment and completely ignores the majority judgment.

The judgment does provide interesting *obiter* along lines usually raised by indignant wives. It seems that the actual marriage ceremony was in the Anglican Church. The learned Chief Justice of Nova Scotia, obviously conversant with the Anglican ceremony, made more than passing reference to the phrase which, he almost judiciously notes, is used in the ceremony "with all my worldly goods I thee endow". Having enlightened counsel as to what actually took place in the ceremony itself, he says:[25]

> In making this pledge or promise the husband assured his wife of her rights in his estate created by the assumption of the marital status.

He then goes on to state that the "innocent mutual mistake as to the existence of the prior divorce deprived their ceremony of legal capacity to create that status but did not denude it and their married life of their moral and equitable effects . . . These equities, adhering to him when he died, should be honoured by his estate."[26]

It could almost be expected that a new area of contract law was about to be developed based on the wording of the marriage ceremony. Regrettably, the learned Chief Justice stopped short of developing this novel principle and slid comfortably into his solution of the constructive trust.

The court did not see fit to refer to, or perhaps did not have before it, the English case of *Cook* v. *Head*.[27] In that case Cook became Head's mistress in 1962. They bought land in Head's name in 1964, hoping Head's wife would divorce him. Miss Cook did not contribute any money to the purchase price. However, they planned and built the house together with Cook doing "quite an unusual amount of work for a woman". She also helped with the mortgage instalments. They pooled their joint incomes with Head putting in more money than Cook. They separated in 1966 and Head decided to sell. Miss Cook demanded a share of the property and accordingly commenced action. The trial judge allowed Cook one-twelfth of the sale proceeds on appeal. Lord Denning M.R. allowed Cook one-third of the proceeds:[28]

> If this case had come up 20 or 30 years ago, I do not suppose that Miss Cook would have had any claim to a share. It would be said that, when she did all the work on the house there was no contract to pay her anything for it. And when she put these moneys into the money box, Mr. Head made no contract to repay it. So it was a gift, but that has all been altered now. At first the courts changed the law by giving a wide interpretation to s. 17 of the Married Woman's Property Act 1882. They took the words of that statute which gave a judge power to make such an order 'as he thinks fit'. That was held, however, to be erroneous because the section did not empower the courts to alter property rights. So the courts had recourse to another way. They said that shares in a home depended on the common intention of the parties; and they used considerable freedom to ascertain that common intention. This too has recently come into disfavour, because of the difficulty of ascertaining a common intention. So the courts, under the guidance of the House of Lords, have had recourse to the final way, the law of trusts. It is now held that, whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust.

25. *Id.* at 107.
26. *Id.* at 107-108.
27. [1972] 2 All E.R. 38.
28. *Id.* at 41.

> The legal owner is bound to hold the property on trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applied to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too.

Spears v. *Levy* was not referred to by the trial judge in the later Nova Scotia case of *Moore* v. *Moore*.[29]

In *Moore*, the property was purchased in the name of the husband. The parties completed the home thereon "as money and materials became available". The wife actually helped in the construction and for six years during the first part of her separation from the husband and while she was living in the home, she actually paid the property tax.

The learned trial judge firstly quotes extensively from *Trueman* and then extensively from *Murdoch*. Without even a cursory attempt to distinguish *Trueman* from *Murdoch*, he finds there was no trust. In what seems to be an attempt to fit his facts within *Murdoch*, he then states:[30]

> . . . I am further satisfied the contribution made by the defendant [wife] to the house and property was minimal and does not express an intention to amount to an equal monetary contribution to that of the husband as a means of acquiring a legal interest in the property. Her assistance with the construction was in reality no more than what might have been done by any good friend or neighbour . . .

Perhaps Mrs. Moore would have been better off if she had not been married, and had just lived with Moore as his mistress. Being his wife was of no benefit; and it would not have helped her to be either "a good friend or a neighbour". The facts were strikingly similar to those in *Trueman* and the reasons for judgment do not, it is respectfully submitted, clearly indicate why the trial judge chose to find the way he did. One can only hope there will be an appeal.

(E) Whiteley *v.* Whiteley[31]

In this case the parties were married and lived together for 20 years. Some land was purchased in the name of the husband in 1950. The wife contributed the sum of $600.00 (the total downpayment) and the husband, over the next few years, contributed approximately $9,000.00. The trial judge dismissed the wife's claim for a one-half interest in the property in view of the fact, as he found, that there was no agreement between the parties that the husband would hold the property for the wife, or that she had an interest in it.

In an unanimous decision of the Ontario Court of Appeal, Martin J.A. stated:[32]

> In my view, the learned trial judge erred in failing to hold that, notwithstanding the absence of an agreement between the parties that the appellant [wife] was entitled to an interest in the land, a trust arose in her favour.

The court, as authority, seemed to cite *Murdoch*, and in doing so quoted solely from *Gissing* as cited in *Murdoch* by Mr. Justice Martland.

Mr. Justice Martin further set out what might be considered to be a requirement in order to establish a trust:[33]

> Accepting that the proper test in determining whether a trust is imposed is whether the words or conduct of the parties satisfy the court that it was their common intention that

29. (1977) 26 R.F.L. 346.
30. *Id.* at 354.
31. (1974) 16 R.F.L. 309, 48 D.L.R. (3d) 161.
32. *Id.* at 315.
33. *Id.* at 318.

> the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other . . .

The court, in allowing the wife's claim, refused to accept her collateral argument that since the monies for the regular monthly payments made on the property came from a joint bank account, the presumption of advancement applied as to one-half of the payments. The court stated further that the presumption could only be drawn in the absence of evidence to the contrary. In *Whiteley,* some evidence was given by the husband as to why the joint bank account existed which was inconsistent with joint ownership of that account. This evidence was capable of rebutting the presumption of advancement.

The argument that the existence of a joint bank account gives rise to a presumption of advancement has previously been rejected.[34]

Whiteley was not referred to in a subsequent case in the Ontario Trial Division, *Easton* v. *Easton.*[35] There, the trial judge, on similar facts, actually distinguished *Murdoch* and allowed the wife's claim as to one-half of the property registered in the name of the husband.

Whiteley was followed by *Madisso* v. *Madisso.*[36] In a short judgment, the Ontario Court of Appeal allowed the wife's claim for a one-half interest in the matrimonial home. The trial judge had found that the wife had not contributed directly to the acquisition of the matrimonial home. The Ontario Court of Appeal stated:[37]

> [The trial judge] was in error in concluding that the absence of such formal contribution precluded her right to a beneficial interest in the property. The trial judge found that the wife had contributed substantially to the family income as a result of which the husband was able to pay for the matrimonial home. In our opinion, a trust was thereby created in favour of the wife.

In the *Madisso* case, *Murdoch* was not mentioned.

(F) Kowalchuk *v.* Kowalchuk[38]

In *Kowalchuk* the Manitoba Court of Appeal faced a situation almost identical to that of *Murdoch.* Here the parties had been married twenty-nine years. Farmlands had been acquired in the husband's name. There was no direct contribution by the wife. She had, however, worked on the lands and that was "significant" in terms of the family fortune. Also, there was a finding that the husband had always told the wife that the farm was "for both of us". One might ask whether this indicated a common intention and therefore an express trust.

Murdoch again created a major obstacle that the court had to face. This was dealt with by Hall J.A. when he said:[39]

> At the very root of the *Murdoch* decision is a finding of fact in the trial court that there was no significant contribution by the wife as here and no common intention that created an interest in the wife in dimunition of the husband's vested proprietary interest.

Thus, the distinguishing factors were: (a) a common intention so found, and (b) the contribution by the wife as to labour. There has been no appeal of the *Kowalchuk* decision.

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34. *See* authorities cited, *supra,* n. 31 at 324; *see also Easton* v. *Easton* (1975) 17 R.F.L. 228.
35. (1975) 17 R.F.L. 228.
36. (1976) 21 R.F.L. 51.
37. *Id.* at 52.
38. [1975] 2 W.W.R. 735.
39. *Id.* at 739.

(G) Rathwell *v.* Rathwell[40]

The last illustration of the effect of *Murdoch* is the *Rathwell* case. Here, the husband and wife married in 1949 and separated in 1967. Both contributed approximately an equal amount to a joint bank account. From that account approximately one-half was used to purchase farmlands which were taken in the name of the husband. Further lands were similarly purchased. At the time of trial the lands were worth approximately $150,000.00.

The trial judge, Didsbury J., accepted the evidence of the husband and almost rejected that of the wife. Indeed, he felt she was "playing to win".

The husband admitted that the land was acquired by a joint effort. In commenting on this rather important admission, Didsbury J. made the statement in his written judgment that caused a furore among women's groups throughout Canada:[41]

> The fact is now so notorious that I am able to take judicial notice that husbands (other than a foolhardy and valiant few) who desire a life of peaceful coexistence within the matrimonial bailiwick rather than either a hot or cold war habitually use the diplomatic and ambitious 'ours' rather than the forthright and challenging 'mine' when referring to anything of monetary value.

As one would have anticipated, the wife's claim on the farmlands was accordingly dismissed by the trial judge.

In an unanimous decision the Saskatchewan Court of Appeal allowed the wife's claim. Not only was the court faced with the adverse findings of credibility, but the trial judge had found that the wife had done only the normal work to be expected of a farm wife on the farm.

Mr. Justice Woods, contrary to the finding of the trial judge, held that each party made his or her contribution to the property. Having found a contribution and therefore a constructive, as well as an express trust, he then discussed *Murdoch*, and distinguished it. Mr. Justice Brownridge also found a common intention and cites with approval the dissenting judgment of Laskin J. (as he then was) in *Murdoch*.[42]

Mr. Justice Hall reviewed the evidence extensively and found that the wife's work contribution did not even match that of Mrs. Murdoch. He further dwelt at length with the joint bank account. He properly stated the law to be that the mere existence of a joint bank account was not evidence of joint ownership of assets purchased with the funds thereof. "The proper approach is not to look at the form of the account but at its substance".[43] Where the monies of which the wife is a joint owner are used to purchase assets taken in the name of the husband there is a rebuttable presumption that the husband is a trustee for himself and the wife jointly: *Thompson* v. *Thompson*.[44] The rebuttal of the presumption depends upon the evidence of the person furnishing the money. According to Hall J.A., the wife's evidence upheld the presumption. The existence of *Murdoch* was virtually ignored by Hall J.A.; after merely referring to it, he confined *Murdoch* to its facts, that is, actual work is not by itself sufficient contribution to give rise to a trust situation.

The Supreme Court of Canada, a court composed of nine justices (*Murdoch* was decided by a court composed of five members), in a five to

40. (1976) 23 R.F.L. 163. Upheld on appeal to the Supreme Court of Canada. As yet unreported.

41. (1974) 14 R.F.L. 297 at 304.

42. (1976) 23 R.F.L. 163 at 173.

43. *Id.* at 180.

44. [1961] S.C.R. 3 at 9.

four decision, upheld the judgment of the Saskatchewan Court of Appeal and essentially adopted their reasoning. The majority opinions were delivered by Dickson J. (with Laskin C.J. and Spence J. concurring) and Richie J. (Pigeon J. concurring). The dissent was delivered by Martland J. and concurred in by Judson J., Beetz J. and de Grandpre J.

Mr. Justice Dickson delivered a judgment which goes well beyond the facts of *Rathwell* and, it is respectfully submitted, analyzes the law of matrimonial trusts in an extremely clear and lucid manner. Mr. Justice Richie concurs in the result, but disclaims that his occurrence is based upon "the application of doctrine of constructive trusts or unjust enrichment".

It is essential for anyone having an interest in this area to read carefully the judgment of Mr. Justice Dickson. Indeed, the writer is tempted to reproduce it in full. However, perhaps some limited quotations will suffice:[45]

> The settlement of [matrimonial property] disputes has been bedevilled by conflicting doctrine and a continuing struggle between the 'justice and equity' school, with *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63, the leading case and Lord Denning the dominant exponent, and the 'intent' school, reflected in several of the speeches delivered in the House of Lords in *Pettitt* v. *Pettitt*, [1970] A.C. 777 and *Gissing* v. *Gissing*, [1971] A.C. 886, and in the judgment of this court in *Murdoch* v. *Murdoch*, [1975] 1 S.C.R. 423. The charge raised against the former school is that of dispensing 'palm-tree' justice; against the latter school, that of meaningless ritual in searching for a phantom intent. In England, in spite of apparent reversal in *Pettit* and in *Gissing*, the justice and equity tide flowed unabated until, in 1970, Parliament effectively removed matrimonial property disputes in England from the common law by enacting the Matrimonial Proceedings and Property Act 1970, c. 45, the relevant provisions of which are now contained in the Matrimonial Causes Act 1973, c. 18.
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> * * *
>
> Many factors, legal and non-legal, have emerged to modify the position of earlier days. Among these factors are a more enlightened attitude toward the status of women, altered life-styles, dynamic socio-economic changes. Increasingly, the work of a woman in the management of the home and rearing of the children, as wife and mother, is recognized as an economic contribution to the family unit.
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> * * *
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> The need for certainity in matrimonial property disputes is questionable, but it is a certainity of legal principle hedging in a judicial discretion capable of redressing injustice and relieving oppression.

However, the learned justice does temper these general statements by limiting their application:

> . . . The mere fact of marriage does not bring any prenuptial property into community ownership or give the courts a discretion to apportion it on marital breakdown.
>
> * * *
>
> In the absence of legislative provision to that effect, it is not proper for a court to upset current matrimonial property practice by acting as if such an institution existed. This is a point of great importance and needs re-emphasis here. . . . But it must also be noted that there is a considerable distinction between judicial legislation of community of property and judicial enforcement of the equitable doctrines of resulting and constructive trust. It is understandable that confusion between the two should arise in matrimonial property disputes for the apparent net effect of each is normally a divestiture of property, or an interest in it, and transfer from the titled to the non-titled spouse. The essential difference, however, is that the divestiture from community of property has as its source the fact of marriage; the divestiture in trust arises out of a common intention (resulting trust), or out of inequitable withholding resulting in an unjust enrichment (constructive trust).

45. Unreported. Page citations are, therefore, not possible.

The concepts and distinctions of the constructive trust and resulting trust is set forth in, perhaps, the clearest manner yet seen in judicial pronouncement.

As to resulting trusts, Dickson J. says in part:

> The presumption of a resulting trust is sometimes explained as the fact of contribution evidencing an agreement; it has also been explained as a constructive agreement. . . . The courts are looking for a common intention manifested by acts or words that property is acquired as a trustee.

The difficult area of constructive trust is dealt with at length:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment. Thus, if the parties have agreed that the one holding legal title is to take beneficially an action in restitution cannot succeed: *Peter Kewit Sons Co. of Canada* v. *Eakins Construction*, [1960] S.C.R. 361 at 368-9; *see* also *Restatement of the Law of Restitution*, (1936), s. 160.
>
> The emergence of the constructive trust in matrimonial property disputes reflects a diminishing preoccupation with the formalities of real property law and individual property rights and the substitution of an attitude more in keeping with the realities of contemporary family life. The manner in which title is registered may, or may not, be of significance in determining beneficial ownership. The state of legal title may merely reflect conformity with regulatory requirements, such as those under the Veterans Land Act, which stipulate that the veteran must make the application; it may, on the other hand, be a matter of utmost indifference to the spouses as to which name appears on the title, so long as happy marriage subsists; the manner in which title is recorded may simply reflect the conveyancing in vogue at the time, as for example, the practice in Western Canada of placing title to farmland in the name of the husband. The state of title may be entirely fortuitous; it should not be taken as decisive against the non-titled party.

In reviewing the first twenty-three pages of the judgment of Dickson J., it becomes apparent that, in view of his lengthy and most learned discussion of this area, he must somehow deal with *Murdoch*. He tackles *Murdoch*, firstly, by limiting it to its facts: that is, the absence of financial contribution by the wife. In *Rathwell* this contribution was undisputed. Secondly, he critically comments: "It is also worthy of note that *Murdoch* did not overrule *Trueman*." Thirdly, having limited *Murdoch* to the facts, as he does in careful detail, he then goes on to administer what may well result in the coup de grace for Murdoch when he states:

> Another point of difficulty in *Murdoch* arises through the adoption of common intention as the central test, and what might be regarded as implicit rejection by the majority of the court of the concept of constructive trust of which Laskin J. spoke. The issue of constructive trust was not advanced by counsel in any court during the *Murdoch* litigation. At trial the claim was based on equal partnership, or in the alternative, on the contractual doctrine of *quantum meruit*. In the Court of Appeal, and in this court, the case for Mrs. Murdoch was based on resulting trust and partnership. The issue of constructive trust never had a thorough airing before either of the lower courts or in this court. To this extent *Murdoch* did not deny the possibility of an action in constructive trust. In the present case the issue of constructive trust was thoroughly argued before the Court of Appeal and this court, and it constituted one of the express grounds of decision in the Court of Appeal.

Seemingly not satisfied with having isolated *Murdoch* to its facts, and being of the opinion that the relevant law was not argued before the court deciding *Murdoch*, he then makes absolutely certain that he is not in any way misunderstood:

> However, having recognized that the *Murdoch* decision is distinguishable in various ways, I wish also to say this: to the extent that *Murdoch* stands for the proposition that a wife's labour cannot constitute a contribution in money's worth and to the extent that *Murdoch* stands in the way of recognition of constructive trust as a powerful remedial instrument for redress of injustice, I would not, with utmost respect, follow *Murdoch*.

This statement made by a justice of the Supreme Court of Canada and concurred in by two other justices cannot help but lead one to the happy conclusion that the highest court in this country is looking for a way to break out of the armlock of *stare decisis,* and may, in the near future, be able to bring itself to the mature and laudable position of not being bound by its previous decisions. Hopefully, this refreshing approach will be applied to this as well as to other areas of the law.

It must be emphasized that *Rathwell* has not changed the law; substantial contribution was found on Mrs. Rathwell's part. However, it is respectfully submitted, it has enlarged the scope within which counsel are able to work on behalf of the economically disadvantaged wife.

This concludes the review of the cases since *Murdoch*. It has been demonstrated that some rather interesting results have come forward which were not readily apparent at the outset. Prior to the Supreme Court of Canada's decision in *Rathwell,* of the six cases from various Courts of Appeal only one follows *Murdoch*. The remaining five, some almost indistinguishable on their facts, deliberately, appear to attempt to circumscribe *Murdoch*.

Moore seems to follow *Murdoch*. But the impression is given from the former judgment that there may have been subjective factors present which do not appear in the written judgment.

(H) Unreported Alberta Decisions

There are several unreported trial division decisions from Alberta which seem to support the anti-*Murdoch* trend.

In *Katish* v. *Katish*,[46] McDonald J. was able to find that the wife had worked far harder than she would normally have been expected to do. He found a trust, using *Murdoch* and *Kowalchuk* as authorities. Mr. Justice Steer in *Brewster* v. *Brewster*[47] found equal ownership in a quarter section of farm land purchased in the name of the husband only, subsequent to land registered jointly in the name of both the husband and the wife. To obtain funds for the latterly acquired quarter section, the wife pledged her ownership in the jointly owned land. A trust was thus construed in her favour based on *Fiedler*. *Murdoch* was not mentioned.

In *Borek* v. *Borek*[48] the farmland and stock at the time of the marriage was transferred by the husband to a company. The wife obtained one share with the husband owning the rest. On the facts, Laycraft J. found an expressed intention, based on the evidence of the wife, that ownership would not be equal. In any event he further found the work of the wife was not "routine" but almost equal to that of the husband. *Trueman, Murdoch* and *Fiedler* were applied in order to find a trust. If there was doubt about the expressed intention, there was, in addition, a presumed intention, therefore an implied trust.

Mr. Justice Manning in *Sikora* v. *Sikora*[49] canvassed the law thoroughly. In that case the facts were not much different from *Murdoch*

46. December 1975, Judicial District of Edmonton, Action No. 80191 and No. 10425.

47. April 1976, Judicial District of Edmonton, Action No. 91542.

48. April 1976, Judicial District of Calgary, Action No. 119615.

or *Fiedler*. The property was all in the name of the husband. The parties were married in 1948. The learned trial judge found that the wife had worked equally as hard as the husband. The wife claimed one-half of the total assets, all of which were in the name of the husband. Mr. Justice Manning referred to *Murdoch* and found it useful for two propositions:[50]

> A trial judge may have doubts as to whether a wife is entitled to ownership of part of the 'family' assets. She may have contributed little or nothing or perhaps her conduct has been such as to disentitle her to the benefits of equitable doctrine. In that event the judge should look to the majority judgment of Martland J. in *Murdoch*.

but

> . . . if a trial judge thinks that fairness and equity require, on the facts of his case (as I think in this case) that the wife should have a share in the ownership of the assets, he will find the relevant legal doctrines reviewed by Laskin C.J.C.

Not only does the learned trial judge try to distinguish *Murdoch* on its facts, as has been done in the other trial-level cases in Alberta before this, but goes on to state that either the majority or minority judgments are applicable, depending on what facts are found. So far this may be the most succinct comment, the most refreshing (or perhaps isolated) description of *Murdoch* yet put forth. After finding contribution by the wife, he also found a common intention from the wife's evidence that they "were engaged in a family operation".

Prior to January of 1978, there would have been no doubt that *Sikora* would have been appealed (the learned trial judge anticipated that in his judgment) and there would have been yet another opportunity in the Appellate Division to take a careful and considered look at the whole area of matrimonial property. In view of the direction that the majority of the provincial courts of appeal, and now the Supreme Court of Canada in *Rathwell*, are proceeding, and the effect that it is now being given to *Murdoch* in those courts, perhaps the "social concern" of *Murdoch* will be reflected by a broadly considered judgment in any appeal of *Sikora*. In view of *Rathwell*, there is an excellent chance that if an appeal is taken the decision reached at trial will be upheld.

III. CONCLUSIONS

(A) General

At the start of this paper, the writer referred to the continued existence of the historical presumption of advancement in favour of the wife. It would seem that this presumption still exists, despite some authority tending to denigrate its present effectiveness. Indeed, Dickson J. in *Rathwell* does indicate that at present the presumption "has ceased to embody any credible inference of intention". In the case of *Robertson* v. *Robertson*,[51] Laycraft J. had before him a husband and wife who were registered as joint owners of a quarter section of farmland. The wife, a medical doctor, was able to show that all payments were made by her to a joint bank account in her name and that of her husband, out of which all payments were made on the property in question. Her income tax returns showed her as the owner of the farming operation, both taking the losses on her income and also showing any profit solely attributable to her. It was available to the couple to split the income, thereby saving tax. This

49. [1977] 6 W.W.R. 580.

50. *Id.* at 588.

51. [1977] 4 W.W.R. 77.

was not done. The husband claimed the wife used language such as "we bought the farm", tending to show a joint ownership. The learned trial judge stated: ". . . married persons form the habit of speaking of 'we' without tending thereby to describe legal ownership."[52] (This seems reminiscent of Didsbury J. in *Rathwell.*)

Mr. Justice Laycraft found that the presumption of advancement still exists in Alberta as well as its reciprocal presumption, that of resulting trust. If the wife puts property into the husband's name, there is no presumption of gift (as there is in the opposite case), but a presumption in favour of the wife that the husband holds title as trustee for her. Using *Murdoch* the learned trial judge found no agreement or financial contribution by the husband and, applying *Fiedler,* found there was no inducement by the wife to the husband to act to his detriment.

An interesting case, using the same presumptions, but reversing the parties, is the recent case of *Affleck* v. *Affleck.*[53] Here the parties originally owned real property as joint tenants, the wife's interest being acquired by gift from the husband. The properties were then sold and a new property was acquired and registered in the name of the husband alone, ostensibly for tax purposes.

The husband tried to distinguish *Thompson, Trueman, Murdoch, Kowalchuk* and *Fiedler* on the basis that they referred only to the matrimonial home. In the present case, he contended, there was a commercial investment, and the presumptions ought not to apply. The British Columbia trial judge refused to accept this argument and found a trust based on the rebuttable presumption that the husband held title in trust for himself and his wife.

The *Affleck* and *Robertson* decisions are completely compatible; they both use the presumption of advancement and resulting trust consistently. The result is different for one reason only; the sex of the plaintiff was not the same in both cases.

The "social concern"[54] with *Murdoch* as expressed in *Gerk* and implied in the trial decision in *Fiedler,* the writer respectfully suggests, is a reaction to the seemingly equal status of the sexes, without any real recognition of the usually disadvantageous economic position of the wife *vis-a-vis* the husband.

If *Murdoch* and *Fiedler* (in the Alberta Appellate Division) can be described by some groups as "sexist" decisions, then similar appellations can be affixed on both *Affleck* and *Robertson.* In the former two cases, the wives, to use a non-legalistic colloquialism got the "short end of the stick" because of the application of the law. Cannot the same be said for the respective husbands in the latter two decisions? However, it is anticipated there will be little outcry as to the results of *Affleck* and *Robertson* because the wife was successful in those cases.

It seems fairly obvious that four Provincial Appeal Courts (Saskatchewan, Manitoba, Ontario and Nova Scotia) and now the Supreme Court of Canada in *Rathwell* have embarked upon a policy, apparently without concert, to confine *Murdoch* to its facts in order to deal with the litigants before it in an unhampered and, it is respectfully suggested, reasonable and equitable manner.

52. *Id.* at 82.
53. (1977) 27 R.F.L. 119.
54. *Supra,* n. 22.

What is the position of the lawyer acting for the wife in a *Murdoch* situation? Outside of Alberta, the answer is rapidly becoming clarified. In Alberta, the hurdles, at least at the appeal level, may be still difficult.

The writer would suggest that in order to have a reasonable chance of success in Alberta of circumventing the effects of *Murdoch*, it would be essential to prove the following:

1. That a portion of the initial purchase monies belonged to the wife (*Rathwell*).
2. The wife paid or contributed to regular payments on the land.
3. The wife incurred actual or apprehended liabilities (notes, mortgages, etc.) in the acquisition or maintenance of the property (*Easton*).
4. The parties carried on their operation "as a team" (*Trueman*) and had a common intention (an express trust) that the property belonged to both of them (*Kowalchuk*).
5. In addition to the above, the wife contributed her labour and services, hopefully beyond that contributed by Mrs. Murdoch.

Of the above factors a successful plaintiff would need certainly to prove item four. The existence of the other items in addition should permit a reasonable expectation of success. Given those factors, the court should then be able to escape the bonds of *Murdoch*, and it is hoped that the courts can and will recognize the basic inequity in the *Murdoch* and *Fiedler* decisions, as Dickson J. has done in *Rathwell*.

It is true that eventually both Mrs. Murdoch and Mrs. Fiedler ended up with lump sums. Mrs. Fiedler did so by settlement and Mrs. Murdoch after a trial as to maintenance.[55] Can these lump sums be justified on a basis other than redistribution of property, particularly in the light of *Krause*? Certainly, the ostensible base of the awards was maintenance, but, in reality, it is suggested they were really a division of property. Mrs. Murdoch was awarded $65,000.00, slightly less than one-third of the value of the farm.

The object of the law is, it is suggested, to arrive at rules that are fair. The rules as expounded in *Murdoch* and *Fiedler* may be basically fair between litigants in general. But the application of those rules to the marital situation, although fair at first glance, do not recognize the pre-existing economic relationships or motivation of a husband and wife. It is trite to say they do not recognize whatsoever the status of marriage. To speak of justice is difficult. It is just that the same rules apply to all people that come before the courts. But, should the rules be the same for people who have entered into special relationships beyond that of mere contract? The rules applied in *Affleck* and *Robertson* were, perhaps historically, just. Are they fair today? Lord Justice Scrutten pointedly observed: "I am sure it is justice. It is probably law for that reason".[56]

The writer has some real difficulty in applying that statement to the result in *Murdoch* and *Fiedler*. Certainly the court supplied the law, but the courts refused to consider whether the underlying social policies and reasons that gave rise to the earlier decisions from which *Murdoch* and *Fiedler* flowed, apply today. To paraphrase Laskin J. in *Murdoch*[57] the

55. [1977] 1 W.W.R. 16, (1977) 1 Alta. L.R. (2d) 135.
56. *Gardner* v. *Heading* [1928] 2 K.B. 284 at 290.
57. (1974) 13 R.F.L. at 204.

better way to lay down policies is by legislative action. But the better way is not the only way and the courts should be open to equitable sharing. However, in Alberta, now seemingly alone, the courts have declined to pursue this avenue to any meaningful extent. Certainly, they were in the vanguard in *Trueman*, but in the whirlwind development in this area in the last three years, have now been left, along with *Murdoch*, in what may be an isolated position.

(B) Legislative Responses

The Government of Alberta, despite pressure from various groups, and in the face of a recommendation (at the government's request) from the Alberta Institute of Law Research and Reform, was slow in introducing any type of legislation.

In a totally cynical view, one might even question that the hesitancy on the part of the provincial government was directly connected to an anticipated loss of votes from male supporters, which fear (probably groundless) may have contributed to the obvious hesitancy to change the law.

It was until recently left to the legal profession to insist that some equitable resolution be found in the courts, by continually bringing to the court's attention the inequities inherent in the *Murdoch* ratio.

Again, citing Dickson J. in *Rathwell*: "Canadian legislatures generally have given little or no guidance for the resolution of matrimonial property disputes, with the result that laws applied are perforce judge-made laws".

The Alberta government finally responded. In November of 1977 they introduced Bill 102, the Matrimonial Property Act and then promptly allowed the Bill to die. This naturally was done to promote discussion from the general community.

It is probably futile and certainly premature to go through a detailed analysis of that Bill in this paper (except perhaps for an academic masochist), but certain broad comments cannot be withheld by the writer.

The Bill provided, *inter alia*, for the following:

1. It would have been applicable with or without a divorce.
2. It would have been applicable prior to a divorce if the parties were separated.
3. It would have been applicable even if an order was made without a divorce and a further order under this Act could be made upon a divorce.
4. It would have applied to nullity or judicial separation actions.
5. The court could order sale, transfer of property or payment from one spouse to the other, regardless of ownership.
6. The court, in making such an award, must consider all of 19 factors, as set out in the Act, including:
   (a) contribution, financial or otherwise by each of the spouses (there seems to be an emphasis on the financial in two of the factors),
   (b) the transfer of such property on the earning capacity of the spouse or the value of the property of a spouse,
   (c) there seems to be an oblique approval of marriage contracts in one clause, in that agreements are to be considered in any award.

Reviewing the Bill, as the writer has stated, will not accomplish much. If the Bill were brought in its present form it is the writer's suggestion that there would in all likelihood be no change in the practice of the court because it presently uses the tools of trust in property actions and lump sums in divorce actions. All that Bill 102 really seems to do is pay lip service to the demand that the economically disadvantaged (but "equal") wife be given an equitable treatment. The results may well be very little different than they are at present.

A cynic might say this was the deliberate intention of Bill 102. Had some semblance of equality and fairness been really intended, then the Bill could have stated that upon either party invoking the provisions of the Act, the judge would start from the proposition that all property is held jointly and equally, but that he might raise or lower one of the spouse's shares according to the factors enunciated, providing he gave considered reasons for any variation. The failure of the Bill to provide some basic starting point may have at least one clear effect. It will promote litigation so that the number of matrimonial cases contested will rise dramatically and trials will be lengthened well beyond the present one-half to one day average. This should be a financial boon to legal as well as to the accounting community!

If the writer is even partially correct in the above prediction, then the Alberta Legislature has disregarded, perhaps through inadvertence, the "social concern" of the community. However, the writer's cynicism may be unwarranted. Perhaps the Attorney-General for Alberta, in allowing Bill 102 die, is anticipating sufficient outcry and constructive suggestions to allow him, politically, to modify Bill 102 and re-introduce a modified Bill in the next session. A new Bill, hopefully, will recognize the present economic imbalance between spouses so that litigation can be reduced through proper settlement between lawyers. If a contest is necessary (and sometimes it is) then perhaps the courts will not have to resort to intricate findings of fact carefully applied to archaic principles of law in order to achieve equitable results.[58]

58. This paper encompasses the law as found by the author, up to the end of January 1978.

Editor's note:

On May 16, 1978, Royal Assent was given to the Matrimonial Property Act, to come into force on a date to be fixed by proclamation. A comprehensive analysis of the new Act will be printed in the next issue of the Alberta Law Review. The article will deal with the underlying principles of the legislation, a detailed section by section survey of its effects, changes in practice necessitated by the new Act, and problem areas which will require judicial and judicious determination.