

March 1975

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75-1

BRIEF

OF

THE ONTARIO COMMITTEE ON THE STATUS OF WOMEN

RESPECTING

O.L.R.C. FAMILY LAW REPORT PART IV, FAMILY PROPERTY LAW

- (1) The Ontario Committee on the Status of Women strongly recommends that the Ontario government change the present law relating to ownership of property acquired during marriage. The need for such change is, we think, beyond debate.

- (2) We recommend that a new property system for Ontario take account of the following fundamental concerns which were advanced by our members in answer to a questionnaire distributed to them (see Appendix A):
 1. The right to a half-share in the matrimonial home is regarded by a majority as perhaps the most important proprietary right for a married woman. The home is the focal point of domestic life, and is a chief source of security for family members. It is often the major (or only) asset acquired during marriage.
 2. Regarded as almost as important is the right to share in other property acquired during marriage.
 3. Our members are in favour of a right to share in the matrimonial home and other property during the marriage as well as at its break-up. Vested rights during marriage

are fundamental to the economic security of a spouse.

4. Third in order of priority for our membership, but still very close to the first two matters (1 and 2 above) is the right to get support from a spouse for oneself and the children of the marriage.
5. Fourth in order of importance to our membership is the wife's right to keep her property for herself, and fifth is the right to share in a husband's business assets.
6. Whatever scheme is adopted, a high priority should be avoidance of complexity. Well over half of our questionnaire respondents evinced a desire to reduce not only the lawyer's involvement, but that of the courts, in matrimonial property matters. The regime of deferred community proposed by the Law Reform Commission suffers from too much complexity.

(3) The Ontario Committee recommends that an optimum property system have these four basic components:

1. There should be separate protection of the spouses' interests in the matrimonial home, regardless of how disposition of their other assets is to be governed. Similar protection should encompass leasehold premises.
2. The basic regime in Ontario should be one that guarantees sharing during marriage as well as at the end, and which would apply to all couples whenever married unless they

opt out. This basic regime could be called community of property with joint management and control; it could fall short of that but be modelled on the O.L.R.C. proposals regarding the matrimonial home.

3. Spouses should be able to opt out of the basic scheme and do one of two things: adopt a marriage contract, or choose to be bound by a modified system of separate property.
4. The modified system of separate property would feature judicial discretion to vary property interests, according to criteria set out in legislation. We reject the idea of completely unfettered discretion; we also reject the present approach of no discretion to vary property interests.

(4) Specific Recommendations:

I. The Matrimonial Home

1. We recommend adoption of the principle of co-ownership in the matrimonial home expressed in recommendation 90 of the O.L.R.C.: "a principle that would entitle the husband and wife to equal shares in the home secured by their joint control and rights of occupation, retained for their joint enjoyment and capable of being disposed of or otherwise dealt with only with the consent of both spouses or by order of the court."

2. We recommend that co-ownership of the matrimonial home be given immediate, widespread and retrospective effect as a general legal principle. It should apply to all matrimonial homes, whether title is held in the name of one spouse or in the name of both; and notwithstanding the fact that one of the spouses may have made no financial contribution to the acquisition, maintenance or capital improvement of the home. (rec. 91).
3. We disagree with O.L.R.C. recommendation 99(a); it is our recommendation that the principle of co-ownership apply as well to homes that were, on the effective date of the legislation, registered solely in the name of the wife.
4. We are of the view that homes owned by one of the spouses before the marriage present a difficult problem deserving of special treatment. Quite often, one spouse will own a house before marriage because it was acquired during a previous marriage; the house was left to the spouse by will, or devolved by reason of joint tenancy, or was part of a property settlement arising from dissolution of a previous marriage. Particularly in the latter case, the interests of children of this first marriage may have a bearing on the ownership question in the second. Accordingly, we recommend that where a home is owned by one spouse before the marriage, it

should continue to be regarded as the sole property of that spouse after marriage unless there is an express agreement to the contrary.

We further recommend that where there is no express agreement to the contrary, the non-owner spouse should be protected vis-à-vis the contributions he or she makes to substantial renovation, capital expenditures, etc. by way of a provision analogous to section 37 of The Matrimonial Proceedings and Property Act 1970, (United Kingdom) (Appendix B.)

However, where the house is bought by one of the parties in contemplation of marriage (i.e. within two years preceding the date of the marriage) it should be subject to the presumptive equal share rule.

5. We agree with recommendation 100 of the O.L.R.C. that the principle of co-ownership should not operate so as to preclude the donor of a matrimonial home (or of funds used to acquire the asset) from transferring the entire beneficial interest therein by way of gift to one of the spouses where it is the donor's intention to benefit only that spouse.

We recommend, however, the following restrictions on that principle:

- (1) as in (4) above, the interest of the non-owner spouse who contributes to the property after its

acquisition should be protected.

- (2) the intention to benefit only one spouse must be clearly evinced, in writing; there should be a presumption against such intention that must be rebutted by clear and convincing evidence.
 - (3) consideration should be given to the possibility of abuse of this principle by means of a corporation owned by one of the spouses. For example, a spouse might cause a corporation of which he or she is controlling shareholder to purchase a home, and "give" it to him or her as a bonus. Ontario and federal corporation law and Ontario partnership law should be carefully reviewed to assess the likelihood of this and similar devices, and steps taken, if necessary, to devise "insider" or other rules to forestall them.
6. We endorse the principles enunciated in O.L.R.C. Recommendations 93, 95, 97, 101, 102, 103, 104, 105, 106 (first sentence), 109, and 111, respecting consent of one of the spouses to transactions by the other.
 7. We endorse O.L.R.C. recommendation number 107.
 8. We recommend that spouses should be free to make their own private arrangements regarding ownership of the matrimonial home, notwithstanding legislation. Such arrangements, however, should be express, and in writing;

we reject the O.L.R.C. proposal that variation of beneficial interests in the home can be by implied agreement. We accept the proposition in recommendation 92 that "it should be presumed that every married person is entitled, in equal shares with his or her spouse, to a direct beneficial interest in their matrimonial home as of right", and we are of the view that this presumption should only be rebuttable by way of clear written agreement between the spouses. Both spouses should have independent legal advice before making such agreement.

9. We recommend that the court have power to review agreements made between spouses to alter the presumptive equal shares; we are in substantial agreement with recommendation 99 regarding the powers of the court on review, but with one alteration. We would recommend that the court be subject to the guidelines set out in Recommendation 11 below (p. 15) when exercising its discretion to vary the property rights between spouses. To reiterate the point made in (8) above, we feel that the court's power to review necessitates that agreements between spouses to alter the presumptive shares be express, writing. To give a court broad powers to review "implied" agreements would, it is submitted, cause a replication of the existing problem

of proving intention or implied agreement.

10. Occupational rights

- (a) We recommend that on separation of the parties, or dissolution of the marriage by divorce or annulment, the parties may enter into a written agreement respecting occupational rights in the matrimonial home and use and enjoyment of household goods therein, and in event of a failure to agree, either spouse may apply to a court for its decision.
- (b) We agree with Recommendation 123 of the O.L.R.C. that the court should have power to make orders concerning use and enjoyment of household goods in separate proceedings, or in proceedings, concerning occupational rights.
- (c) We agree with O.L.R.C. recommendation 116 that the occupational rights of the spouses in the matrimonial home should prevail over any rights to partition and sale.
- (d) We agree in part with recommendation 124. We are of the view that in determining an application for either occupational rights or use and enjoyment of household goods, the court should have power to make such order as it thinks just and reasonable having regard to the respective needs and financial resources of the spouses, and to the needs of any

children, and to all the circumstances of the case. With regard to the "conduct of the spouses", we are troubled that this may introduce questions of matrimonial fault and blameworthy conduct, and feel that this factor should be minimized.

- (e) We agree with recommendations 120, 121, 122, 127-133, and 136.
- (f) We agree in principle that the court should have power to order an extension of occupational rights (rec. 117) and use and enjoyment rights (rec. 126) beyond the termination of the marriage by divorce or annulment. We think, however, that an extension of such rights in the event of death of one of the spouses might adversely affect the administration of estates, prejudice the succession duty position of testamentary beneficiaries (particularly non-family members or "strangers"), and leave unclear the extent of the interest that the beneficiary is assuming. Accordingly, we recommend that the government accept our recommendation 11 below* (p.10), or that further study be given to this problem in the context of death.

In the context of dissolution of marriage by divorce or annulment, we recommend that it be made clear that a spouse's rights of extended

occupation and use of household goods do have monetary implications for other aspects of relief (i.e. quantum of support, lump sum payments, interest on lump sum payments, etc.).

11. Succession

- *(a) We recommend that on death the whole home automatically become the property of the surviving spouse, regardless of how the title to the home has been taken. We see no valid reason for making the distinction between situations where title stands in the name of one only, and situations where it stands in joint names (CLRC Recommendation 114). Our proposal, we think, has the merit of eliminating the problems with extended rights of occupation on death discussed above.
- (b) In the alternative, if it is decided to maintain the distinction between property held in joint names and property held in one name alone, we recommend that
 - (a) joint tenancy pass, as now, by survivorship;
 - (b) where property is held in one name alone, both spouses have the right to dispose of their co-ownership interests by will, but where the testamentary disposition is to someone other than the spouse and the spouse

survives, the survivor be protected by way of a statutorily-created life interest in the property.

12. Leasehold premises

- (a) We endorse O.L.R.C. recommendation 134 that provisions respecting use and enjoyment of household goods should apply as well to spouses residing in leasehold premises. We further recommend that these provisions, so far as is possible, be extended to spouses living in premises in which one holds a life tenancy.
- (b) We reject the notion that leasehold premises not be protected. Economic reality dictates that many couples spend a large part of their married life, if not all, in rented premises. The difficulty of finding suitable leasehold property, particularly for a family with children, is increasing. Older persons on fixed incomes, and spouses with young children, in particular, should be protected against having to leave suitable rental accommodation because of marital problems, or against having to agree to higher rent because of a change in the name on the lease. Lastly, exemption of leasehold premises may lead to abuse; a spouse may cause a corporation to purchase a house and "lease" it to the couple. Thus we recommend adoption of a regular procedure by which interests in tenancies

can be determined; and recommend to the Ontario government that the New Zealand Matrimonial Proceedings Act, 1963, Part VIII, ss.60, 61 (Appendix C) or the United Kingdom Matrimonial Homes Act, 1967, s.7 (Appendix D) be considered as models.

13. Definition of Matrimonial Home

- (a) Subject to the foregoing remarks about leasehold premises, we recommend that "matrimonial home" be defined as the principal family residence; where such residence forms part of a business undertaking (farm, apartment or other commercial property) it should be regarded as severable from that property and treated separately.
- (b) We accept the proposal that there should only be one "matrimonial home" at any given time (Recommendations 88, 89); however, we are of the view that insufficient attention has been given by the Ontario government to problems that arise because tax planning considerations affect the mode in which title to property is held. We recommend, therefore, that a full study of the impact of income taxation on the matrimonial home concept be undertaken.

14. We also recommend that the foregoing protection be afforded to couples that have lived together for at least two years, without going through a ceremony of marriage.

II. Other Property

1. We recommend that couples share equally in assets accumulated (by either) during the marriage.
2. This sharing should take place during the marriage as well as at the end.
3. We recommend that the sharing principle apply automatically to all marriages in existence at the date of the coming into force of the legislation, and accordingly reject the "opting in" proposal.
4. We recognize that the question of what property should be subject to sharing is a complex one. We offer the following considerations, expressed by O.C.S.W. members by means of our questionnaire. The requirement of equal sharing should not apply to gifts of money or property received from the other spouse; gifts, inheritances, windfalls acquired from a third person; property owned by the spouse before marriage; property that from its nature appears to have been intended for the personal use of one spouse only (e.g. clothing). As a general principle, we endorse the idea of equal sharing of debts as well as assets. We specifically accept that a spouse should be required to share debts incurred by the other pursuant to an obligation to support the spouse or children, and also that losses to investments should be shared. We reject the idea of sharing debts incurred by one spouse before marriage. Our members appear to be equally divided on the question of whether a spouse's business losses should be shared; this is perhaps in keeping with the uncertainty about whether sharing in a spouse's business assets is desirable.

5. It would appear that the best way of accomplishing equal sharing of assets during the marriage as well as the end would be to introduce a system of community property with joint management and control.
6. A possible alternative to full community would be to identify certain kinds of property (i.e. summer cottages, cars, other large quasi-durable goods, etc.) and make them subject to the same kinds of considerations so far as is possible as the matrimonial home would be (i.e. presumption of co-ownership, necessity of consent to deal etc.). Other property might then be subject to contract or modified separate property. (See recommendation 8 below.)
7. Whichever approach is adopted to accomplish equal sharing during marriage, as well as at the end, it seems clear from our questionnaires that the members of the Ontario Committee on the Status of Women give little support to the deferred community principle. We accordingly recommend its rejection.
8. Whichever approach is adopted to accomplish equal sharing during marriage as well as at the end, we recommend that couples be able to opt out of it and do one of two things:
 - a) make their own marriage contracts, or
 - b) choose to be bound by a modified form of separate property.
9. We recommend that before opting out, each spouse should have independent legal advice.
10. We recommend that spouses making marriage contracts be required to have independent legal advice, and that all contracts be in writing.

A couple should be able to name in the contract the system of law (full sharing, revised separate property, or a relevant foreign system) that is to govern its interpretation.

11. A revised system of separate property would have, we recommend, the following features:
 - a) The principle enunciated in Recommendation 150 of the O.L.R.C. Report.
 - b) The principle enunciated in Recommendation 151 of the O.L.R.C. Report.
 - c) The principle enunciated in Recommendation 152 of the O.L.R.C. Report.
 - d) Discretion in a court to alter or vary property interests as between the spouses, and as between the spouses and their children.
 - e) Criteria enunciated in legislation that would govern the court in its exercise of discretion. We recommend consideration of those criteria that are included in sections 25(1) and 25(2) of The Matrimonial Causes Act, 1973 (U.K.). (Appendix E)
 - f) Applications for determination and disposition of property interests by the court could be made not only on dissolution of the marriage by divorce or annulment.

III. Support

1. We recommend acceptance of O.L.R.C. recommendations 54, 55, and 56 regarding child support.
2. We further recommend that the child be given an independent right of action to apply for child support from either or both parents; such application could be brought by the child alone where of sufficient age, or on the child's behalf by one of the parents, or a third person. At present, securing support for a child by way of court application may only be done by way of an application by the mother (but not the father) under The Deserted Wives' and Children's Maintenance Act, The Child Welfare Act (Part III), or in some other contentious proceeding between the parents (custody, alimony, divorce). The only Ontario statute dealing solely with child maintenance (The Children's Maintenance Act) provides no direct mechanism for the child to obtain an order of support against a parent. We regret the fact that interests of children are often overlooked, or used as bargaining tools in disputes between parents, and recommend that an independent right of application be vested in the child.
3. We recommend that there be a positive duty on one spouse to support the other, according to his or her means and abilities, where a spouse is old, blind, lame, mentally deficient, disabled, or bearing the major responsibility for child-rearing, and unable for those reasons to work.
4. We also recommend that where neither spouse comes within the frame of reference set out in (3), both spouses should have a legal obligation

to contribute, according to their means and abilities, to their mutual support. (Rec. 58)

5. We stress that "... the legislation creating the mutual support obligation should provide that the respective contributions of husbands and wives should be assessed not only in monetary terms." (Rec. 59)
6. In view of the mutuality principle endorsed above, we recommend that a deserted spouse should be able to pledge the other spouse's credit for necessities to the extent of his or her support obligation. We recognize that in view of a wife's difficulty in obtaining credit in her own right, our recommendation is likely to be at present more useful to deserted wives than to deserted husbands.
7. We further recommend, in keeping with the Project Study's view, that there be a rebuttable presumption that either spouse be able to pledge the "family credit" for necessities while the parties are cohabiting. (Project Study, Vol. 3 at p. 541)
8. We recommend adoption of OLRC Recommendation 153, that dum casta clauses in separation agreements should be deemed to have no effect on the obligation of support, except insofar as the failure to remain chaste can be shown to have reduced the need for support.
9. We recommend that the obligation of child support accrue to all parents, whether married, single, or cohabiting without going through a ceremony of marriage in accordance with O.L.R.C. recommendations 54-56.
10. We recommend that "inter-spousal" support obligations arise between couples living together without going through a ceremony of marriage

after they have cohabited for at least two years.

11. We strongly desire that the Ontario government take steps to improve the present mechanism of enforcing support obligations; the onus of enforcement should be removed from the spouse or child in whose favour the order is made, and should instead be placed with a government-funded agency.
12. We further strongly desire that the Ontario government move immediately to improve women's opportunities of participating with dignity and equality in the workforce, by substantially increasing availability of day care, by enacting legislation to provide equal pay for work of equal value, by removing the onus for enforcing legislation from the individual female worker, and by implementing contract compliance-affirmative action in its own contractual arrangements. We cannot emphasize enough the need to take these steps in order to make mutuality of support a realistic goal and reduce women's dependency.

IV. Other Recommendations

1. We recommend adoption of recommendations 154, 163 and 155 and urge the Ontario government to proceed immediately with implementation of a unified family court.
2. We recommend that the Ontario government fund training sessions for all judges who will be dealing with the new legislation to acquaint them with its provisions, but more particularly, with its departures from the philosophy of the present law.
3. We endorse the recommendations of the Ontario Council on the Status of Women that a programme be set up to inform all Ontario residents of the new legislation, and that the Minister of Education and the Minister of Colleges and Universities introduce or alter courses so as to acquaint persons with the new provisions.
4. We similarly endorse the Ontario Council's recommendation that all new legislation use non-sexist terms: "spouse" instead of husband and wife, "his or her", "his and her", instead of just "his"; "he or she" "he and she" instead of just "he", etc., where applicable.
5. We endorse the recommendations of the Ontario Law Reform Commission respecting abolition of legal anachronisms, i.e., Recs. 156, 157, 159, 160, 162, 165.
6. We endorse the following statutory changes proposed by the Ontario Law Reform Commission: to The Dependent's Relief Act (Rec. 61), to The Devolution of Estates Act (Recs. 137, 138, 139, 140, 141,

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