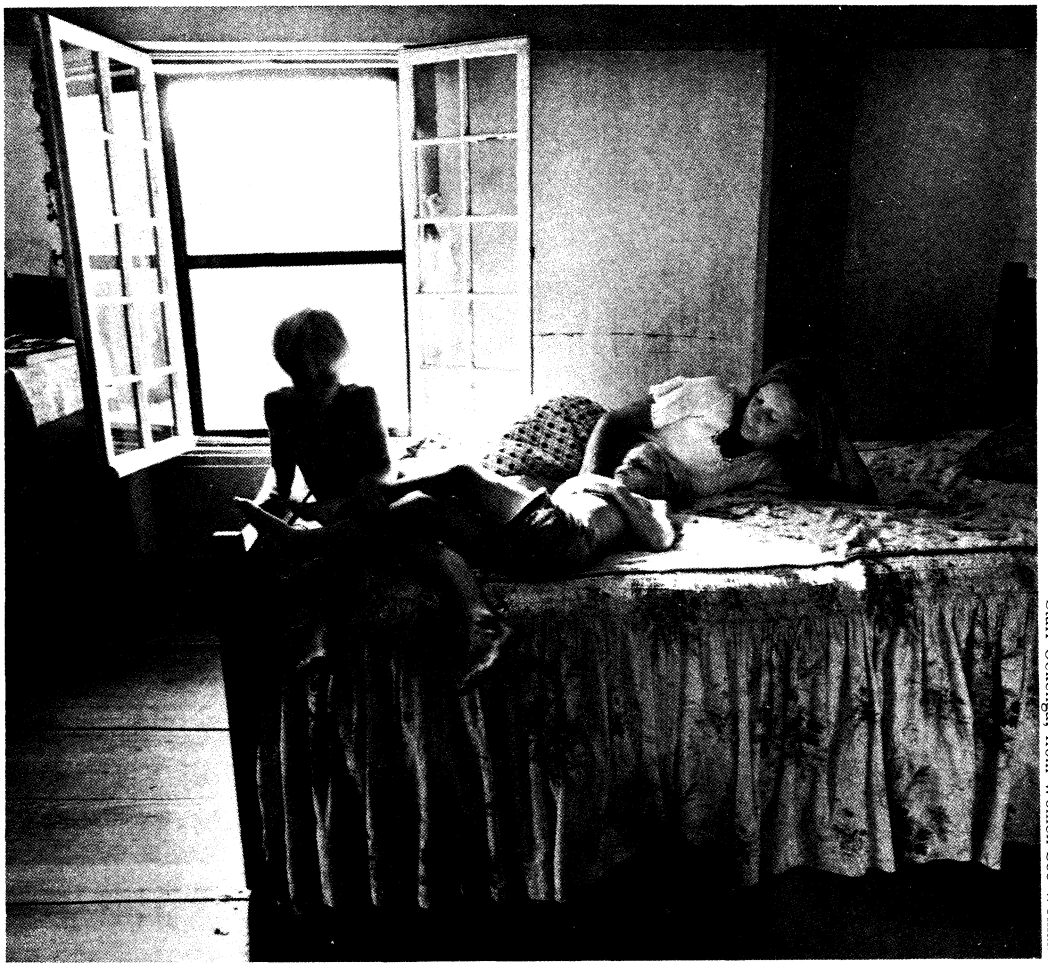
A Report on Family Law Reform in New Brunswick

Le gouvernement du Nouveau Brunswick a proposé deux projets de réforme des lois sur la propriété matrimoniale et sur l'entretien du ménage. L'examen de ces propositions par un comité d'avocats d'expérience a persuadé la commission des réformes législatives de les renvoyer pour une nouvelle rédacion.



Starr Ockenga, from Women See Woman

Until recently, survivors of marriage breakdown and divorce and the practitioners of family law shared a common bond of frustration, embarrassment, and impatience with traditional matrimonial law in this country. The infamous *Murdoch* case was the best-publicized example of our legal system's inability to deal with contemporary problems of marital dissolution. From the time that decision hit the headlines in 1973, provincial governments across Canada have been discussing, proposing, surveying, and redrafting marital law reform. Since 1978, radical and comprehensive marital law legislation has been proclaimed in Ontario, Alberta, Manitoba, Prince Edward Island, British Columbia, and Saskatchewan.

In the province of New Brunswick, reform has been studied since 1977, the working papers have been reviewed at public meetings, and the draft legislation has been published. The legislative proposal for the treatment of family property is contained in Bill 79, entitled the Marital Property Act. This bill is based largely on the Ontario Family Law Reform Act. It defines separate classes of property as 'family assets,' 'marital property', and 'business assets'. The meaning of family assets is set out in section 1 of the bill as property used by both spouses or their children 'for shelter or transportation, household, educational, recreational, social or aesthetic purposes' during cohabitation. Unlike the Ontario reformers, the New Brunswick draftsmen decided to give each spouse an automatic right to a one-half interest in marital property, which includes family assets plus anything else (excepting business assets, gifts, and items acquired following separation).

This approach to property division was rejected by the six practitioners who were members of the Committee on Family Law of the New Brunswick Branch of the Canadian Bar Association, as being an encouragement to litigation,

Bronwyn H. McIntyre

a bar to settlement and an impediment to quick relief between spouses. In the view of these representatives of the New Brunswick Bar, the use of such a wide definition for the property that the spouses must share would do little more than cause hard feelings between parties from the beginning, by forcing them to try to protect their own possessions from each other. These practitioners instead recommended the Ontario approach: equally dividing all family assets and then tallying the value of personal belongings in a final balancing of the spouse's shares. The question becomes whether a person should have to worry about losing a doll collection or a gun collection to a vindictive spouse, when the real issue before the court is that of dividing the bank account, the furniture and the family home. The provisions of Bill 79 were also criticized by the Bar Committee for failing to provide a forum for parties who are residing in the same house but whose marriage has broken down and whose property must be divided.

Other members of the public appeared before the Law Amendments Committee of the Legislature in reaction to the proposed Marital Property Act with their comments. The Chairwoman of the New Brunswick Advisory Commission on the Status of Women, Madelaine LeBlanc, applauded the bill and urged its immediate implementation for the benefit of families throughout the province. A strong negative opinion was voiced by the Chairman of the Legislation Committee of the New Brunswick Barristers' Society, Eric L. Teed, Q.C. Teed condemned the bill for encouraging bigamy, common law marriages and illegitimate children.

The aim of the reform legislation as stated in section 2 of the bill is to recognize the 'equal importance' of the contributions of spouses to their marriage through their duties of 'child care, household management and financial provision'. Those different but equal contributions to the family are the basis of each partner's entitlement to one-half of the 'marital property' and the 'marital debts'. The proposal then allows for a balancing of the equities between the parties through judicial discretion to vary the shares of each spouse—as, for example, where the marriage was very short-lived or one party dissipated the marital property.

The bill would also affect unmarried couples who have lived together for three years or longer, and would allow the courts to divide the property they acquired during their cohabitation by the same considerations applicable to wife and husband. It is the imposition of these responsibilities upon couples who are unmarried that has alarmed Teed and others who view this kind of reform as an unwarranted attack upon the sanctity of the family.

The present situation in marriage breakdown in New Brunswick leaves a deserted wife, for example, with the option of applying to the Provincial Court–Family Division for support, the quantum of which is normally awarded in accordance with applicable welfare rates; or of filing for divorce, which allows much greater possibility of property division; or of negotiating a separation agreement with her husband. If she has no grounds for divorce and her husband is unwilling to consider a separation agreement, then she must live on the meagre award collected by the Family Court. If she is a joint tenant with her husband in the matrimonial home or if she has worked with her husband in his business, she can start a civil action for a partition and sale or a declaration of trust. Of course, this kind of litigation is extremely slow and can be dragged on indefinitely by a vindictive husband who may try to starve his wife while she waits for discovery, transcripts, and a busy court docket. If this deserted spouse has custody of the children, her financial distress and insecurity will be severe. The idea that the welfare rolls will act as an adequate response to family breakdown is unacceptable to the community, both economically and morally.

The draftsmen of the New Brunswick reform legislation have divided the new family law between the Marital Property Act and Bill 92, the Child and Family Services and Family Relations Act. The latter bill attempts to deal with all issues concerning children in contact with the Department of Social Services. It includes proposals on child abuse, wardship, foster parenting, adoption, paternity suits, child support, custody and access. The breadth of this act is a potential problem, which the Family Law Committee of the Bar emphasized in its report to the Legislature's Law Amendments Committee. From the lawyer's point of view, the new law relating to the children of marriage breakdown should be included with Bill 79 or should be treated separately for the convenience of the bench and the bar. It seems very strange that the treatment of the children of separating parents should be an afterthought in an omnibus bill consolidating the powers of the Minister of Social Services and that the importance of children to the division of family property should not be mentioned in Bill 79. On the positive side, the proposed legislation states the list of considerations that must be reviewed by the courts in determining the 'best interests of the child', a phrase which has become the principle for awarding custody, but an ideal which could vary from judge to judge.

The support sections of the proposed Child and Family Services and Family Relations Act apply to a spouse as well as a child, and they are notable in that they base the determination of the amount of a maintenance award on need alone. This is a laudatory departure from the traditional rule that support depends on the conduct of the parties. However, s. 115(6) of the bill allows a judge to deny maintenance to a spouse who has acted in a way 'so serious and unconscionable as to constitute a repudiation of the relationship between spouses'. This unfortunate choice of words will undoubtedly open the courts to the usual arguments about adultery, as has already happened in Ontario.[1] The policy decision must be whether one act of adultery by a wife will prohibit her from receiving support, regardless of her need. Given the principles of contribution outlined in the Marital Property Act, new rules for maintenance should not be chained to the traditional bar of adultery, which has always been applied against a dependent wife.

The briefs presented to the Legislature's Law Amendments Committee have been sent to the draftsmen for review and a redrafting of the proposals is underway. It was the fervent hope of the majority of those persons who appeared before the Committee that the reform legislation would be enacted quickly and that New Brunswick would enter the 1980s with matrimonial law appropriate to the needs of its citizens.

[1] *Gilbert v. Gilbert*, 1979 10 R.F.L. (2d) 385.