New matrimonial property legislation for Nova Scotia

by Gretchen Pohlkamp

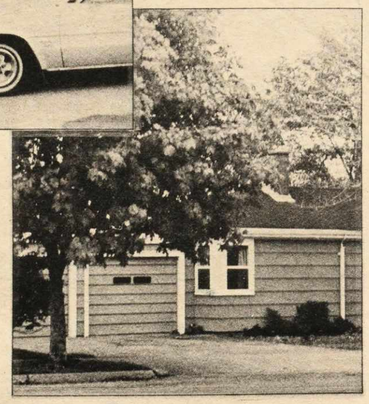
On October 1, 1980, with the coming into force of the Nova Scotia Matrimonial Property Act, the women of the province took an important step towards equality with men. The moment passed quietly, with little fanfare, as had the passage of the Bill through the House of Assembly in May 1980. What is this legislation? How does it affect women in N.S.? Why was it enacted?

The Act deals with the designation and distribution of matrimonial assets and property and replaces the outdated notions of dower rights which gave women an automatic life interest to one third of the matrimonial property.

The preamble states several principles, lofty goals which women have sought to have recognized for many years. The government of N.S., although the second last provincial government in Canada to enact such legislation, has taken these principles and given women an equality they never had before.

"We have it now," says Diana Dalton, one of the lawyers instrumental in drafting the Act. "It's a very important statement for government or society to be making."

As well as being important, this statement is long overdue. Women have struggled long to have the work of a homemaker recognized as a contribution in building up family assets. Before this new legislation, courts had to depend on equity and common-law to compensate the homemaker. Both were unable to do this adeuqately and the result was often grossly unfair to women.



HARTT/DAL PHOTO

A well known example of this inherent inequity is the case of Murdoch vs. Murdoch. The wife was denied a half share of the matrimonial property because the work she had done throughout her marriage " was the work done by any ranch wife" and she could not prove that she had made any financial contribution to the acquisition of the property. During the first four years of their marriage, the Murdochs had worked together in ranches in Alberta. Their joint pay was given to the husband and in 1947 he acquired his first ranch property in partnership with his father.

The court ruled that Mr. Murdoch had paid his share out of his own assets, but the dissenting judge noted that those assets had been earned through the efforts of both husband and wife. After a series of purchases and sales Mr. Murdoch acquired, in his name alone, a valuable ranch and homestead. When, in 1968, the marriage broke down, Mrs. Murdoch claimed a one-half share, not only in the homestead, but in the ranch also.

Because she had made no direct financial contribution, under the law of Alberta at that time, as in Nova Scotia until October 1980, Mrs. Murdoch was entitled only to her dower rights, unless she could show that the work she had done was beyond what was normally expected of a ranch wife. In this case, although Mrs. Murdoch ran the ranch five months of every year while her husband worked away, and helped him with haying, raking, etc. when he was there, the court decided that she had done no more than was expected of any ranch wife.

It is obvious that the decision against Mrs. Murdoch was excessively inequitable and yet the law had to be applied as it stood.

The divorce courts found a way around these harsh provincial laws by ordering lump sum awards as provided for under the federal Divorce Act. In the Murdoch case, "a lump-sum payment of $65,000 was ordered to be charged against the home quarter section of the ranch."

By ordering the lump sum payment charged against the property of Mr. Murdoch, the judge was effectively transferring the property to Mrs. Murdoch. This could be construed as unconstitutional because the federal divorce court has strayed into the provincial share of property rights.

It was because of these obvious problems in the old matrimonial property legislation, that the provinces started enacting new legislation.

In 1978 the then Liberal government of Nova Scotia introduced a Bill entitled an Act Respecting the Property of Married Persons. It was an abortive attempt to address the inequities in the existing legislation. It was poorly drafted and received wide criticism for its inflexibility.

With the death of Bill 15, the Provincial Advisory Council on the Status of Women made various proposals for legislative change. On 5 June 1980, the Matrimonial Property Act and the Family Maintenance Act were enacted.

Before looking at the legislation in detail it is important to have some understanding of how it will work together with the Divorce Act, the Family Maintenance Act and any other relevant legislation.

It would be preferable if the economically weaker partner could make just one application to one court to obtain a package of relief including property resolution, maintenance and divorce.

This might be possible if the federal government in its efforts at constitutional reform granted divorce powers to the provinces. The Canadian Bar Association's report on the constitution suggests that "the provinces have primary authority over cultural matters and local affairs." This would include divorce and marriage. But until such time as the Canadian Bar Association's recommendations are put into effect, a person seeking a divorce in Nova Scotia will still have to deal with two applications although to the same court.

An Act to Reform the Law Respecting the Property of Married Persons

WHEREAS it is desirable to encourage and strengthen the role of the family in society;

AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;

AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;

AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;

AND WHEREAS it is desirable to recognize that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets;

THEREFORE be it enacted by the Governor and Assembly as follows:

1 This Act may be cited as the Matrimonial Property Act.

One of the major innovations of the Act is to include death as one of the events which triggers the operation of the statutory regime. In Nova Scotia it is not advantageous for a spouse to divorce rather than take the partner "till death doth them part."

The spouse with the greater portion of matrimonial assets in his/her name cannot now dispose of them unilaterally. Wills which were drawn up prior to the enactment of the new legislation should be reviewed to see if they still do what they were intended to do. It may be possible for a wife to take her share of an estate, remarry, and leave the property to her new husband and stepchildren, to the exclusion of the children of the first marriage.

The legislation allows a spouse (as defined in the act) to apply for an equal division of matrimonial assets. It should be noted that spouse does not include persons who are living common-law. The first assumption of the court will be that a 50/50 split of the matrimonial assets is the appropriate division. Thereafter, depending on the circumstances, the court has the discretion to alter the ratio to whatever it deems equitable.

In order to understand the effects of the act, one must have a clear idea of the meanings this legislation has given to specific terms. The matrimonial home has been defined as "the dwelling and real property occupied by a person and that person's spouse as their family residence."

A couple can have more than one matrimonial home, but in the case of a large piece of property, only that portion of the property which is used by the family and necessary for their enjoyment is included under the definition, if the balance of the land is used for other than residential purposes.

Matrimonial assets include all matrimonial homes and all other real and personal property acquired by either or both of the spouses during their marriage, as well as any of these things brought with them into the marriage. There are certain exemptions to this general rule. Gifts or inheritances are excluded as long as they are used exclusively by the donee, and not by his or her family. Personal effects and or money which are obviously used only for the benefit of one spouse may be excluded. Business assets are exempt.

In actual fact everything could be excluded from the matrimonial assets because section 4(1)f allows for the exemption of property so specified in a marriage contract. Therefore if a court held that the marriage contract was valid, and the marriage contract specified that none of the usually accepted joint assets were to be included as matrimonial assets, it would be possible for the couple to exclude them.

What the one hand gives, the other takes away. On first reading one might be inclined to think that the Act is all-encompassing in its definition of matrimonial assets. But the legitimizing of the marriage contract leaves much room for the spouses to define their own parameters.

HARTT/DAL PHOTO

The exclusion of business assets from matrimonial property was criticized by some women. But with the power given the court under section 13, and the precedents set in other jurisdictions, women can feel satisfied that their best interests will be looked after. Section 13 gives the court the power to make an unequal division of property that is a matrimonial asset or to include in the reckoning, assets which are not matrimonial assets, if they feel that a 50/50 split would be unfair or unconscionable.

On deciding what is an unfair or unconscionable situation, the court has 13 possible factors to take into account. The court's discretion is two fold and involves firstly an alteration in the division of matrimonial assets. If then the court still feels the situation is not equally decided, it may include a division of assets which are not matrimonial assets.

"The burden of proof is on the party seeking to assert that an equal sharing is inappropriate or that business assets should also be shared," says Alastair Bissett Johnson and Winifred Holland in their book "Matrimonial Property Law i Canada." ". . .Where the burden of proof is satisfied, one might expect that the courts, following the Ontario example, would prefer to satisfy the claim out the matrimonial assets prior to embarking upon a division of business assets that could entail tax and commercial problems of great complexity."

The factors which could affect the variance of the 50/50 split include such things as debts, the existance of a marriage contract, the length of time of cohabitation, the needs of the children, the contribution of one spouse to the education and advancement of the other, etc.

The list of factors seems to be exhaustive, seeking to redress most inequitable situations. It will depend on how strict the court is in requiring proof of unconscionability or unfairness, whether or not this section is actually used as a further equity.

Sections 6 through 12 of the Act deal with the matrimonial home and disposition thereof. These sections provide women, who have traditionally only had their dower rights to depend on, with legal recourse should the matrimonial home be encumbered or sold without their permission.

In the future the buyer of a house will have to ascertain whether or not the home is included as the matrimonial property of anyone before agreeing to buy. To make this process easier, the Act provides for the designation of the matrimonial home and registration of such designation in the registry of deeds where the property is located.

One possible problem with this designation process is that if one home is designated as the matrimonial home, all other homes cease to be considered as matrimonial homes. It might therefore be possible for the couple to designate one home early in their marriage and while retaining possession of that home, purchase another home which they fail to designate. This second home might then be excluded from consideration as a matrimonial home.

Section 12 of the Act lists the triggering mechanisms which entitle either spouse to apply to the court to have the matrimonial assets divided in equal shares. The four are the filing of a petititon for divorce; the application for a declaration of nullity; the death of one of the spouses; and the separation of the spouses where there is no reasonable prospect of the resumption of cohabitation.

In an effort to allow spouses to create their own framework to govern the ownership and distribution of property as well as to enumerate respective rights and obligations under the marriage, the Act provides for the making of marriae contracts.

Marriage contracts may be made at any time during the marriage but are only valid if they are in writing and signed by the parties and witnessed.

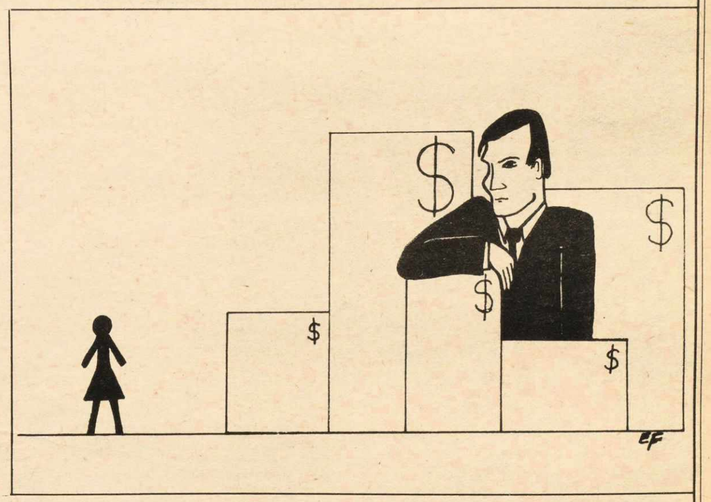
Anyone who has the capacity to marry has the capacity to make a marriage contract. Under common law the relevant ages would be 12 for a girl and 14 for a boy.

It would be advisable for anyone making a marriage contract o have independent legal advice, in order to minimize the chances of the court subsequently varying the terms of the contract. The court has the power in situations where one of the spouses makes application for variance because some term is unconsionable or unduly harsh or fradulent.

Professor of Law at Dalhousie University, Alastair Bissett-Johnson says that the marriage contract will be used mostly by professionals who wish to exempt their business assets from possible future encumberances and older people who are remarrying and wish to set aside the matrimonial assets from their first marriages.

Bisset-Johnson says that there has not been a flood of young people making marriage contracts in Ontario since the implementation of The Family Law Reform Act, 1978. They have not been inundated with trivial litigation.

One section which should hearten battered wives is section 31. This section provides some protection by requiring peace officers to enforce court orders made or arbitration awards filed with the court pursuant to the Act. In the past, peace officers have been somewhat reluctant to step into marital disputes.



Most women's organizations in Halifax have expressed approval of the Act, although there were some minor complaints. The most serious of these is that the government and the Advisory Council have not taken any steps to educate women as to the consequences of the passing of the Act.

The Advisory Council has been working on a leaflet which will explain the legislation in simple terms. This pamphlet will be available soon, says Diana Dalton, the pamphlet's author.

Dalton says there is nothing in the Act which requires that women rush out immediately and seek legal advice, although it is advisable to professional help at sometime to ensure that the Act is working towards the principles of equality which it professes to legitimate.