Marriage: An Equal Partnership The Family Relations Act of British Columbia

Une année de travail du nouveau Family Relations Act a montré que le mariage en Colombie britannique est en effet une association égale.

Sardi Klein, from Women See Woman

The 'new' Family Relations Act of British Columbia was proclaimed in force on March 31, 1979. If three recent cases decided under this act are any indication, then marriage in B.C. has indeed become an equal partnership and the hard work of women's groups since 1972 to reform the matrimonial property legislation has produced the desired result.

B.C.'s family law reform goes further than any other provincial legislation, in the sense that Part 3, dealing with marital property, in essence states that every 'family asset' a husband and wife have,

Carol Huddart

regardless of who is the registered owner or how it was acquired, must be divided equally between the spouses on termination of the relationship. This includes, I believe, almost any business interest either spouse may have in his or her own name, whether acquired before or after this act came into force, unless acquired before marriage or by gift or inheritance.

What Is a Family Asset?

Two tests determine whether or not an asset is a 'family asset'. The first test is that of use. If an asset is ordinarily used for a family purpose it is a family asset. This test can encourage convoluted reasoning and probing; for example, if a business in which a husband has shares owns six automobiles, and his wife can use any one of them for her regular shopping, are all of these automobiles family assets? The onus of proving that an asset is not 'ordinarily used for a family purpose' is on the person opposing the claim.

The second, or contribution test, is one of the most important aspects of the act for homemakers and mothers. This test defines as a family asset any acquisition to which a spouse has contributed, either directly or indirectly. Directly, of course, means loaning or investing money or working in a business. An indirect contribution 'includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property'. Here the onus of proving that an asset is a family asset is on the claimant, who must satisfy the court that the 'non-owning' spouse made a direct or indirect contribution to the acquisition of the asset in question or to the operation of the business owned by the other spouse.

This means that the role of manager of the home and teacher of children is now recognized as being worth one-half of all of the assets acquired during the existence of the marriage. Marriage is therefore an equal partnership, the success of which has been founded upon the contribution by each partner of his or her own particular skills and efforts. Regardless of whose name is attached to any asset, it is one-half hers and one-half his.

So what does all this mean? It means that despite a husband's protestation that his business belongs to him, his wife is entitled to one-half of its value. It means that the securities a wife purchases with savings from the housekeeping allowance must be shared equally. It may mean that one-half the value of a college degree, or perhaps of a name or photograph (if he or she is a celebrity), must be shared. It certainly means that all pensions are to be shared equally. Above all, it means that a spouse must have competent assistance to protect his or her claim, to evaluate the assets, to negotiate a settlement or to conduct a trial.

The majority of matrimonial disputes are settled out of court by negotiating a separation agreement that fairly distributes the assets *in specie* or money's worth. Thus, if the only assets are a matrimonial home worth $100,000 and two cars each worth $6,000 and all are owned free and clear, the wife may want to settle for the house and one car while the husband keeps the business and one car.

The wife may want the husband to keep the business so that he can pay her and the children the amount of maintenance necessary to support the family in the manner to which it has become accustomed, taking into account the husband's ability to pay and the wife's obligation to contribute to her own and the children's maintenance and, eventually, to become self-supporting.

I recommend for immediate reading the thoughtful judgment of Judge Anderson of the Supreme Court of British Columbia in *Margolese v. Margolese*. It is a comprehensive analysis of the Family Relations Act, ably written in language all can understand.

In this case Judge Anderson found the following to be the facts:

(a) the parties had been married for almost 30 years;
(b) the parties had not lived separate and apart for any substantial period of time;
(c) no property was brought into the marriage by either the Petitioner or the Respondent;
(d) no assets had been dissipated or given away to third parties;
(e) none of the assets were acquired as a result of an inheritance or gift; and
(f) both parties were economically independent and self-sufficient.

He then determined that:

(a) the wife had made an indirect contribution through effective management of the home and the raising of the children; and
(b) she had contributed directly by assisting in the business when she could.

Judge Anderson's decision was to award the wife 50 per cent of the couple's combined assets. In so doing, he refused to vary the equal division, as he was entitled to do by section 51 of the act, holding that not enough evidence was produced by the husband to persuade him that an equal division would be unfair (having regard to the guidelines set out in section 51). Judge Anderson said, 'It was not intended to give the Court a general power to divide the "family assets" as deemed proper by the Court.' Rather the Court can exercise its power of apportionment if any of the circumstances listed in section 51 (a)–(e) exist, or pursuant to s. 51 in 'exceptional' circumstances. These factors are: (a) length of marriage; (b) length of separation; (c) date of acquisition or disposition of property; (d) extent to which property was acquired by one spouse as a gift or inheritance; and (e) the needs of

either spouse to become or remain economically independent and self-sufficient.

Thus, in a long marriage with children where neither spouse was a spendthrift or lazy, where neither inherited a significant amount and where neither brought to the marriage substantial assets, an equal division will be made. No attempt will be made 'to measure the respective contributions made by each of the parties.'

Marriage Agreements

Judge Fawcus in the *Robertshaw v. Robertshaw* case reached a similar conclusion in finding a medical practice to be a family asset even when the wife had been well paid for her services to the practice. In this case, however, the Judge varied the division because of the duration of the marriage (one year), the date of acquisition of the practice, and the wife's savings from her income from the practice.

If an equal partnership is not intended, or if either spouse wants to protect pre-acquired or inherited assets, then the act (in section 48) allows parties to make a marriage agreement provided that it is in writing and signed by both spouses. Such an agreement would at the least reverse the onus of proof and require the claiming spouse to prove that the division provided in the agreement is unfair. It would likely be enforced by the courts, who wish to encourage parties to order their own affairs without recourse to the courts. To ensure enforcement there should be a full disclosure, independent legal advice, and a fair agreement.

Maintenance

If the property division gives the dependent spouse sufficient assets to permit economic independence and self-sufficiency, then it is likely that maintenance will be ordered only for the dependent children, with each parent contributing to the children's needs in accordance with his or her ability to pay.

Where the property division does not permit such self-sufficiency, section 61 of the act permits the dependent spouse to apply for maintenance to enable him or her to become self-sufficient. This maintenance may be in the form of periodic payments or a lump sum.

This principle of self-sufficiency is the reverse side of the 'equal property division' coin, and may produce hardship for the average homemaker whose 'equal' share of the family assets is modest. *Rutherford* is an example of such a situation, with one difference. In this case Dr. Rutherford had an entitlement to substantial benefits from the government of B.C. on retirement. Mrs. Rutherford was held to be entitled to one-half of those benefits, adjusted for contributions made to the plan after their divorce. In what is already coming to be known as a 'Rutherford Order,' Judge Bouck ordered that, in addition to being entitled to share in the pension upon Dr. Rutherford's retirement, Mrs. Rutherford was to be designated as the beneficiary of survivor's benefits should he die before retirement. She was entitled to a monthly payment commencing on Dr. Rutherford's 55th birthday—the amount to be determined at that time, failing agreement, by the court. Dr. Rutherford is entitled to choose to retire at 55 years of age; if he does not retire, he deprives Mrs. Rutherford of a benefit to which she is entitled.

This sharing in a pension plan is part of property division and *not* maintenance. There will be cases, however, where there are few assets other than the family home, its contents, one or two cars, and perhaps an RRSP or an insurance policy. In these situations, where the wife has been a full-time homemaker, she may find herself obliged to fulfil the obligation imposed on her in Part 4 of the act: to do her best to become self-sufficient. The same will be true of a woman who has given up a career to marry, but whose marriage has ended quickly.

As had been the trend for some years under the *Divorce Act* of Canada, the courts will order maintenance of a rehabilitative nature, determined by the wife's needs and the husband's ability to pay, taking into account the wife's responsibility for child care.

The new *Family Relations Act* also deals with guardianship and custody of children (Part 1) and with the right to occupy the family home and use its contents. It does not deal with property rights on death.

Our first year's experience with the new act has given us reason to believe that the desire to remedy the unfairness of *Murdoch v. Murdoch* without the necessity for an appeal to the court to apply the principles of equity set out in *Rathwell v. Rathwell* has, in B.C., been fulfilled.

The government may, as a result of the *Margolese* decision, be placed under pressure to amend the act. We must await the Court of Appeal's affirmation of the principles of *Robertshaw*, *Rutherford*, and *Margolese*. But in the meantime, marriage in B.C. today, while not a guarantee of maintenance for life, is 'a partnership of equals'. When the marriage terminates, the parties are to go their own way as independently as possible while recognizing joint responsibility for their children.

References

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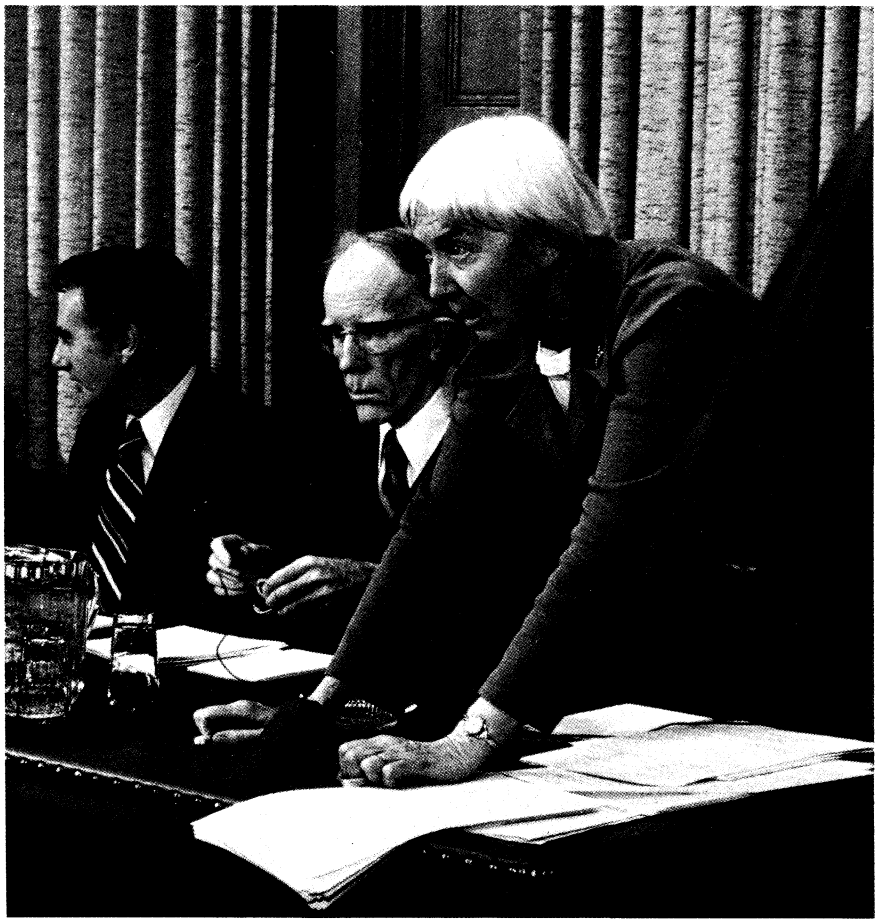
Laura Jones



National Action Committee, Ottawa

Kay MacPherson