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REVIEW OF THE ONTARIO FAMILY LAW REFORM ACT

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BRIEF TO THE ONTARIO STATUS OF WOMEN COUNCIL,
SECRETARIAT FOR SOCIAL DEVELOPMENT

CC - ATTORNEY GENERAL R. ROY MCMURTRY

BY THE ONTARIO COMMITTEE ON THE STATUS OF WOMEN

HISTORY OF INVOLVEMENT

The Ontario Committee on the Status of Women has been actively involved in Family Law Reform since 1971.

Some background materials pertinent to the present review of the Ontario Family Law Reform Act to which reference will be made in this brief are attached:

- Appendix A - Ontario Committee on the Status of Women
1177-5 Historical Summary of Family Law Reform
in Ontario prepared in November 1977.
- Appendix B - Press Release of Ontario Committee on the
873-1 Status of Women dated January 12, 1978.
- Appendix C - Copy of Bill 50-50, a Private Citizens'
78-1 Bill referred to in the January 12, 1978
Press Release.
- Appendix D - Press Release of the 50/50 OR FIGHT
873-3 Committee dated March 16, 1978.

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PHILOSOPHICAL GOALS OF FAMILY LAW

The Ontario Committee on the Status of Women has consistently taken the position that Ontario Family Law must encompass the principles so clearly enunciated by the Advisory Council on the Status of Women:

1. The concept of marriage as an economic and social partnership of equals.
2. The concept of the family as the fundamental group of the economy.
3. The recognition that unpaid work within the family is as vital to this fundamental unit and to society as is paid work performed outside the family.
4. The right of the partners during the marriage to an equal, ongoing share of both present and future security.
5. The right to an ongoing splitting of pensions, insurance, investments and savings.
6. The responsibility of marriage partners to support each other with services and/or finances to reflect the concept of marriage as an interdependent partnership of shared responsibilities.
7. During the marriage, the right to the protection of assets from undue alienation.
8. If dissolution should occur, the right of the marriage partners to an equal share of the assets accumulated during the marriage.

PROBLEM AREAS AND RECOMMENDATIONS FOR IMPROVEMENT

Laws regulate our conduct and influence our attitudes. As the symbols of what is acceptable, laws are powerful social conditioners. With the enactment of Bill 59 in March 1978, signatory groups of the 50/50 or Fight Committee expressed the opinion that the bill's philosophy that responsibility for childcare, housework and financial support should be equally shared by both spouses was not achieved. The committee also expressed concern in five major areas (Appendix D). After almost five years experience with the legislation and the resulting decisions, these concerns remain. If the integrity of the law is to be preserved, Ontario Family Law Reform must be reviewed and amended. As Nellie McClung wrote In Times Like These, "Chivalry is a poor substitute for justice."

"Family" and "Non-Family" Assets

In March 1979, in the case of O'Reilly vs O'Reilly, it was the judgement of Mr. Justice C. A. Osborne of the Ontario Supreme Court that Muriel O'Reilly was entitled to more than 50% because she had worked full-time outside the home for most of her 28-year marriage, in addition to running the home and raising a family. Mr. Justice Osborne said the act "assumes that household management, childcare and financial provision are joint responsibilities (of husband and wife)" and on that assumption justifies an equal split of family assets. "One of the problems I have in this case is a result of my finding that Mrs. O'Reilly has assumed virtually the total burden for household management and childcare." Mrs. O'Reilly's compensation must come from the family assets, the judge said, because the only non-family asset owned by either husband or wife was the husband's partnership in a business, and to order that it be dispersed would destroy the only means by which Mr. O'Reilly is able to support himself.

The above might lead to the expectation that where the act of sharing would not impoverish one individual the court would make a division of such assets presently defined as non-family. This did not appear to be the case however in the Leatherdale decision. The Supreme Court of Canada awarded Barbara Leatherdale a share of her former husband's stock and savings in recognition of only the nine years she had worked outside the home. Apparently, the contribution she made by working in the home the rest of their married life entitled her to a share of family assets and nothing more.

Contribution of "work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of property, other than family assets," is still narrowly interpreted as a direct financial contribution only. We are still grappling with the questions of

- who contributed how much money
- whether or not to impute to the parties a common intention
- whether titled interest in property can be rearranged because it is fair to do so
- can a joint venture be inferred from the marriage relationship
- is a woman entitled to a share in her husband's property because of her unpaid child-rearing and housekeeping responsibilities?

The Foreword to "Family Law Reform - Your new rights" signed by R. Roy McMurtry, Attorney General for Ontario states in part that the legislation "recognizes marriage as an equal partnership in view of the mutual contribution of the spouses to the welfare of the family, including the previously undervalued contribution of the full-time homemaker." That recognition is not evident in the decisions made by some judges.

The same booklet outlining the new legislation states that "Under the new law, a wife's contribution as a homemaker and mother will no longer be taken for granted and undervalued when a marriage breaks down. The new law recognizes that a homemaker's managerial skills give her husband more freedom to function effectively in his occupational role outside the home, and recognizes the mutual contribution of the spouses to the welfare of the family." Judicial discretion in the interest of fairness will only be fair where there is recognition by judges that childcare and household management are equally as important as financial provision. Should judicial discretion mean that judges are free to make their own interpretations of the value placed on responsibilities undertaken?

Homemakers usually are female, and they make up the largest single occupational group in Canada. They spend more hours than most employed people engaged in tasks which when performed in the workforce, clearly are jobs. The very real contribution made by caring for children and managing a household must be recognized; by remaining at home to perform these duties a

spouse forgoes opportunities to make money and obtain property, by reason of the division of responsibility in the marriage.

Again we quote from the Foreword in the Family Law Reform booklet: "The new law declares that each spouse has an obligation to provide support for himself or herself, to the extent that he or she is capable of doing so. This does not mean that every married person who is not earning his or her own salary must go out and seek a job. Spouses remain free to make informal arrangements on how they will share the responsibilities of looking after their family during their marriage."

With a greater number of Canadian marriages now ending in divorce, a homemaker has less job security and, as Barbara Leatherdale learned, they pay for the informal arrangements made with respect to looking after their family during their marriage. If a husband is able to accumulate assets because he is not spending half his time looking after his children and his house, then such assets should be considered to be acquired for both partners. At this point in time, it appears that in the minds of many, assets in the form of savings, insurance, investments and pensions, even though accumulated during the marriage, are considered to be business assets accruing solely to the financial provider and outside the purview of not only family but non-family assets.

During the life of a marriage most couples planning for retirement do so with their joint retirement in mind. While some may argue that a homemaker never has the option of retiring, merely graduating from having her children at home to having her husband at home, there is general agreement that the financial requirement is greater for a couple than for a single person. One disadvantage of working in the home is that one has no personal claim on the Canada Pension Plan. At the very least, the definition of family assets should be expanded to include savings, insurance, investments, pensions, superannuation credits and tax-free retirement savings.

Any system for sharing property must be designed with the average couple in mind. However, the law should assume that most people see their marriage as a partnership, with each person contributing, making mutual decisions about finances and day-to-day matters, and sharing equally in the assets of the marriage if it ends in separation or divorce.

The recommendation of the Ontario Committee on the Status of Women is there should be provision for all assets acquired during marriage to be shareable, with specific exceptions being clearly set out. (Appendices B and C)

Guaranteed Share of Property for surviving spouse

In 1910 the writer and women's rights crusader Emily Murphy convinced Alberta legislators to pass the Married Women's Relief Act, which, with subsequent amendments, authorized the court to give the widow something from her deceased husband's estate if he did not adequately provide for her in his will.

Workers in most other occupations are protected by laws and union contracts with respect to working conditions, hours, wages and pensions. Homemakers find themselves in a feudal barter arrangement, defined by family rather than labour laws. Replacement of dower rights by provisions of the new law could result in a surviving spouse having fewer property rights than in the case of marriage breakdown. (Appendix D)

The recommendation of the Ontario Committee on the Status of Women is that the legislation should be extended to provide for a guaranteed share of property on the death of one of the spouses.