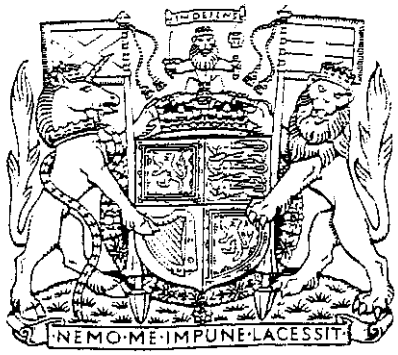

SCOTTISH LAW COMMISSION

CONSULTATIVE MEMORANDUM NO : 57

MATRIMONIAL PROPERTY
Vol 1: Parts I – V

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SCOTTISH LAW COMMISSION
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MATRIMONIAL PROPERTY

PART I

INTRODUCTION

1.1. In this consultative Memorandum we seek comments on possible reforms of the law of Scotland relating to the property of married couples. The possible reforms on which we seek views fall into two categories - (a) major reforms involving the introduction of more or less extensive community property or statutory co-ownership, and (b) minor reforms to the present system. The first category would include such options as the introduction of wide-ranging community property systems of the type found in many continental countries or the introduction of a scheme of statutory co-ownership of the matrimonial home. The second category would include such options as the introduction of presumptions of co-ownership of certain assets, such as normal household goods or funds in joint names, or the introduction of a right to apply to a court for the sharing of certain property in circumstances other than divorce. On some of these possible reforms we have come to provisional conclusions one way or the other. On other possible reforms, such as co-ownership of the matrimonial home, we have come to no provisional conclusion. There are arguments for and against statutory co-ownership of the matrimonial home. We set out the most important of these, and we give details of a possible scheme in order to elicit comments. Our conclusions on what reforms, if any, to recommend will be reached only after the most careful consideration of the comments received on consultation.

Scope of consultative Memorandum

1.2. In this consultative Memorandum we are concerned primarily with the property consequences of marriage during the subsistence of the marriage. We dealt with the financial

and property consequences of divorce in an earlier Report.[1] We intend to deal in a later consultative Memorandum with legal rights and succession rights on the dissolution of a marriage by death. There is, however, a certain amount of overlap between the subject matter of this Memorandum and the property consequences of the dissolution of a marriage by death or divorce and we shall refer, among other options, to solutions which would involve a radically new approach, in this country, to the property consequences of marriage both during its subsistence and on its dissolution.

Historical development of the law[2]

The common law

1.3. The view that the husband was "the natural head of the family"[3] for centuries determined Scots law's approach to the property consequences of marriage. The mere fact of marriage gave the husband extensive rights over the property owned at marriage or acquired thereafter by the wife. The wife's moveable property, subject to certain exceptions, became the absolute property of the husband by virtue of his jus mariti.[4] The transfer was by operation of law: nothing further, such as delivery or assignation, was needed.[5] The husband, as owner,

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[1] Scottish Law Commission, Report on Aliment and Financial Provision (Scot. Law Com. No. 67, 1981).

[2] See generally Anton, The Effect of Marriage on Property in Scots Law (1956) 19 M.L.R. 653, pp.653 to 656; Clive, The Law of Husband and Wife in Scotland (2nd edn. 1982) pp.295 to 299 (cited as "Clive").

[3] Per Lord Deas in McDougall v. City of Glasgow Bank (1879) 6 R. 1089 at 1091; see also Stair I.4.9, Erskine I.6.13 and Bell, Principles para. 1561.

[4] Fraser v. Walker (1872) 10 M. 837 per Lord Kinloch at 847. See also Fraser, "Husband and Wife" (2nd edn. 1876) pp.676 and 679 (cited as "Fraser"). Stair's suggestion at I.4.9 that the jus mariti imported only a sole and unaccountable power of administration fails to convey the full extent of the husband's rights.

[5] Stair, I.4.9; Erskine, I.6.13; Fraser, p.679.

could alienate the moveables at will, and was under no obligation to account. His creditors could attach the moveables in satisfaction of his debts. The wife was completely divested, and had no entitlement whatsoever to the property.[1] One exception to this rule related to the wife's paraphernalia:[2] goods used for the wife's personal adornment, and the repositories in which they were kept, did not fall to the husband. Another exception related to alimentary provisions for the wife.[3] These were for the maintenance of the wife personally, and could not be assigned. Marriage accordingly could not imply assignation to the husband. A third exception, very important in practice, related to cases where the jus mariti was excluded or renounced.[4] Donations or bequests to wives by third parties could be made under exclusion of the jus mariti.[5] Husbands could by antenuptial marriage contract renounce their jus mariti in respect of all or part of the wife's moveables.[6] Husbands' post-nuptial

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[1] See Lord Kinloch in Fraser v. Walker (1872) 10 M. 837 at 847. Wives had no right to be alimented from property they had brought into the marriage: Turnbull (1709) Mor. 5895; Robb (1794) Mor. 5900. The husband, however, took over the wife's antenuptial debts alongside her moveable property. He did not become personally obliged to her creditors, but his whole moveables were attachable in satisfaction of such debts: Stair I.4.17, Erskine I.6.16 to 19.

[2] Dicks v. Massie (1695) Mor. 5821, Stair I.4.17, Erskine I.6.15. See generally Fraser, pp.770 to 774.

[3] Stair I.4.17, Erskine, I.6.14; see Fraser pp.746 to 769.

[4] Until Walker v. The Creditors of Her Husband (1730) Mor. 5841 it was thought that operation of the jus mariti could be avoided only by the wife transferring property to third parties before marriage, to be held on her behalf while the marriage subsisted. Antenuptial contracts whereby the husband renounced his jus mariti were thought to be ineffectual because the wife's personal right thereunder would itself fall to the husband under his jus mariti: Stair I.4.9. See McDougall v. City of Glasgow Bank (1879) 6 R. 1089 per Lord Deas at 1091, also Fraser p.781.

[5] Erskine I.6.14; Young v. Loudoun (1855) 17 D. 998, especially per Lord Murray at 1001 and Lord Cowan at 1001 to 1002; Fraser, p.784.

[6] Erskine I.6.14; McDougall v. City of Glasgow Bank (1879) 6 R. 1089 per Lord Deas at 1091 to 1093. See generally Fraser, pp.781 to 796.

renunciations, however, were subject to revocation under the rule that donations between spouses were revocable during the spouse's lifetime.[1]

1.4. Where the jus mariti operated, the wife had certain rights on dissolution of marriage. In the case of dissolution by death,[2] a distinction was made between dissolution within a year and a day of marriage, and dissolution thereafter.[3] In the former case, unless a child had been born and heard to cry, restitutio in integrum was given.[4] In all other cases, the wife, or her executors if dissolution was by her death, recovered a third of the moveables if there were surviving children of the marriage, a half if there were none.[5] In the case of dissolution by divorce, the wife's rights depended on whether she was the innocent or the guilty party.[6] If innocent, she recovered as if the husband had died.[7] If guilty, she forfeited her claim.[8] Dissolution of the marriage had effects on heritage also. The wife was entitled to terce[9] (a liferent of a third

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[1] Stair I.4.18, Erskine I.6.29. See generally, Fraser pp.916 to 962. The revocability rule meant that paraphernalia donated to the wife, or alimentary provisions made by the husband during the marriage, could be attached by the husband's creditors as donations, despite their not falling under the jus mariti.

[2] These rights were not rights of succession, but rights to share in the "community" moveables on dissolution of the "community".

[3] Stair I.4.19.

[4] Stair I.4.19.

[5] Stair I.4.21.

[6] Stair I.4.20.

[7] Ibid. See also Fraser v. Walker (1872) 10 M. 837 per Lord President Inglis at 842.

[8] Ibid. The fact that the husband was also guilty did not alter this - Fraser v. Walker (1872) 10 M. 837 per Lord President Inglis at 843.

[9] See generally Walton on Husband and Wife (3rd edn. 1951) (cited as "Walton") pp.250 to 261.

of the husband's heritage) where dissolution was by the husband's death or by divorce where she was innocent.[1] Where dissolution was by the wife's death, or by divorce where the husband was innocent, the husband was entitled to courtesy (a liferent of the wife's heritage).[2] A guilty party in divorce had no rights over heritage.

1.5. Heritage, and moveables not falling under the jus mariti, were subject to the management and control of the husband in virtue of his jus administrationis.[3] The wife owned such property, but any dealing with it required the husband's consent. Only where the jus mariti was inapplicable and the jus administrationis was renounced or excluded[4] did wives have the same property rights as single women.

Statutory reforms

1.6. Successive statutory reforms departed from the common law approach. The result has been the replacement of a primitive system of community of goods (communio bonorum), in which the husband's rights (jus mariti, jus administrationis) were the dominant feature, by a separate property system in which each spouse owns and administers his or her own property. The main steps in this process are summarised below.

1.7. The Intestate Moveable Succession (Scotland) Act 1855 altered the law relating to the spouses' rights on the dissolution of a marriage by death. It abolished the special

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[1] Unless dissolution was within a year and a day of marriage, and no child had been born and heard to cry - Walton pp.250 and 251.

[2] See generally Walton pp.262 to 269. Courtesy was excluded if, whatever the duration of the marriage, no child had been born and heard to cry.

[3] See generally, Fraser, pp.796 to 799.

[4] By antenuptial marriage contract or donor's direction.

rules on dissolution by death within a year and a day of marriage.[1] More significantly, it abolished the right of the wife's executors to share in the husband's moveables on dissolution of the marriage by the wife's death.[2] The purpose of this reform was to prevent unfairness to husbands - who at common law would have lost a third or half of their moveables on the wife's death - even if the wife had brought no property into the marriage.

1.8. The Conjugal Rights (Scotland) Amendment Act 1861 reduced the husband's rights over his wife's property in certain cases where to give full effect to those rights was particularly harsh. It provided that where a married woman acquired property otherwise than by her own industry,[3] it should not fall under the husband's jus mariti or jus administrationis unless he made reasonable provision for her maintenance out of the property, provided such provision was claimed before the husband obtained possession.[4] The Act gave deserted wives the right to seek orders protecting property they acquired after desertion from seizure by the husband or his creditors.[5] Further, it provided that where a wife[6] obtained a decree of judicial separation, the husband should have no rights in property she acquired thereafter - even, in the absence of contrary agreement, if cohabitation was resumed.[7]

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[1] S.7.

[2] S.6.

[3] By donation, succession etc.

[4] S.16. And before his creditors, or others claiming through him, obtained real rights. See generally Fraser, pp.830 to 836.

[5] Ss.1 to 5.

[6] I.e. not the husband.

[7] S.6. Ss.1 and 6 averted the particular hardship the jus mariti caused to deserted and separated wives - see e.g. Fraser, p.824.

1.9. The Married Women's Property (Scotland) Act 1877 introduced further limited separation of property. The jus mariti and jus administrationis were excluded[1] in respect of earnings married women gained through their own industry.[2] Also, the husband's liability for the wife's antenuptial debts was restricted to the value of the property the husband received from, through, or in right of the wife at, or before, or subsequent to the marriage.[3]

1.10. The Married Women's Policies of Assurance (Scotland) Act 1880 gave wives the right to effect policies of assurance not subject to the husband's jus mariti or jus administrationis over their own and their husband's lives.[4] Policies effected by husbands over their own lives, expressed on the face of them to be for the benefit of their wives or children, were to be deemed held by the husband merely as trustee for the beneficiaries.[5]

1.11. The Married Women's Property (Scotland) Act 1881 finally abolished the jus mariti.[6] The Act also gave the husband a right (equivalent to the wife's right to share in the husband's moveables on the dissolution of the marriage by his death) to share in the wife's moveables on the dissolution of the marriage by her death.[7]

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[1] S.3.

[2] I.e. received in employment, or in the exercise of her own trade or own business, or for literary, artistic or scientific skills etc. It was subsequently decided, however, that the 1877 Act only applied where the wife's earning was wholly removed from the husband's participation and control. Thus, the husband's rights would not be excluded in respect of earnings derived from employment by the husband or from carrying on a trade together with him etc.: see McGinty v. McAlpine (1892) 19 R. 935, especially Lord President Robertson at 940, and Dryden v. McGibbon 1907 S.C. 1131, especially per Lord Ardwall at 1142.

[3] S.4.

[4] S.1. The Act was amended by the Married Women's Policies of Assurance (Scotland)(Amendment) Act 1980. It now applies equally to both spouses.

[5] S.2.

[6] S.1.

[7] S.6. This is known as the jus relicti.

1.12. The Married Women's Property (Scotland) Act 1920 abolished the jus administrationis,[1] and, subject to one exception, the rule that donations between spouses were revocable while both were alive.[2]

1.13. The Succession (Scotland) Act 1964 abolished terce and courtesy,[3] and replaced the innocent wife's entitlement to a fixed share of the husband's moveables on divorce with a system of discretionary awards of a periodical allowance or capital sum or both.[4]

The separate property rule

1.14. Thus, a system of separation of property between spouses, where marriage had almost no property consequences, was produced. It should be noted, however, that Scots law has never applied the principle of separate property without modification after the dissolution of a marriage by death or divorce. On death the surviving spouse has always had legal rights which could not be defeated by will.[5] On divorce the innocent spouse formerly had legal rights and both spouses now have the right to apply for financial provision.[6] This may take the form of a capital sum which, in effect, redistributes the spouses' property on divorce. As we note later, recent statutes have also modified the separate property principle in relation to savings from a wife's housekeeping allowance[7] and occupancy rights in the matrimonial home.[8]

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[1] S.1.

[2] S.5. Donations made less than a year and a day before the donor's sequestration remained revocable at the donor's creditors' instance.

[3] Ss.10(1) and 25.

[4] S.25 et seq.

[5] See para. 2.9 below.

[6] See para. 2.8 below.

[7] Married Women's Property Act 1964. See para. 2.6 below.

[8] Matrimonial Homes (Family Protection)(Scotland) Act 1981. See para. 2.5 below.

1.15. Subject to certain restrictions,[1] spouses have always been free to regulate property ownership by marriage contracts.[2] Such contracts, particularly antenuptial marriage contracts, were extremely common and important in the nineteenth century. Marriage contracts, however, declined in importance as separation of property between spouses increased. They are rare today. Where they are entered into, the reasons are more likely to be fiscal than a desire to alter the normal property consequences of marriage. As we shall see later, however, it is common for spouses to take the title to their home in joint names.[3]

Factual Background to Present Law

1.16. In 1979, we commissioned a study by the Social Survey Division of the Office of Population Censuses and Surveys, to investigate, among other things, the actual ownership of property by married couples in Scotland, particularly in relation to the matrimonial home and household goods. The results of this study were published in 1981 and have been of great value to us.[4]

1.17. Matrimonial home. In considering ownership of the matrimonial home, it should be borne in mind that Scotland has a significantly higher proportion of public sector tenancies,[5] and a significantly lower proportion of owner occupied homes,[6] than the rest of Britain. In relation to the division of property rights in the matrimonial home, the survey showed a marked difference between the situation where the home was

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[1] See para. 1.3 above.

[2] See generally, Clive pp.345 to 357.

[3] See para. 1.17 below.

[4] A.J. Manners and I. Rauta, Family Property in Scotland H.M.S.O., 1981) (cited in this Memorandum as "Manners and Rauta").

[5] 54% of all matrimonial homes, as against 29%-30% elsewhere in Britain. See Manners and Rauta, Table 2.1.

[6] 37% of all matrimonial homes, as against 57-59% elsewhere in Britain. See Manners and Rauta, Table 2.1.

owned, and the situation where it was occupied under a lease. Almost all leases of homes occupied by married couples, in both the public and the private sector, were in the name of one spouse alone.[1] Of these, the overwhelming majority were in the name of the husband.[2] The majority of owner-occupied matrimonial homes, on the other hand, were owned in common.[3] The survey disclosed a marked trend towards ownership in common. The more recently a home had been purchased, the greater was the likelihood that title had been taken in the names of both spouses.[4] On the basis of this trend, one can expect that over 80% of couples buying a home today will take title in joint names. Where the matrimonial home was owned by one spouse alone, the husband was much more likely to be the owner than was the wife.[5] Most owner-occupying couples had bought their home but 3% had acquired it by inheritance and 1% by gift.[6]

1.18. Household goods and car. All married couples in the survey owned at least some moveable property. The proportions owning certain types of property are shown in the following table.[7]

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[1] 93% of leases were in the name of only one of the spouses. Only 5% of couples were joint leaseholders, and such joint holding was almost entirely confined to public sector tenancies. In the other 2% the home was rented in the name of a child or parent or there was no formal arrangement. See Manners and Rauta, Table 2.3.

[2] The husband was the sole tenant in 85% of leased matrimonial homes. See Manners and Rauta, Table 2.3.

[3] 57% were owned in common. See Manners and Rauta, Table 2.4. "Ownership in common" is the technically correct term for the normal situation of co-ownership. "Joint ownership" is an unusual form of ownership which is in practice confined to trusts and unincorporated associations. See Magistrates of Banff v. Ruthin Castle, 1944 S.C. 36.

[4] Thus, between 1930 and 1959, 31% of couples acquiring a home took title in joint names. Between 1977 and 1979, however, 78% did so. See Manners and Rauta, Table 2.4. This trend was found established irrespective of the age of the couples concerned. See Manners and Rauta, p.4.

[5] Ibid. Table 2.4. In 37% of cases the husband was the sole owner and in 5% of cases the wife was the sole owner. In 1% of cases the title was held at least in part by third parties.

[6] Ibid., p.4.

[7] Derived from Manners and Rauta, Table 2.9.

Goods	Owners as % of all married couples	Goods	Owners as % of all married couples
Furniture	100	Washing machine	93
Vacuum cleaner	98	Record player	66
Refrigerator	97	Car	52
Cooker	97	Television	47[1]

Because of the lack of any documentary title to these goods and the difficutlies often encountered in determining the legal ownership of them[2] it was not practicable to ascertain how ownership was split between husband and wife.

1.19. Savings accounts and current accounts. The rule that savings are, in the absence of donation, owned by the spouse who provided the funds also made it impracticable for the survey to ascertain the legal ownership of funds in savings accounts and current accounts. Spouses were therefore merely asked in which name accounts stood. It was found that couples where neither spouse had a savings account, or where only one had such an account, were relatively few. In most cases both spouses, either jointly or separately, had small savings accounts.[3] The majority of couples were found to have at least one joint savings account.[4] Just over half of the couples had at least one current account at a bank or Post Office.[5] Sixty four per cent of the couples who had only one account had it in joint names.[6] Twelve per cent of couples had more than one current account.[7]

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[1] The question specifically excluded rented television sets.

[2] See para. 2.2 below.

[3] In 73% of couples, both spouses (either jointly or separately) had savings accounts; in 15% of couples only one spouse had such an account, and in 12% of cases neither spouse had such an account. See Manners and Rauta, Table 2.11. The amounts of savings held were often low. Only 41% of couples estimated the value at over £1,000 and only 15% at over £5,000. Ibid. Table 2.16.

[4] 53% of couples had joint savings. See Manners and Rauta, Table 2.11.

[5] Manners and Rauta, Table 2.12.

[6] Ibid.

[7] Ibid. The most common pattern in this group was for the husband to have one account and the wife to have one.

1.20. Life insurance and pension rights. Rights under life insurance policies and private pension schemes, which spouses generally own individually, were found to be significant items of property.[1] Rights under pension schemes, being dependent on employment of a certain type, tended to be predominantly owned by husbands alone.[2] Rights under insurance policies were, however, owned by both spouses in the majority of couples, though where one spouse only had such rights, this was much more likely to be the husband than the wife.[3]

1.21. Stocks and shares etc.[4] Eight per cent of husbands and five per cent of wives were found to have unit trusts, property bonds, stocks or shares, or other financial investments in their sole names, and two per cent of couples had such investments in joint names.

1.22. Other property.[5] Some couples owned buildings or land apart from the family home. One per cent of husbands and one per cent of wives were sole owners of such property. One per cent of couples owned such property jointly and one per cent owned it in the names of one or both spouses jointly with other persons.

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[1] 89% of couples had at least one life insurance policy; in 56% of couples, at least one spouse had rights under a private pension scheme. See Manners and Rauta, Table 2.13.

[2] In 39% of couples, the husband alone had rights. In 11% of couples both spouses had such rights, and in 6% of couples only the wife had such rights. See Manners and Rauta, Table 2.13.

[3] Both spouses had rights under a policy in 64% of couples. The husband alone had rights in 21% of couples, the wife alone in 4% of couples. See Manners and Rauta, Table 2.13.

[4] Ibid., p.7.

[5] Ibid., p. 7.

1.23. Businesses.[1] Eight per cent of couples had at least one business. Five per cent of husbands and one per cent of wives owned a business, either alone or with people other than the spouse. Two per cent of couples owned a business jointly.

1.24. Date of acquisition of property.[2] Married informants were asked in the family property survey if they had owned certain types of property at the time when they got married. Three per cent had owned a house or land, and 43% had owned some personal savings. Many had also owned a car (22% of husbands and 3% of wives). People who had been married before were more likely to have owned a home or a car at the date of their second marriage. About ten per cent of previously married people, for example, owned a home at the date of their second marriage. Women were as likely as men to own a house or savings at the time of their second marriage but less likely to own a car.

1.25. Contributions.[3] Married informants were asked about their respective contributions in money and work in and around the home towards setting up and maintaining their household. The question on work was in the following terms. "Thinking about work done in the home - including housework, do-it-yourself, looking after the family, gardening and so on - did you and your husband/wife each make about the same contribution, or did one of you make a larger contribution than the other?" The results are shown in this table.[4]

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[1] Ibid., p.7.
[2] Ibid., pp.10 and 11.
[3] Ibid., pp.9 and 10.
[4] Ibid., Table 2.18.

Relative contributions of husband and wife in money and unpaid work at home, by sex of partner

Contribution in informant's marriage:	Money		
	Husbands	Wives	All
	%	%	%
Greater by husband	67	76	71
Same by both partners	29	19	24
Greater by wife	4	5	5
Contribution in informant's marriage:	**Unpaid work at home**		
	Husbands	Wives	All
	%	%	%
Greater by husband	5	4	5
Same by both partners	51	50	50
Greater by wife	44	46	45

1.26. Summary. Many married couples in Scotland own very little property. In many cases the couple's property consists of household goods, some small savings[1] and, possibly, a car.[2] Those who own their home tend to have larger amounts of savings and other assets than those who do not, but even among owner occupiers property is generally confined to the home, the household goods, the car and some savings.[3] In addition most couples have some life insurance or pension rights.[4] The general picture revealed by the survey on family property in Scotland is fairly clear. The law on matrimonial property must, however, apply to all cases, non-typical as well as typical. A law which produced fair enough results in the typical case might nevertheless be unacceptable if it produced results which were perceived as unfair in a significant number of non-typical cases. Indeed it is the cases which are non-

[1] Ibid., Table 2.14. About 26% owned household goods and savings.

[2] Ibid., Table 2.14. About 30% owned household goods, savings, and a car.

[3] Ibid., pp.7 to 9.

[4] Ibid., Table 2.13.

typical, in that they involve more property and more different types of property than normal, which are likely to give rise to most difficulty in applying the law on matrimonial property. It is clear from the survey on family property in Scotland that there is a significant number of such non-typical cases. In describing the general social picture it is natural to make such statements as "only 5% of married owner-occupiers have their house in the wife's name", or "only 5% of wives own financial investments other than the usual types of savings or current accounts" or "only 8% of married couples own a business" or "only 3% of married people owned heritable property at the date of their marriage". In considering the implications for law reform it is as well to remember that "as many as" 5% or 8% or 3% may fall into these categories. Even one per cent of married couples in Scotland represents a significant number of people.

The Royal Commission on Marriage and Divorce

1.27. Matrimonial property law in both Scotland and England was considered by the Royal Commission on Marriage and Divorce which reported in 1956.[1] The Commission rejected[2] the introduction of a system of community of property between spouses. It thought that a community system would produce more, rather than less, injustice than the existing separate property rules, while being necessarily much more complex and difficult to operate.[3] Community of property limited to the matrimonial home and household goods was rejected on the same grounds.[4]

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[1] Cmnd. 9678 (cited as "Morton Report").

[2] By a majority of twelve members to seven.

[3] Morton Report, para. 651.

[4] Ibid. The Commission recommended, however, at para. 701 that savings from a housekeeping allowance should, in the absence of an agreement to the contrary, be deemed owned by the spouses in equal shares. This recommendation was implemented, but not in the precise terms recommended by the Royal Commission, by the Married Women's Property Act 1964, s.1.

The recommendations of the Law Commission for England and Wales

1.28. In 1971, the Law Commission in a working paper[1] gave more detailed consideration to the question of whether community of property between spouses, either in relation to property generally, or in relation only to the matrimonial home and household goods, should be introduced in England and Wales. With regard to the introduction of a general scheme of community of property, the Commission set out a possible scheme, without making any proposals.[2] The scheme put forward was one of deferred community of property. It envisaged each spouse remaining free to deal with his or her property independently, while the marriage subsisted, subject only to certain restrictions required to protect the interests of the other spouse.[3] On termination of the marriage, however, there would be equalisation of property.[4] Equalisation under the scheme would be limited to property the spouses had acquired, otherwise than by gift or inheritance, during the subsistence of the marriage.[5] It was envisaged that rights to equalisation would be available alongside spouses' rights on dissolution of marriage by divorce, judicial separation and declaration of nullity,[6] and spouses'

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[1] Published Working Paper No. 42, Family Property Law. (Cited as "Working Paper 42").

[2] See generally, Working Paper 42, pp.261 to 315.

[3] See Working Paper 42, pp.279 to 281.

[4] Where termination was by the death of one of the spouses, the Commission proposed that there should only be equalisation where this would favour the surviving spouse, i.e. a surviving spouse should not have to make equalisation payments to the deceased spouse's estate. See Working Paper 42, pp.300 to 302. The scheme also envisaged equalisation on the application of one of the spouses during the subsistence of the marriage, either where the spouses had agreed on equalisation, or where the other spouse had abused the right to administer his or her own property. Once an equalisation during marriage had taken place, the spouses would hold their property separately, and there would be no further equalisations. See Working Paper 42, pp.293 and 294.

[5] See Working Paper 42, pp.283 to 291. Spouses would be free to contract out of the scheme, either before or during the marriage. See Working Paper 42, pp.279 and 280.

[6] See Working Paper 42, pp.298 to 300.

rights in succession.[1] With regard to the matrimonial home, the Commission again put forward a possible scheme without making specific proposals.[2] Under the scheme, where one spouse owned the matrimonial home, or the right to occupy it under a lease, the other spouse would automatically acquire half of the owner spouse's beneficial interest in the home. The owner spouse would no longer be the absolute onwer, but would hold the home or the lease merely as a trustee, on behalf of himself or herself, and the other spouse, in equal shares.[3] As the transfer would be automatic, there would be no public record of the acquiring spouse's interest. The scheme accordingly envisaged special provisions being made to protect the acquiring spouse from the other's dealing with the property after a half share of the beneficial interest had passed.[4] The matrimonial home scheme would also operate alongside spouses' rights on dissolution of marriage and spouses' rights in succession.[5] The Commission did not regard the introduction of co-ownership of household goods as a first priority. Instead, they proposed that a spouse's right to occupy the matrimonial home should carry with it the right to use and enjoy the household goods.[6]

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[1] See Working Paper 42, pp.302 to 304.

[2] See generally, Working Paper 42, pp.52 to 114.

[3] Neither spouse, however, could alienate his or her share of the beneficial interest during the marriage without the other's consent. See Working Paper 42, pp.88 to 91. The scheme would be applicable where the owner spouse owned the home or the lease before the marriage, but not where he or she had acquired the home or the lease by gift or inheritance. See Working Paper 42, pp.99 and 100. Spouses would be free to contract out by mutual agreement. See Working Paper 42, pp.92 and 93.

[4] See Working Paper 42, pp.102 to 108.

[5] See Working Paper 42, pp.113 and 114.

[6] See generally, Working Paper 42, pp.123 to 153.

1.29. The working paper was followed, in 1973, by a report, which made recommendations in the light of comments received on the working paper.[1] The Commission, while not putting forward any specific scheme, recommended the introduction into English law of a scheme of statutory co-ownership of the matrimonial home, under which husband and wife would automatically own their home in equal shares, unless they had agreed otherwise.[2] The introduction of a system of community of property such as that suggested in the working paper was, however, rejected.[3] It was felt that such thorough-going reform would be unnecessary if co-ownership of the matrimonial home were introduced, given the courts' wide discretionary powers to award financial provision on divorce and the existing and proposed law on family provision on death.[4]

1.30. A further report in 1978 put forward detailed schemes, to enable the recommended principles to be put into effect.[5] In relation to co-ownership of the matrimonial home, the recommended scheme was broadly similar to the scheme suggested in the working paper.[6] Thus, where one spouse had a beneficial interest in the matrimonial home, or in the right to occupy it under a lease, he or she and the other spouse would

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[1] Law Commission No. 52, First Report on Family Property: A New Approach. (Cited as "Law Commission 52").

[2] See generally, Law Commission 52, pp.4 to 10.

[3] See generally, Law Commission 52, pp.15 to 19.

[4] See Law Commission 52, pp.18 and 19.

[5] Law Commission No. 86, Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods. (Cited as "Law Commission 86").

[6] See generally, Law Commission 86, pp.7 to 240. The scheme in the report was worked out in much greater detail than the scheme in the working paper.

automatically own that beneficial interest in equal shares.[1] On the death of one of the spouses, his or her share in the beneficial ownership would automatically pass to the survivor.[2] Each spouse would, during life, be free to alienate his or her share of the beneficial interest. Restrictions on this freedom, to protect the other spouse, were felt unnecessary, as in practice such shares would be virtually unmarketable.[3] Spouses would remain free to contract out of the scheme, either by express agreement, or by their adopting their own form of co-ownership of the matrimonial home.[4] A complex scheme of rights, to be made inherent in co-ownership,[5] was envisaged to protect the acquiring spouse, whose interest would not be on a public register, from the dealings of the other spouse.[6] Thus, dispositions of the home, or part thereof, would require the consent of both spouses.[7] An acquiring spouse, not on the legal title, would be entitled to apply to the court to be entered on the legal title as a joint trustee,[8] or could give prospective purchasers notice

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[1] See Law Commission 86, pp.8 to 32. The scheme would apply to matrimonial homes owned by one of the spouses before marriage, and homes acquired by gift or inheritance. In the former case the owner spouse could, however, exclude the operation of the scheme by an antenuptial declaration: in the latter, the scheme could be excluded by a direction of the donor. See Law Commission 86, pp.32 to 37. The report also differed from the working paper in its approach to matrimonial homes which were part of a larger whole. It recommended that where severance of the matrimonial home from the remainder was impracticable, the scheme should not operate: where severance was practicable, only the matrimonial home should be co-owned. See Law Commission 86, pp.17 to 20. Other exceptions to the scheme are considered in Law Commission 86, pp.44 to 51.

[2] See Law Commission 86, pp.8 and 9.

[3] See Law Commission 86, pp.23 and 24.

[4] See Law Commission 86, pp.37 to 44.

[5] The Commission recommended that these rights should also be given to spouses who were co-owners otherwise than under the scheme. See Law Commission 86, p.61.

[6] See generally, Law Commission 86, pp.61 to 98.

[7] See Law Commission 86, pp.71 to 76.

[8] See Law Commission 86, pp.76 to 79.

of his or her rights by registration of a notice.[1] Where one matrimonial home was sold and another acquired, each spouse would have the right to require the other to contribute towards the cost of acquiring the new home, from the other's half share of the proceeds of the old.[2] The scheme would operate alongside spouses' rights on dissolution of marriage and spouses' rights in succession.[3]

1.31. In relation to household goods, the report rejected the working paper's suggestion that a right to use and possess such goods should be linked to each spouse's right to occupy the matrimonial home. Instead, the Commission recommended that each spouse should have the right, at any time during the subsistence of the marriage, to apply to the court for an order giving him or her the right to use and possess certain or all of the household goods.[4] Such orders would cease to have effect on the dissolution of the marriage by divorce, judicial separation or declaration of nullity, on the death of either spouse, or at an earlier time set by the court.[5]

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[1] See Law Commission 86, pp.79 to 94. Where the acquiring spouse's interest was registered, buyers from the other spouse would be subject to the rights of the acquiring spouse.

[2] See Law Commission 86, pp.94 to 97.

[3] See Law Commission 86, pp.51 and 52.

[4] See generally, Law Commission 86, pp.335 to 363. The court would have no power to make orders in respect of goods in which third parties had property rights. See Law Commission 86, pp.349 and 350.

[5] See Law Commission 86, pp.347 and 348.

1.32. In their most recent report, in 1982,[1] the Law Commission re-affirmed their support for automatic co-ownership of the matrimonial home.[2] They recommended the implementation, with minor amendments, of the co-ownership scheme worked out in the 1978 report, under which spouses would, in the absence of an agreement to the contrary, own the beneficial interest in the matrimonial home in equal shares. The acquiring spouse's interest would be registrable, and only a registered interest would prevail against third parties acquiring the home from the other spouse.[3] As a further protection, dealings with the matrimonial home would require the consent of both spouses, wherever both had ownership interests in the matrimonial home.[4]

1.33. We should point out that some of the difficulties which the Law Commission's recommendations are designed to meet do not arise in Scotland. In Scots law the ownership of a matrimonial home is not usually a matter of uncertainty as it often is in England. In Scotland proprietary rights in land and houses depend on registration. In England "proprietary interests can arise informally in equity as a result of the doctrines of resulting, implied and constructive trusts".[5] A spouse may be held entitled to such an interest

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[1] Law Commission No. 115, The Implications of Williams & Glyn's Bank Ltd v. Boland. (Cited as "Law Commission 115"). The House of Lords in Boland [1981] A.C. 487 held that a third party acquiring land from a registered legal owner took the land subject to the unregistered interest of an owner of a share of the beneficial interest in the land, where that beneficial co-owner was in actual occupation. For a summary of Boland, and a consideration of the effects of the decision, see generally Law Commission 115, pp.1 to 31. The Commission's scheme for co-ownership of the beneficial interest in the matrimonial home had assumed that the interest of a beneficial co-owner would only prevail where it had been registered. See Law Commission 86, paras. 68 and 69, at pp.29 and 30. Boland and the conveyancing problems to be expected as a result of the decision hence made a reconsideration necessary.

[2] See Law Commission 115, pp.45 to 49.

[3] See Law Commission 115, pp.32 to 36. This would reverse the effect of Boland and so counter the problems the case raised.

[4] See Law Commission 115, pp.40 to 42.

[5] See Law Commission 115, p.4.

on the basis of contributions to the cost of acquiring or improving the home "but the circumstances in which a trust of this kind will arise are not always easy to predict".[1] The present law is regarded as confused and uncertain.[2] The problems are rendered more acute because the unregistered beneficial interest of a person in actual occupation of a house may prevail over the rights of a purchaser from the person appearing on the legal title.[3] These conveyancing and property considerations provide one justification for introducing statutory co-ownership of the matrimonial home[4] which does not apply in Scotland.

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[1] Ibid.

[2] Ibid., p.5.

[3] Williams & Glyn's Bank Ltd. v. Boland [1981] A.C. 487.

[4] See Law Commission 115, p.46.

PART II

SUMMARY OF PRESENT LAW

General rule during marriage

2.1. The general rule in Scots law is that marriage does not of itself affect the ownership or administration of property. Unless property has been conveyed to them both jointly or they have voluntarily taken their property in joint names, the spouses own and deal with their property separately.

2.2. Money and moveables. The application of the general rule means, first, that each spouse owns his or her earnings and other income.[1] Money in bank accounts and savings generally are, in the absence of any donation to the other spouse, owned by the spouse who provided the funds.[2] The name in which the account stands is not conclusive.[3] Thus the rule applies, in theory, even where the account is taken in joint names, with both spouses entitled to draw on it.[4] Corporal moveables are owned by the spouse who acquired them on his or her own behalf. There is no presumption of ownership in common, even where both spouses use the goods.[5] Wedding presents are, due to their nature, in a peculiar position. If the donor's intention can be established (by his direct evidence, by evidence of his expressed intention, or its being admitted), or inferred from the circumstances (e.g. the nature of the gift), then it will determine

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[1] Smith v. Smith 1933 S.C. 701, Preston v. Preston 1950 S.C.253.

[2] Smith v. Smith 1933 S.C. 701, Johnstone v. Johnstone (1943) 59 Sh. Ct. Rep. 188, Preston v. Preston 1950 S.C. 253.

[3] Smith v. Smith 1933 S.C. 701.

[4] Johnstone v. Johnstone (1943) 59 Sh. Ct. Rep. 188. In practice money in accounts in joint names will very generally be regarded as owned in equal shares, at least where both spouses have contributed.

[5] Harper v. Adair 1945 J.C. 21, per L.J.-G. Normand at 28; see also Duncan v. Gerrard (1888) 4 Sh. Ct. Rep. 246, and Allan v. Wishart (1890) 6 Sh. Ct. Rep. 185.

ownership.[1] Where there is no such indication, it has been suggested that the spouses own the gift in common.[2] Where one spouse acquires moveables on behalf of the other, or partly on behalf of the other, ordinary agency principles must be applied to determine ownership.[3] Where only one spouse is in a position to provide funds for the purchase of household goods, the practical effect of these rules will often be that he or she alone will own any that are bought.[4] Similarly, where goods are being acquired under a hire purchase or conditional sale agreement, only the debtor in the agreement can exercise rights thereunder to acquire ownership in the goods.[5]

2.3. Heritable property. Ownership of heritage generally follows recorded title.[6] A spouse who acquires a house and

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[1] McDonald v. McDonald 1953 S.L.T. (Sh. Ct. Rep.) 36. See also Strain v. Strain (1885) 2 Sh. Ct. Rep. 108, Duncan v. Gerrard (1888) 4 Sh. Ct. Rep. 246, and Anton, "Some Questions of Property between Spouses" 1955 S.L.T. (News) 193 and 197, esp. at p.194.

[2] McDonald v. McDonald 1953 S.L.T. (Sh. Ct. Rep.) 36.

[3] These principles may be very difficult to apply where one spouse uses the other's funds or funds deriving from both parties. It has been suggested that where both spouses contribute to the acquisition of goods, these are owned in common: McDonald v. McDonald 1953 S.L.T. (Sh. Ct. Rep.) 36. There is much to be said for such an approach where application of the ordinary rules does not produce a clear determination of ownership, due e.g. to a lack of evidence, but it cannot be said to be supported by clear authority. There is certainly no firm authority in Scots law for any special rule applying to acquisitions by married people.

[4] See Peggie v. Rex & Co. (Falkirk) Ltd. (1946) 62 Sh. Ct. Rep. 142; also Duncan v. Gerrard (1888) 4 Sh. Ct. Rep. 246, McIntosh v. Macrae (1887) 4 Sh. Ct. Rep. 317, Allan v. Wishart (1890) 6 Sh. Ct. Rep. 185, and Anton, "Some Questions of Property between Spouses" 1955 S.L.T. (news) 193 and 197 at p.194.

[5] Where the goods are furniture and plenishings of the matrimonial home, which are reasonably necessary to enable the home to be used as a family residence, the spouse of such debtor is entitled to make payments etc. in respect of the goods: Matrimonial Homes (Family Protection)(Scotland) Act 1981, s.2(5).

[6] Special considerations may arise where one spouse has taken title in the name of the other, or in the names of both spouses without the other's participation. On these, see Clive, pp.308 to 313.

takes title in his or her own name will be the sole owner of it.[1] If the spouses acquire a house jointly, and take title in joint names, they own it in common.[2] The same principles apply where a real right of ownership has not been obtained by recording,[3] and heritage is possessed merely in virtue of a personal right to obtain ownership - for example under a contract of sale, or under a contract obliging a creditor to reconvey the property on repayment of a loan. A spouse who has contracted, on his own behalf, to obtain ownership, alone has the personal right to do so: if both have contracted, the right is owned in common.[4]

Principal exceptions to general rule

2.4. The main exceptions to the general rule that spouses own and administer their property as if they were unmarried are in relation to occupancy rights and other rights in the matrimonial home, savings from a housekeeping allowance, and sequestration.

2.5. Occupancy and other rights in relation to the matrimonial home. Where one spouse alone owns the matrimonial home the other spouse has no ownership rights. The Matrimonial Homes (Family Protection)(Scotland) Act 1981, however, gives such non-entitled spouses occupancy rights in the matrimonial home, plus certain subsidiary and consequential rights required to make the occupancy rights meaningful.[5]

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[1] Millar v. Millar 1940 S.C. 56; Fraser, pp.687 and 688.

[2] See e.g. Hay's Trs. v. Hay's Trs. 1951 S.C. 329; Steele v. Caldwell 1979 S.L.T. 228, per Lord Allanbridge at 232 and 233.

[3] In the Register of Sasines or Land Register.

[4] Cf. McDougall v. McDougall 1947 S.N. 102, Cairns v. Halifax Building Society 1951 S.L.T. (Sh. Ct. Rep.) 67.

[5] Ss.2 and 3(2). Occupancy rights can be renounced by a non-entitled spouse under s.1(5).

When not in occupation, such spouses have the right to enter into and occupy the matrimonial home.[1] When in occupation, they have the right not to be excluded by the entitled spouse.[2] Such occupancy rights generally cannot be defeated by the entitled spouse's dealing[3] with the matrimonial home.[4] Thus, a spouse who is sole owner of a matrimonial home is not deprived of ownership as such, but his or her freedom to exercise the rights of an owner is greatly restricted. The 1981 Act also gives a spouse who has occupancy rights in the matrimonial home the right to seek an order entitling him or her to possession and use in the matrimonial home of such furniture and plenishings of the other spouse as are reasonably necessary to enable the home to be used as a family residence.[5] Again the property rights of the owner are not affected but his freedom to deal with the goods is greatly restricted.

2.6. Savings from wife's housekeeping allowance. Savings a wife derives from a housekeeping allowance provided by her husband, and property acquired with such savings, are subject to a special rule. The Married Women's Property Act 1964 provides that, unless the spouses agree otherwise, these belong to the husband and the wife in common in equal shares.[6]

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[1] S.1(1)(b).

[2] S.1(1)(a).

[3] "Dealing" for these purposes is defined in s.6(2).

[4] S.6. There are exceptions: see s.6(3). Most notably, s.6 does not apply where the matrimonial home is bought by a third party in good faith, provided the entitled spouse at the time of dealing produced to him either an affidavit to the effect that there is no non-entitled spouse; or a renunciation of occupancy rights; or a consent to the dealing, bearing to have been properly made or given by the non-entitled spouse: s.6(3)(e).

[5] S.3(2).

[6] The Act does not apply to the situation where a husband makes savings from a housekeeping allowance made to him by his wife. Such savings would belong to the wife, under the normal rule, as she provided the funds: Preston v. Preston 1950 S.C. 253.

2.7. Sequestration. Special rules which depart from the general principles of separation of property also apply in regard to sequestration. The Married Women's Property (Scotland) Act 1881 provides that a wife's funds which have been lent or entrusted to her husband, or have otherwise become inmixed with his funds, should, on the husband's sequestration, be treated as part of his sequestrated estate. A wife may claim against the sequestrated estate in respect of such funds, but her claim is postponed to those of all the husband's creditors for value.[1] The Married Women's Property (Scotland) Act 1920 provides (as an exception to the rules that donations between spouses, like donations between persons who are not married, are irrevocable) that donations between spouses should be revocable at the instance of the donor's creditors where the donor is sequestrated within a year and a day of the donation.[2]

Patrimonial effects of dissolution of marriage

2.8. Divorce. On dissolution of a marriage by divorce, either spouse can apply to the court for financial provision under the Divorce (Scotland) Act 1976,[3] and the court may order payment of a periodical allowance[4] or a capital sum[5] or variation of a marriage settlement which takes effect on or after dissolution of marriage.[6] An applicant spouse may apply for one or more of these orders. The court also has

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[1] S.1(4). There is no corresponding provision in respect of the situation where a husband's funds are inmixed with those of his wife at her sequestration. We have recommended that there should be. See our Report on Bankruptcy and Related Aspects of Insolvency and Liquidation (Scot. Law Com. No. 68, 1982) para. 11.16.

[2] S.5(b). We have recommended the repeal of this rule. Scot. Law Com. No. 68, para. 12.22.

[3] S.5.

[4] S.5(1)(a).

[5] S.5(1)(b).

[6] S.5(1)(c).

power, in a divorce action, to transfer the tenancy of the matrimonial home from one spouse to the other.[1] Under the present law there is no clear objective to financial provision on divorce. The award is at the discretion of the court, which is directed by the Act to make "such order, if any, as it thinks fit, having regard to the respective means of the parties to the marriage and to all the circumstances of the case ...".[2] It is not uncommon for a wife to be awarded between a third and a half of the value of her husband's property on divorce. The court has no power to order the transfer of property on divorce[2] but by means of an order for payment of a capital sum it can bring about a significant redistribution of the parties' assets after divorce. We deal later[3] with those recommendations in our recent Report on Aliment and Financial Provision[4] which are particularly important for matrimonial property law.

2.9. Death.[5] On dissolution of a marriage by death, the surviving spouse has a right to a fixed share of the deceased spouse's moveables.[6] This right - the relict's right (jus relictae, jus relicti) - is to a third of the deceased

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[1] Matrimonial Homes (Family Protection)(Scotland) Act 1981, s.13(2). This power is not limited to divorce actions. Under s.13(1) the court has power, on an independent application, to order a transfer of a tenancy.

[2] Divorce (Scotland) Act 1976, s.5(2).

[3] Paras. 4.11 to 4.15.

[4] Scot. Law Com. No. 67, 1981.

[5] See generally, Meston, The Succession (Scotland) Act 1964 (3rd edn. 1982).

[6] A widow is entitled to jus relictae at common law; Stair I.4.21. A widower is entitled to jus relicti under the Married Women's Property (Scotland) Act 1881, s.6.

spouse's moveables if there are surviving children of the deceased, to a half if there are none. It cannot be defeated by the deceased spouse's will or other testamentary disposition. A surviving spouse has also significant prior rights in the intestate estate of the deceased spouse under the Succession (Scotland) Act 1964. Where the intestate estate includes a relevant interest[1] in a dwellinghouse[2] in which the surviving spouse was ordinarily resident at the deceased spouse's death,[3] the surviving spouse is entitled to succeed to that interest,[4] unless its value exceeds £50,000, in which case the survivor receives £50,000.[5] Where the intestate estate includes the furniture and plenishings[6] of a dwellinghouse in which the surviving spouse was ordinarily resident at the deceased spouse's death,[7] the surviving spouse is entitled to succeed to the furniture and plenishings, up to a value of £10,000.[8] Further, a surviving spouse is entitled to

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[1] Defined for the purposes of s.8 in s.8(6)(d) as ownership or tenancy, excluding tenancies to which the Rent Acts apply.

[2] Defined for the purpose of s.8 in s.8(6)(a).

[3] S.8(4). Where the intestate estate includes more than one dwellinghouse in which the surviving spouse was ordinarily resident at the deceased spouse's death, the surviving spouse has six months from the death to decide in respect of which dwellinghouse to exercise his prior rights: s.8(1).

[4] Unless the dwellinghouse is part of a larger whole of which the deceased spouse was tenant (s.8(2)(a)), or the dwelling-house, or the whole of which it is part, was used by the deceased spouse for his trade, profession or occupation, and the value of the estate as a whole would be likely to be substantially reduced if the dwellinghouse were disposed of apart from the assets of the trade, profession or occupation (s.8(2)(b)). Where s.8(2) applies, the surviving spouse receives the value of the relevant interest, up to a limit of £50,000.

[5] S.8(1), as amended.

[6] Defined for the purposes of s.8 in s.8(6)(b).

[7] S.8(4).

[8] S.8(3), as amended. Where the furniture and plenishings of two dwellinghouses in which the surviving spouse was ordinarily resident at the deceased spouse's death are included in the intestate estate, the surviving spouse is entitled to choose one set of furniture and plenishings within six months of the deceased spouse's death: s.8(3). Where the surviving spouse also has a choice of dwellinghouse under s.8(1), his choices are independent of each other.

financial provision from the intestate estate of the deceased spouse: £15,000 if the deceased spouse is survived by issue,[1] £25,000 if not,[2] plus interest from the date of death.[3] The surviving spouse's entitlement to financial provision is met from both the heritable and the moveable intestate estate, in proportion to the respective value of the heritable and moveable intestate estate.[4] Where the surviving spouse's entitlement exceeds the value of the intestate estate, the surviving spouse receives the whole intestate estate.[5]

2.10. Surviving spouses also have special rights to succeed to certain tenancies under the Rent (Scotland) Act 1971 and the Tenants' Right Etc. (Scotland) Act 1980.

Conclusion

2.11. It will be seen that there are very few special rules on the property of married people during the subsistence of the marriage, but very important special rules on the patrimonial consequences of the dissolution of a marriage by death or divorce. The main purpose of this consultative memorandum is to assess the merits and demerits of this system and to consider options for reform. Before we can do that properly, however, it is necessary to consider the matrimonial property laws of some other countries. The next part of the memorandum is therefore a brief comparative survey.

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[1] S.9(1)(a), as amended.

[2] S.9(1)(b), as amended.

[3] S.9(1). Where the surviving spouse is entitled to a legacy, other than one of a dwellinghouse or furniture and plenishings to which s.8 applies, from the estate of the deceased spouse, financial provision is reduced to the difference between the sum stated in s.9(1) and the value of the legacy: s.9(1).

[4] S.9(3).

[5] S.9(2).

PART III

COMPARATIVE SURVEY

General

3.1. The purpose of this part of the consultative memorandum is to give a very brief outline of some of the main types of matrimonial property system to be found in developed countries today. There is an enormous literature on this subject.[1] We have not attempted to be exhaustive in our coverage or to go into great detail about any one system. We hope, however, that this outline will help to give some idea of the range of options available.

3.2. There are different ways of classifying matrimonial property systems. The usual division is into community property systems, in which all or some of the spouses' property is "community property" subjected to a special legal regime; and separate property systems, in which the general rule is that each spouse owns and administers his or her own property as if unmarried. Community property systems are commonly subdivided according to the property to which the special regime applies. In a full community system, for example, the regime applies in principle to all the spouses' property: in a system of community of acquests it applies in principle only to property acquired during the marriage. Endless variations are possible. Traditionally, community property systems have been strong on economic equality but

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[1] Recent general surveys include Rheinstein and Glendon, Interspousal Relations (Book IV, chapter 4 of the International Encyclopedia of Comparative Law, 1975) which has a very wide geographical coverage; and Verwilghen (ed.), Régimes Matrimoniaux, Successions et Liberalités: droit international privé et droit comparé (Union Internationale du Notariat Latin, Commission des Affaires Européennes, 1979). This book covers Austria, Belgium, France, Great Britain, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, Turkey, the Vatican and West Germany. For a useful review of the position in Canada and the United States of America, see Bartke, "Marital Property Law Reform: Canadian Style", 25 American Journal of Comparative Law (1977) 46.

weak on legal equality: both spouses had rights in the community property but the husband controlled it. Separate property systems, in contrast, have traditionally been strong on legal equality but weak on economic equality. More recently there has been a tendency for both types of system to move towards the middle ground. Many community property countries have introduced measures designed to bring about greater equality in the administration of the spouses' property during the marriage. Many separate property countries have introduced more sharing on the termination of marriage (for example, by providing for the redistribution of property on divorce and by giving the surviving spouse increased rights on the death of the other spouse) and more protection during the marriage (for example, by protecting a spouse's occupation of the matrimonial home).[1]

3.3. The movement towards the middle ground has culminated, in some countries, in so-called "deferred community" or "participation" or "deferred sharing" systems. The essence of these systems is that the spouses own and manage their own property during the marriage but share their property, or some of it, on the termination of the marriage. Clearly a community property country which changes to this sort of regime is going to end up with a system very like that of a separate property country which has provided for sharing of property on divorce and death. Differences will tend to be differences of degree - such as the amount of discretion left to the courts in the re-allocation of property.

3.4. In the following pages we consider full community systems, community of acquests systems, participation systems and separate property systems. The accounts given will, of necessity, be brief. They do not do full justice to the sophistication of some of the systems described.

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[1] See Glendon, "Matrimonial Property - A Comparative Study of Law and Social Change", 49 Tulane Law Review pp.21 to 83 (1974).

Full community systems

3.5. South Africa has a traditional type of full community system called community of property and of profit and loss.[1] The general rule, which is subject to a number of exceptions, is that all assets owned by either spouse at the time of the marriage or subsequently acquired become part of the community. This applies to both moveable and immoveable property. Although the law was altered in 1953 to give the wife the management of some of her own property, and to require her consent to certain dispositions, the system is still based on the idea that the husband is the head of the community, with full powers of management and control. Indeed in some cases it has been suggested that "the husband is the sole owner of the community, and the wife has merely a claim to participate in it on its dissolution".[2] Although this view is said not to be generally accepted today[3] it is significant that it can be held at all. The community is liable for all debts incurred by either spouse before or during the marriage. As the wife's capacity to incur debts during the marriage is limited, the practical effect of this rule is to place the wife's property at risk in relation to debts incurred by the husband. The community terminates on death, so that on the wife's death before her husband half of the community property goes to her heirs even if she brought no property into the community.[4] The community also terminates on divorce. Again the principle is an equal division but (a) the court

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[1] See generally, Hahlo, The South African Law of Husband and Wife (4th edn. 1975) pp.213 to 318; South African Law Commission, Report Pertaining to the Matrimonial Property Law ...(RP 26/1982).

[2] Hahlo, p.215.

[3] Hahlo, p.215.

[4] Hahlo, p.247. The spouses can prevent this result by taking appropriate steps while they are both alive.

has power to order either party to forfeit his or her benefits in whole or in part[1] and (b) the court has power to order maintenance to be paid by one party to the other.[2] If the husband is maladministering the joint estate, so that there is a danger of the family being reduced to penury, the wife can apply for a decree of separation of goods, but little use is made of this remedy in practice.[3] It is very common for South African couples to contract out of the community regime and to opt by antenuptial contract for a separate property regime.[4] Nonetheless the South African Law Commission has recommended that full community of property should continue to be the legal regime, subject to modifications designed among other things to give the spouses equal powers in the administration of the joint estate.[5]

3.6. The Netherlands formerly had a full community property system which gave the husband all the powers of management. In 1956, however, the law was reformed to provide for equality as between husband and wife in the management of the community.[6] The community property still consists, subject to a few exceptions,[7] of all the property owned by the

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[1] Divorce Act 1979, s.9. Forfeiture can be ordered "if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if an order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

[2] Divorce Act 1979, s.7.

[3] Hahlo, pp.164 and 165, 241.

[4] "Roughly half of the 41,000 white marriages contracted in 1972 were with antenuptial contract." (Hahlo, p.287.) "... 47% of Whites married out of community of property during 1979", South African Law Commission Report (RP 26/1982) p.20.

[5] RP 26/1982, pp.78 to 81.

[6] Verwilghen, Vol. II, p.243.

[7] Including a somewhat vaguely worded exception for goods having a special personal connection with one of the spouses. The interpretation of this exception is left to the courts: Verwilghen, Vol. II, p.247.

spouses at the time of the marriage or acquired later but, in contrast to the South African system, each spouse can administer and dispose of those assets which he or she has brought into the community. Debts incurred by either party before or during the marriage can be enforced against the community assets. However, if a creditor seeks to enforce one spouse's private debt against community assets, the other spouse can direct him to have recourse first to designated private funds of the debtor spouse if there are any,[1] and if a private debt is paid out of community funds the debtor spouse must reimburse the community.[2] Debts which are not private debts and which bind the community without giving rise to rights of recourse include obligations incurred by either spouse for normal household supplies. There are rules designed to make it easier to identify the assets under the control of each party. A spouse is, for example, deemed to have brought into the community any item of property which he has actually acquired, even if the funds used for the acquisition were not his.[3] And a third party is entitled to assume that corporeal moveables and bearer bonds are under the control of whichever spouse has possession of them.[4] There are also special provisions on community assets used, with the consent of one spouse, in a business or profession carried on by the other. The community ends on death or divorce. The division of the community fund is then into two equal shares, but on divorce the court may modify this (by an award of damages for harm to the community) if a spouse has, within six months before the commencement of divorce proceedings, recklessly incurred obligations, dissipated community assets or engaged in certain transactions without the other's consent. The court may also award

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[1] Burgerlijk Wetboek, I, art. 96 para. 1.

[2] B.W., I, art. 96 para. 2.

[3] Verwilghen, Vol. II, p.252.

[4] B.W., I, art. 92.

maintenance after divorce. The very limited nature of the power to depart from an equal division of all property seems calculated to lead to hard cases where all the property has been brought into the community by one spouse and where the marriage has been short. Even if the marriage continues for a long time there is, as under most community property systems, a serious risk of prejudice to one spouse as the result of the acts of the other. To provide some remedy for this situation there is provision for termination of the community by judicial decree for various causes, including irresponsible incurring of debts and dissipation of community assets.[1] It is fairly common for spouses to modify or opt out of the full community regime by marriage contract. The percentage doing so has apparently increased from 5.93% in 1930 to 10.48% in 1970 and about 15% in 1975.[2] The percentage is said to be still increasing. Given that most couples begin marriage with little or no property, these figures are impressive. Of those spouses who do conclude a marriage contract about 70% simply exclude community property completely and thus opt for separate property: among the remaining 30% a system of participation in acquests is said to be increasing in popularity.[3] Under this system assets are owned and administered separately but the spouses bind themselves to share their acquests on the dissolution of the regime or even at intervals during the regime.[4]

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[1] B.W., I, art. 97.

[2] Rheinstein and Glendon, p.57; Verwilghen, Vol. II, p.247.

[3] Verwilghen Vol. II, pp.250-251. The figures relate to 1970.

[4] Ibid. pp.250-251.

Community of acquests

3.7. A community of acquests system was adopted as the legal matrimonial regime in France in 1965.[1] Under this system there will often be three separate funds:- (1) the husband's separate property; (2) the wife's separate property; and (3) the community. If the wife is earning, the community will be subdivided into (a) her reserved part of the community (consisting of her earnings and acquisitions out of them); and (b) the ordinary community (consisting of the rest). Each spouse's separate property will include any property owned at the time of the marriage, any property received by gift or inheritance, personal clothing, actions for damages for personal injuries or solatium, inalienable rights and pensions and, generally, goods which have a personal character and rights which are "exclusively attached to the person".[2] The community property consists, subject to the exceptions noted, of "acquests made by the spouses together or separately during the marriage and deriving from the fruits and revenues of their separate property".[3] Needless to say, difficult questions arise as to what is, or is not, covered by the respective definitions of community property and separate property.[4] When, for example, is revenue from separate property transformed into community property by becoming savings or goods acquired from savings? What is covered by the category of goods and rights marked out as having an accentuated personal character? The French

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[1] Law of 13 July 1965. The former legal regime was one of community of moveables and acquests. The new system is set out in arts. 1400 to 1491 of the Code Civil. It is described in Rheinstein and Glendon, pp.76 to 93. See also Mazeaud, H., L. and J; Leçons de droit civil, vol. IV and other standard works on French law. A special regime for the property of artisans and tradesmen whose spouses work in the family business was laid down by law 82-596 of 10 July, 1982. See La Semaine Juridique 11.8.82 para. 52993.

[2] "les actions en réparation d'un dommage corporel ou moral, les créances et pensions incessibles, et, plus généralement, tous les biens qui ont un caractère personnel et tous les droits exclusivement attachés à la personne". C.C. art. 1404.

[3] C.C. art. 1401.

[4] Mazeaud, pp.156 to 196.

civil code contains special rules for assets which replace or represent others. Contrary to what might be expected there is no general rule that a replacement asset has the same separate or community character as the asset replaced, but this result does come about automatically in certain defined cases and can be brought about by the observance of certain formalities in others.[1]

3.8. So far as the management of the funds is concerned, the French law of 1965 did not bring about complete equality as between husband and wife. The position is that (1) the husband manages his separate property; (2) the wife manages her separate property; and (3) the husband manages the community. If, however, the community includes a part reserved for the wife (derived from her earnings) that part is managed by the wife. There are restrictions on the freedom of the husband to deal with general community assets and on the freedom of the wife to deal with her reserved part of the community assets: gratuitous alienations require the consent of the other spouse, as do various other important transactions including dispositions of immoveable property.[2]

3.9. The rules on liability for debts under the French system of 1965 are more complex.[3] Their effect is that creditors may, depending on the nature of the debt and on whether the husband or the wife is the debtor, have recourse against various funds and combinations of funds. These funds may or may not be ultimately liable for the debt as between the spouses. So there are provisions for "recompense" of the fund which has wrongly had to bear the burden of the debt.[4]

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[1] Mazeuad, pp.192 to 229.

[2] Mazeaud, pp.299 to 350.

[3] Mazeaud, pp.233 to 278.

[4] C.C. arts. 1409, 1412, 1413, 1416, 1417, 1419.

3.10. The community regime is dissolved on death, divorce or judicial separation. In addition a spouse can seek a judicial dissolution of the community if it appears from the disorder of the other spouse's affairs that the continuance of the community would imperil the interests of the applicant spouse.[1] On the dissolution of the community it is necessary first to decide what assets form part of the community. There is a presumption that assets are community assets unless the contrary is proved.[2] Then debts are apportioned. Then it is necessary to deal with the process of recompense of any fund which has been enriched at the expense of another.[3] For example, if improvements to a house owned by the husband at the time of the marriage have been paid for out of community funds, his fund will have to make due recompense to the community. The community assets are then divided equally.[4] On divorce a spouse may also have a claim, depending on the ground of divorce, for damages (available only to the innocent spouse in a divorce for fault) or a "compensatory payment" (to adjust differences in the spouses' living conditions caused by the breakdown of the marriage) or for periodic maintenance (available only to the defender in an action for divorce on the non-fault ground of "rupture of the life in common").[5]

3.11. The idea of equal sharing of property derived from the income or efforts of the spouses during the marriage has an obvious appeal if marriage as seen as a sort of partnership in life. It is perhaps not surprising therefore that systems of community of acquests have been adopted in many countries in Europe and America. Millions of married couples are

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[1] C.C. art. 1443.

[2] C.C. art. 1402.

[3] C.C. arts. 1468, 1469.

[4] The process is regulated in some detail by C.C. arts. 1471 to 1475.

[5] C.C. arts. 265 to 285.

governed by such systems. Community of acquests is the legal regime in the U.S.S.R. and eastern European countries.[1] In western Europe it is the legal regime not only in France but also in Belgium,[2] Italy,[3] Luxembourg,[4] Portugal[5] and Spain.[6] From Spain the system of community of acquests spread to the Spanish possessions in America. It is the legal regime in several South American countries and several states of the United States of America.[7] Quebec, traditionally a community property jurisdiction because of the heritage of French law, adopted "partnership of acquests" as the legal regime in 1970.[8] The law was further reformed, as from 1981, in the direction of legal equality of husband and wife but the legal regime continues to be partnership of acquests. Many married couples, however, opt for separate property. "It is a

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[1] Rheinstein and Glendon, pp.45, 73 to 76.

[2] Law of 14 July, 1976. See Verwilghen, Vol. I, pp.595 to 617.

[3] Law of 19 May, 1975. See Verwilghen, Vol. I, pp.1126 to 1130.

[4] Law of 4 Feb., 1974. See Verwilghen, Vol. I, pp.135 to 150.

[5] Civil Code of 1966, as amended by law of 25 Nov., 1977. See Verwilghen, Vol. II, pp.336 and 337. In certain cases - e.g. when one of the spouses is 60 years of age or more - the legal regime is that of separation of goods.

[6] Civil Code of 1888, as amended by laws of 24 April, 1958, 22 July, 1961 and 2 May, 1975. Community of acquests was the common law regime in most parts of Spain and was adopted in the Civil Code of 1888. The Civil Code applies to about 80% of Spanish territory. The remaining regions have their own laws. In the Balearic Islands, for example, the legal regime is one of separation of assets. Rheinstein and Glendon, pp.62 to 68; Verwilghen, Vol. I, pp.775 to 785.

[7] Rheinstein and Glendon, pp.61, 68 to 73. In the U.S.A., systems of community property derived from the Spanish system of community of acquests are in force in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas and Washington. Between 1939 and 1948 several separate property states enacted community property laws for tax reasons, but when the tax incentives disappeared as a result of changes in the federal tax law these states quickly reverted to separate property. Rheinstein and Glendon, p.69.

[8] See the article on Quebec (and 1981 supplement) by Professor Groffier Atala in Bissett-Johnson and Holland, Matrimonial Property Law in Canada (1980).

striking feature of Quebec society that, for many years, the majority of people have opted out of the legal regime. When community of property was the legal regime, as many as 70 per cent of Quebecers selected separation of property. Although this figure has dropped to 55 per cent with the new regime of partnership of acquests, it is still high, given the fact that the regime was meant to suit the needs of the majority."[1]

3.12. One major problem which many of these community property countries have tackled in recent years is that of combining shared property with equal powers of management for husband and wife. There are three basic solutions and these can be combined in various ways and modified by supplementary rules and presumptions. They are (1) joint management; (2) separate management; and (3) concurrent management. With joint management both spouses manage the community assets: the consent of both is needed for any dealing with community property. This seems an unwieldly and cumbersome solution liable to lead to difficulties if the spouses cannot agree. To be practicable it would probably have to be supplemented by fairly extensive rules on presumed authority - for example, a rule enabling third parties in good faith to assume that a spouse dealing with community assets had the consent of the other spouse.[2] Under a system of separate management each spouse manages his or her property - that is, property which he or she has brought into the community or (an alternative formula) property which would be his or hers if they were not married.[3] This

[1] Ibid. Q7 and 8.

[2] Variants of this solution are adopted in most Soviet and East European laws. Rheinstein and Glendon, p.74.

[3] This is the solution adopted in Texas, subject to the proviso that property which has become "mixed" is under joint management. Texas Family Code (1971) art. 5.22.

solution has the advantage of simplicity but it does seem to run counter to the whole idea of community. It is also open to a criticism similar to that often directed at separate property systems - if the husband brings in the property, and controls it, the equality provided by the law is merely a token equality. Concurrent management means that either spouse can deal with any part of the community property. In its pure form this system would involve serious risks that a spouse could be pauperised by the actings of the other. It is usually, however, combined with a requirement that the consent of both spouses is necessary for certain important transactions, such as those relating to immoveable property. In this form the solution is the one recently adopted in most of the community property states in the United States of America.[1] In Washington, for example, each spouse can deal with any community asset, whatever its source, but the consent of both spouses is needed for:- gifts of community property; testamentary disposition of more than half of the community property; purchase, sale or encumbrance of community real property; sale or encumbrance of community household goods, furnishings or appliances.[2] A slightly different solution (which would probably have much the same effect in practice) is that adopted in the new Italian family property law, where a distinction is drawn between acts of ordinary administration and acts going beyond ordinary administration. The former can be carried out by either spouse acting alone: the latter need the consent of both spouses.[3]

Deferred community or participation systems

3.13. In the modern search for a matrimonial property law which combines fair sharing with equal rights, and practicability with protection, traditional divisions are breaking

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[1] Rheinstein and Glendon, pp.70 to 73.

[2] Ibid., pp.70, 72.

[3] Verwilghen, Vol. I, pp.1129 and 1130.

down. The difference between a community system which grants substantial powers of separate management to each spouse and a so-called deferred community system which requires the consent of both spouses to certain important transactions can be slight and unimportant in practice. Nevertheless there is a difference in legal theory in that in a deferred community or participation system the ownership of property is unaffected by the marriage until the marriage breaks down. It is then and then only that the idea of community comes into play and that there is a sharing of property or gains.

3.14. The classical deferred community system is that of Sweden.[1] The system dates from 1920, although it has been modified since. The starting point is that each spouse owns and manages his or her own assets. Certain assets are, however, divided equally on the termination of the regime. These include most assets owned at the time of the marriage or acquired during it but do not include inalienable or strictly personal rights such as pension rights. The power of each spouse to deal with his or her own property is limited by a rule requiring the consent of both spouses to certain disposals, such as disposal of immoveable property, or of moveables intended for the spouses' joint use. Either spouse can seek a judicial termination of the regime on specified grounds, such as mismanagement which seriously diminishes or threatens to diminish the assets available for division. The regime also terminates on death or divorce. The principle of equal division on death is modified by rules giving the surviving spouse certain rights (which vary depending on whether or not the deceased spouse was survived

[1] Rheinstein and Glendon, pp.100 to 105. The other Nordic countries (Denmark, Finland, Iceland and Norway) have similar systems with, however, certain differences particularly in relationto the effects of death and divorce.

by issue) in addition to his or her right to a half of the community fund. On divorce the court has power to depart from equal sharing if an equal division would be manifestly unfair in view of the economic circumstances of the spouses and the duration of the marriage.

3.15. In 1981 the Swedish Family Law Reform Commission submitted a comprehensive report on reform of the law of marriage and related legal areas.[1] It recommended the retention of the basic principles of separate control during marriage and sharing on dissolution, but concluded that in order to achieve equitable results there had to be "room for exceptions and modifications, the need for which has increased because of social changes during the last sixty years." Among the modifications recommended are a rule that on the division of property the matrimonial home and household goods are to be treated as owned equally by both spouses, no matter who paid for them. The home could, however, be transferred to whichever spouse had the greater need of a place to live. Some of the rules on the management of matrimonial property and on compensation claims would be abolished. The rule of equal division on dissolution of the marriage would be modified in several important respects. First, there would be special rules for short marriages. Secondly, there would be a rule excluding equal division where this would be inequitable. Thirdly, a surviving spouse would always have the right to keep his or her property and thus avoid partition with the heirs of the predeceasing spouse. There would also be provisions to improve the succession rights of the surviving spouse.

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[1] SOU 1981: 85. A summary by the Commission in English is published in the Annual Survey of Family Law (No. 6, 1981) published by the International Society on Family Law.

3.16. In 1957 West Germany adopted as its legal matrimonial property regime a system of participation in acquests or, more properly, sharing of gains.[1] The essential features of this system are as follows. During the marriage each spouse owns and administers his or her own property just as if unmarried.[2] On the termination of the marriage by divorce a calculation is made of the gains made by each spouse during the marriage. This is done by deducting the value of the spouse's assets at the commencement of the marriage from the value of his assets at the end. The gains are then equalised by means of a payment by the spouse having the larger gains to the other. The court can, however, modify the equal sharing of gains in cases of "gross unfairness", particularly if the claimant spouse has failed for a long time to perform the economic duties incumbent on him as a spouse.[3] A distinctive feature of the West German system is that the rules for division on death are entirely different from those applying on divorce. There is normally no equalisation of gains on the dissolution of a marriage by death. Instead, if the couple have lived under the legal matrimonial property regime, the survivor is normally given an increase in the share of the estate of the deceased which he or she would otherwise take.[4] It is important to note that under this system, in contrast to most community property systems, it is not necessary for the surviving spouse to pay out a share of the matrimonial property to the heirs of the predeceasing spouse. In this respect, as in the rules on the spouses' ownership and administration of their property during the marriage, the system is similar to the separate property systems found in most English-speaking jurisdictions.

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[1] Verwilghen, Vol. II, pp.426 to 432.

[2] B.G.B. arts. 1363, 1364, 1370. There are two exceptions to this rule. A spouse cannot dispose alone of (1) the entirety of his estate, or (2) the household goods in the matrimonial home. B.G.B. art. 1369.

[3] B.G.B. art. 1381.

[4] B.G.B. art. 1371.

West German law provides for the judicial termination of the matrimonial property regime by a decree of accelerated equalisation of gains. This can be applied for on various grounds - for example, that the other spouse is dissipating his fortune, or has consistently and without good cause refused the applicant spouse information about the state of his financial affairs.[1]

3.17. A number of Canadian Provinces have recently introduced matrimonial property laws which are based on the ideas of separate property during marriage coupled with provision for the sharing of certain types of property on marriage breakdown.[2] The laws vary considerably[3] but the essential features are generally as follows.

1. The general rule continues to be separate property during marriage. Several Provinces have, however, provided for statutory occupancy rights in the matrimonial home[4] and Newfoundland has introduced statutory co-ownership of the matrimonial home.[5]

2. Either spouse can apply to a court for a division of certain property.[6] The usual rule is that an application can be made only in prescribed circumstances - such as divorce, declaration of nullity

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[1] B.G.B. art. 1386.

[2] See generally, Bissett-Johnson and Holland, Matrimonial Property in Canada (1980).

[3] The following discussion is confined to the common law Provinces. Quebec, traditionally a community property state, has recently reformed its law to provide for a legal regime called "partnership of acquests" with equal powers of administration and disposal. See para. 3.11 above.

[4] New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan.

[5] Matrimonial Property Act 1979, ss.4 to 19.

[6] This is the usual rule. In British Columbia, however, there is no need for a court application. A one-half interest in family assets vests in each spouse on the happening of certain events.

of marriage or separation without any reasonable prospect of a resumption of cohabitation.[1] In four Provinces the surviving spouse can apply for a division of property within a certain time after the death of the other spouse.[2] There is, however, no provision for an application by the representatives of the deceased spouse.

3. There is a norm of equal sharing of specified property but the court has a discretion to depart from equal sharing in special circumstances.

4. The property which is subject to the norm of equal sharing varies from Province to Province. Some Provinces draw a distinction between "family assets" or "matrimonial assets" and other assets and apply the equal sharing rule only to the former. In Ontario, for example, "family assets" means "a matrimonial home ... and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes".[3] This definition is followed by a list of things specifically included within the definition of "family assets". British Columbia defines a "family asset" as "property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose".[4] Nova Scotia defines the divisible assets so as to

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[1] In Saskatchewan a spouse can apply at any time for distribution of matrimonial property.

[2] New Brunswick, Newfoundland, Nova Scotia, Saskatchewan.

[3] Family Law Reform Act 1978, s.3.

[4] Family Relations Act 1979, s.45.

include all the spouses' property with certain exceptions, such as business assets.[1] Saskatchewan defines matrimonial property so as to include all of the spouses' property without exception.[2] Newfoundland limits "matrimonial assets" to the matrimonial home (whenever acquired) and other assets (with certain exceptions) acquired during the marriage.[3] Alberta does not apply the norm of equal sharing to property acquired before marriage, to property acquired by gift or inheritance, to certain awards of damages and to certain insurance proceeds.[4] Those Provinces which do not refer to the date of acquisition in the definition of divisible assets usually refer to it as a factor justifying a departure from equal division.[5]

3.18. The recent reforms in the Canadian common law Provinces are interesting because they represent carefully thought out attempts to introduce an element of deferred sharing of matrimonial property into laws based on the idea of separate property. Of particular interest for our purposes is the fact that a spouse can apply for a sharing of property without also seeking a divorce. What the new Canadian laws do not do is perhaps as interesting as what they do. With one exception they do not introduce statutory co-ownership of the matrimonial home or any other property during the normally functioning marriage.

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[1] Matrimonial Property Act 1980, s.4.

[2] Matrimonial Property Act 1979, s.2.

[3] Matrimonial Property Act 1979, s.16.

[4] Matrimonial Property Act 1978, s.7(2) and (4). The increase in value during the marriage of exempt property can be distributed as the court thinks just and equitable: s.7(3).

[5] See e.g. New Brunswick Matrimonial Property Law 1980, s.6.

3.19. In New Zealand, too, the idea of separate property during marriage, coupled with a right to apply for a sharing of "matrimonial property" on divorce and on certain other events (e.g. separation, bankruptcy or dissipation of assets), underlies the reforms introduced by the Matrimonial Property Act 1976. "Matrimonial property" is defined so as to exclude property owned before the marriage unless it was acquired in contemplation of the marriage and "was intended for the common use and benefit of both the husband and the wife."[1] The matrimonial home and "family chattels" are, however, matrimonial property whenever acquired.[2] There is a presumption of equal sharing. This can be departed from in the case of the matrimonial home and family chattels only if there are extraordinary circumstances making equal sharing "repugnant to justice".[3] In the case of other matrimonial property, equal sharing can be departed from if the contributions of one spouse to the marriage have clearly been greater.[4]

Separate property systems

3.20. In an extreme form a separate property system would provide (a) that each spouse owned and administered his or her own property during marriage as if unmarried; (b) that each spouse kept his or her own property, without prospect of redistribution, on divorce; and (c) that each spouse was free to dispose of his or her own property, without the surviving spouse having any claim against it, on the dissolution of the marriage by death. All of this would be subject to rules on maintenance of the wife, but these rules would not be regarded as affecting property. In the late

[1] Matrimonial Property Act 1976, s.8(d).

[2] S.8(a) and (b).

[3] S.14. There are special rules for marriages which have lasted less than 3 years: s.13.

[4] S.15.

19th and early 20th centuries systems approximating to this extreme model were common in the English speaking world.[1] They are now rare. In many separate property jurisdictions there are special rules protecting a spouse's occupation of the matrimonial home.[2] In the majority there is now at least some provision for sharing property, or its value, between the spouses on divorce and some provision for the disinherited surviving spouse.[3] The distinctive feature of separate property systems nowadays tends to be that the redistribution of property on the termination of the marriage is at the discretion of a court and is not a matter of fixed rights.[4] Even this feature may not be so distinctive in practice, at least in relation to certain types of assets. It has been claimed, for example, that in the operation of judicial discretion on divorce under the Australian Family Law Act,

> "there is more than an embryo deferred community of property system developing with respect to family assets .... There is w th respect to these assets

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[1] Scots law, because of legal rights on death and divorce, remained an exception to the general rule even after the abolition of the jus mariti and jus administrationis in 1881 and 1920 respectively. South Africa, Quebec and the American community property states mentioned above were even clearer exceptions.

[2] See e.g. the English Matrimonial Homes Act 1967 as amended; and for American laws, including "homestead" laws, Rheinstein and Glendon, pp.134 to 136.

[3] See Rheinstein and Glendon, pp.129 to 143.

[4] Ibid. In England family provision on death is at the discretion of the court. In most states of the United States of America the surviving spouse's position is protected by fixed rights of various kinds - dower, forced share or homestead. Dower corresponds to terce in the pre-1964 Scots law. The forced share corresponds to the relict's right (jus relicti, jus relictae) in Scots law (but is not limited to moveables). Homestead is a distinctively American institution which generally protects the home, up to a certain value, from the claims of creditors and testamentary beneficiaries.

> a strong presumption, in a marriage that has lasted for any significant period of time, that they should be shared equally."[1]

Conclusion

3.21. There have been profound changes in the laws on matrimonial property in many countries in recent years. Old distinctions are breaking down as countries with different legal backgrounds seek to reconcile the ideas of community and equality and the requirements of protection and practicability. On the one hand, traditional extensive community property systems providing for control by the husband have been replaced by community systems limited to acquests and providing for equal control by husband and wife. On the other hand, traditional separate property systems have been modified to provide for redistribution of property on divorce, protection of the surviving spouse on death, and protection of the spouses' interests in the matrimonial home. If there is any one general trend it appears to be towards a type of system which combines extensive and equal powers of independent management during the marriage with more or less extensive equal sharing of property or its value on the breakdown of the marriage.

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[1] Family Law in Australia, Report of the Joint Select Committee on the Family Law Act (1980) para. 5.145 (quoting from a paper on "Family Law and Property" by Mr Justice McCall). See also In the marriage of Pothoff (1978) 4 Fam. L.R. 267 at 270; In the marriage of Wardman and Hudson (1978) 5 Fam. L.R. 889 at 893. The approach to "business assets" is not necessarily the same. See In the marriage of Aroney (1979) 5 Fam. L.R. 535 and In the Marriage of W (1980) 6 Fam. L.R. 538. Nor is the approach to assets acquired before the marriage or by inheritance. See In the marriage of Albany (1980) 6 Fam. L.R. 461. The Joint Select Committee recommended preliminary surveys and studies on the question of the introduction of a matrimonial property regime. Since then the Family Law Council has recommended the appointment of a committee to investigate the question of whether any changes, and if so what changes, should be made in the law on the property of married persons in Australia. See its Fifth Annual Report (1980-81) p.26.

PART IV

ASSESSMENT OF PRESENT LAW

Merits of the present law

4.1. The present law on the property of married persons has several merits. It is comparatively simple. It treats men and women as equals. It applies the same rules (with certain minor exceptions) to married couples and couples cohabiting as man and wife. It does not cause undue difficulty for third parties. It leaves the parties free to modify the separate property rule as they wish - for example, by marriage contract or by taking a particular item of property in joint names. It provides some protection for the economically weaker party through occupancy rights in the matrimonial home, financial provision on divorce, and legal and prior rights on the dissolution of the marriage by death.

Criticisms of the present law

4.2. Unfair. The main criticism made of the present law is that it is unfair to housewives.[1] In a marriage where the wife, but not the husband, spends many years out of paid employment, the husband alone has the opportunity to acquire property.[2] The law treats the spouses as equals, but in this kind of marriage there is not economic equality. The separate property rule, it is said,

> "takes no account of the fact that marriage is a form of partnership to which both spouses contribute, each in a different way, and that the contribution of each is equally important to the family welfare and society."[3]

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[1] See the Law Commission, Working Paper 42, paras. 0.12 to 0.14.

[2] In about a third of all marriages the wife has never had full-time work. Manners and Rauta, p.9.

[3] Working Paper 42, para. 0.12. It would be more accurate to say that this was a "view" rather than a "fact". It is a view, moreover, which does not fit all marriages.

A wife who spends, say, thirty or forty years as a housewife will find, on divorce, that her "rights" in the property accumulated by her husband over this period depend on how a single judge chooses to exercise his discretion to award her a capital sum or a periodical allowance on divorce.[1] If the marriage is dissolved not by divorce but by the death of her husband she may find that he had left the matrimonial home to someone else and that she has no rights in it.[2]

4.3. There is clearly considerable force in the point that the law would be unfair if it did not give any recognition to the contributions made and the economic disadvantages sustained by a housewife in the interests of her husband or of the family.[3] It does not necessarily follow, however, that the remedy has to be the introduction of some form of community property during the marriage. It may be that reforms aimed at the situation which arises on the break-down of the marriage would be a sufficient remedy. We return to this point later.[4] It must also be borne in mind that not all marriages follow the pattern of the traditional

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[1] See the Divorce (Scotland) Act 1976, s.5.

[2] See para. 4.17 below. This is, however, a rare situation in practice.

[3] Over 60% of the sample in the survey of Family Property in Scotland thought that work in the home should be taken into account in deciding which spouse owns the house and furniture etc. Manners and Rauta, p.12, Table 3.1. There is, however, another view - namely, that reforms which reward the role of housewife are not in the long-term interests of women. ".... how much weight should be given to the fact that laws emphasizing and responding to the factual economic dependence of married women may tend themselves to perpetuate dependence and to discourage the acquisition of skills and seniority needed to make married women economically independent and equal in the labour market?" Glendon, State, Law and Family (1977) p.163. Cf. Oakley, Housewife (1974) Ch. 9.

[4] See para. 4.18 below.

housewife marriage.[1] This does not destroy the force of the criticism referred to in the previous paragraph but it does suggest that care must be taken in devising a remedy to meet it. An inflexible remedy based on the assumption that all marriages follow a certain pattern may work injustice in those cases which do not.

4.4. Difficult to apply. Another criticism is that the present law is difficult to apply. In Scots law[2] this criticism does not apply to the home. In the normal situation the owner-occupied matrimonial home belongs to the person or persons in whose name the title stands. The matter is perfectly simple and certain. The criticism does, however, apply to the household goods. As we have seen,[3] particular goods will belong to the person to whom the property in them was transferred, under a contract for the sale of goods or otherwise. Normally the spouse who buys the goods will own them, but there may be cases where one spouse was acting as agent or mandatary for the other spouse, or partly on his or her own account and partly as agent or mandatary. There may also be cases where both

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[1] See Manners and Rauta, pp.9 and 10. In 65% of couples both partners had had full-time work at some time during the marriage. 5% of married informants said that the wife had made the greater contribution in money: 5% said the husband had made the greater contribution in unpaid work at home. See also Study Commission on the Family, Family Finances, (1981) pp.11 and 12. "In 56% of households with married women the wife currently works and while 'breadwinner wives' are a small minority (only 5% of working wives contribute 50% or more of family income), the earnings of one-third of wives make up 30 to 50% of family income." A Gallup survey in 1978 found that of mothers with children under 5 years, 6% worked full-time and 18% part-time, while of mothers with children aged 5 to 16, 15% worked full-time and 37% worked part-time. See Deirdre Sanders with Jane Reed, Kitchen Sink, or Swim (1982) p.128.

[2] Unlike English law. See Working Paper 42, para. 0.15; Cretney, Principles of Family Law (3rd edn. 1979) pp.225 to 255.

[3] Para. 2.2 above.

spouses purchase goods jointly. After some years of marriage it will very often be impossible to tell who owns what household goods. The criticism that the law is difficult to apply also applies to bank accounts, and similar accounts, in joint names. The money belongs, in the absence of evidence of donation,[1] to the spouse who paid it in. In practice, however, money in joint accounts will very often be treated as owned in equal shares.

4.5. Again, acceptance of this criticism does not necessarily mean acceptance of the need for some form of community property. A simple presumption of co-ownership of household goods and funds in accounts in the joint names of husband and wife might, for example, go as far as is necessary to meet the criticism.[2]

4.6. Out of touch with the views of most married people. This criticism runs as follows. Most married couples in fact share certain types of property and regard them not as "his" or "hers" but as "ours". In most marriages community of property, in a non-technical sense, is a fact of life. To pretend otherwise, and to try to apply separate property rules, is to fly in the face of reality and to impose on married couples a law which, at least in relation to certain types of assets, is out of touch with their own views.[3] The assets which are generally thought to be most clearly stamped with this "community" character are the household goods and the matrimonial home.

4.7. There would appear to be considerable force in this criticism in relation to many household goods. In the

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[1] Cf. Boucher's Trs. v. Boucher's Trs. (1907) 15 S.L.T. 157; Smith v. Smith 1933 S.C. 701; Johnstone v. Johnstone (1943) 59 Sh. Ct. Rep. 188; Graham's Trs. v. Gillies 1956 S.C. 437 (a case on donation mortis causa).

[2] See paras. 6.2 to 6.10 below.

[3] See e.g. the views of Professor Caparros in Verwilghen, Vol. I at p.68.

survey on family property in Scotland 95% of informants said they thought of household furniture as belonging to both spouses jointly, and most regarded other items of domestic equipment such as refrigerators, vacuum cleaners and washing machines as belonging to both spouses jointly. The actual proportions were as follows:-[1]

Which partner the informant thought of as the owner of various goods

Goods		Partner considered to be owner			
		Both jointly	Husband	Wife	Other answers
Furniture	%	95	1	3	1
Refrigerator	%	93	1	6	-
Television	%	92	2	4	2
Cooker	%	91	1	8	-
Vacuum cleaner	%	90	1	9	-
Washing machine	%	85	1	14	-
Record player*	%	84	6	5	6
Car†	%	74	22	3	1
Powerdrill	%	39	58	3	-

*Data for couples with only 1 record player.
†Data for couples with only 1 car.

It is possible, of course, that informants may have had a natural tendency to give answers which showed them to be fair-minded people and that some of them might have expressed different views in the course of a matrimonial dispute. It is also possible that if the question on furniture had been split up into questions relating to particular items (which would not have been practicable) informants might have given answers such as "Well that's my wife's. She owned it before we were married" or "That's mine. It came from my mother's house." It is significant that, in response to other questions in the survey, people did distinguish between

[1]Manners and Rauta, p.6 and excerpt from Table 2.9.

property owned before marriage or acquired by inheritance and property otherwise acquired during the marriage.[1] The figures given above are nonetheless the best evidence we have on the way married people regard the ownership of most of their household goods.

4.8. There would also appear to be force in the criticism in relation to the matrimonial home. Although "separate property" rules can be applied fairly easily to the matrimonial home, because ownership is a matter of record, the results may be unrealistic. In many marriages both spouses have contributed to the purchase of the matrimonial home,[2] in ways and amounts which it is impossible to determine with precision after the lapse of a few years, and both regard themselves as having a moral claim to a share in it, no matter who appears on the title as the legal owner. In the survey on family property in Scotland informants were asked whether they thought of the matrimonial home as belonging to themselves, their spouses or to both jointly. The results showed that even in the minority of cases where the home was in the name of one spouse alone, 85% of the informants said they thought of it as belonging to both spouses jointly.[3] The owner spouse was as likely to take this view as the non-owner spouse.[4]

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[1] Ibid., pp.10, 13 to 15.

[2] See Manners and Rauta, p.5 and Table 2.5. 30% of informants gave "joint financial contributions" as one of their reasons for putting their home in joint names. This proportion was higher (52%) among couples aged under 30 years.

[3] Ibid., p.5 and Table 2.6. 84% of husbands and 87% of wives took this view. However, 7% of husbands and only 3% of wives thought of the house as belonging to the wife.

[4] Ibid., p.5. There was no evidence that the opinions of widowed, divorced or separated spouses differed from those of the currently married. Ibid., p.11. The number of divorced and separated spouses in the sample was, however, too small to enable any reliable conclusions to be drawn on this point.

Again, of course, it is possible that informants were giving answers which would show them to be fair-minded people. The survey provided other indications, however, that the fact that the legal title is in the name of one spouse alone does not necessarily reflect a conscious decision that that spouse should be regarded, as between the spouses, as the true or beneficial owner of the home. Thus the way in which the title was taken depended very largely on the year of purchase, irrespective of the age of the spouses concerned.[1] The more recently the house was bought, the more likely it was to be in joint names. Only 10% of those who had their house in the name of one spouse had received advice on whether or not it was a good idea to put the home in joint names, whereas 29% of co-owners had received such advice (usually from a solicitor).[2] Many of those who had their house in the name of one spouse nevertheless said they saw advantages in co-ownership and two-thirds said they saw no disadvantages.[3] When all these findings are taken together it seems reasonable to conclude that the way in which the title to the home is held does not necessarily reflect the parties' views as to the true ownership of the matrimonial home as between themselves.

4.9. It does not necessarily follow from these findings that any radical remedy, such as the introduction of a community property regime or statutory co-ownership of the matrimonial home or household goods, is required. It may be that so long as the marriage continues normally the spouses will be quite content with the divergence between legal title or legal ownership and their perception of bene-

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[1] Manners and Rauta, p.4 Table 2.4.

[2] Ibid., Table 2.7.

[3] Ibid., p.6 and Table 2.8.

ficial ownership. They may regard legal title or legal ownership as unimportant. They may never discuss it.[1] The matter may assume importance only on the breakdown of the marriage.[2] Remedies aimed at that situation may be sufficient.

Significance of recent changes and proposals

4.10. The Matrimonial Homes (Family Protection)(Scotland) Act 1981. Before this Act Scots law disregarded the interests of the wife who was not the owner[3] of the matrimonial home to such an extent that she did not even have the right to occupy the home. The Act has given such a wife statutory occupancy rights and has protected and supplemented these rights in various ways.[4] It has improved the position of a non-owner spouse in relation to expenditure incurred on the matrimonial home. Formerly expenditure incurred by one party with the consent of the other on, for example, repayments of a loan secured over the home or on repairs or improvements to the home, could not readily be recovered even if it improved the value of the spouse's property.[5] Now the court has power to make an order apportioning such expenditure.[6] The Act has also improved the position of the wife who does not own the

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[1] In the family property survey informants whose home was in one name were asked if they and their spouses had ever discussed having their home in joint names. Only 36% had ever done so. Manners and Rauta, p.5.

[2] If there is a risk of diligence or bankruptcy, because e.g. one spouse is engaged in a risky business venture, legal ownership would be important. In such a case, however, the spouses may well take steps to provide themselves with the maximum protection - by, for example, having their property in the name of the non-business spouse.

[3] We confine the discussion to wives who are not owners because they are most affected by rules on matrimonial property. The 1981 Act applies also to other "non-entitled" spouses. It applies equally to husbands and wives.

[4] See para. 2.5 above.

[5] See our Report on Occupancy Rights in the Matrimonial Home and Domestic Violence (Scot. Law Com. No. 60, 1980) paras. 2.63 to 2.75.

[6] S.2(3). The court has a similar power where the spouses are co-owners of the home (s.2(4)) and also has powers to apportion expenditure on furniture and plenishings (s.2(5)(b)).

furniture and plenishings of the matrimonial home. She can now apply for an order giving her the possession or use in the home of any such furniture and plenishings.[1] The Act has had a further, and very important, effect in relation to certain dealings with a matrimonial home - such as a sale of the home by the owner spouse to a third party. The occupancy rights of a non-owner spouse are protected against such dealings unless certain conditions are satisfied. One such condition is that he or she has consented to the dealing. The practical effect of this rule is that it is not normally practicable for a spouse who is the sole owner of a matrimonial home to sell the home without the consent of the other spouse.[2] The 1981 Act, in short, goes a long way towards remedying the worst features of the separate property system in relation to the matrimonial home and household goods. A wife who has spent years making her contribution to the marriage as a housewife and mother is no longer liable to be thrown out of the matrimonial home like an unwelcome guest. The Act, however, does not affect ownership, except incidentally.

4.11. Report on Aliment and Financial Provision. An important part of the criticism that the present law is unfair to housewives is that a woman who may have given up employment prospects and pension rights in order to look after home and children finds on divorce that any claim she may have on property accumulated by her husband out of his earnings during the marriage is entirely at the discretion of a judge. She has no fixed rights. There is no principle or norm of equal sharing of property built up during the marriage. One of the main advantages of a community property system is

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[1] S.3(2). The same rule applies to husbands.

[2] This is an over-simplification. The Act provides for the renunciation of occupancy rights, for consent to be dispensed with by the court in certain circumstances and for other special cases. We are concerned, however, to state the broad effect of the Act in ordinary cases.

said to be that it gives the spouses fixed rights on divorce. The wife who has had no earnings during marriage does not have to come to court as a mendicant but can instead claim her rightful share as an equal partner.

4.12. We considered this question in our Report on Aliment and Financial Provision.[1] We were critical of the fact that the present law left the question of financial provision on divorce to the unfettered discretion of the court. We did not, however, favour a system of fixed rights to property on divorce. Such a system would lack flexibility. It would not be able to take account of the infinite variety of special circumstances which can arise in marriages. It would have to be extremely complicated if it were not to produce unacceptable results in a whole range of foreseeable situations. As we have seen in Part III of this Memorandum very few community property systems in fact provide for absolutely fixed rights on divorce. Almost all give the court some discretion, by one means or another, to vary the normal equal division on divorce. Our preferred approach was for a system of statutory principles which would govern financial provision and the redistribution of property on divorce, but which would leave room for judicial discretion in their application to the facts of particular cases. We recommended five governing principles. Three of these principles - one relating to provision for a spouse with young children to care for, one relating to a short-term allowance to ease the transition to independence after divorce, and one relating to the relief of grave financial hardship resulting from the divorce - are not of direct relevance in the present context. The remaining two are, as they were designed to give expression to the idea of partnership in marriage and to ensure due recognition of relevant contributions and sacrifices.

[1] Scot. Law Com. No. 67, 1981.

4.13. The first such principle which, we recommended, should govern an award of financial provision on divorce was the principle of fair sharing of matrimonial property. Our main recommendations on this subject were as follows.[1]

> "The principle of fair sharing of matrimonial property is that the net value of the matrimonial property should be shared equally or, if there are special circumstances justifying a departure from equal sharing, in such other proportions as may be fair in those circumstances. Matrimonial property should be defined as any property belonging to either party or both parties at the date of final separation which was acquired (otherwise than from a third party by gift or succession) by him or them
>
> (i) before the marriage for use by the parties as their joint residence or as furniture or equipment for their joint residence; or
>
> (ii) after the marriage."

We also listed various factors, such as destruction or dissipation of assets and the nature of the property or the use made of it (including use for business purposes or as a family home) which might, if the court thought fit, justify a departure from the norm of equal sharing.[2] In essence, therefore, we recommended a norm of equal sharing of the value of acquests, with power to depart from that norm in special circumstances.

4.14. We recognised in our Report that the above principle would not always provide adequate recognition of contributions made or disadvantages suffered in the interests of the marriage. There might be little or no matrimonial property within the above definition of the term. We therefore recommended a second principle - that of fair recognition of contributions and disadvantages. Our recommendations on this were as follows.[3]

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[1] Scot. Law Co. No. 67, paras. 3.65 to 3.72.

[2] Ibid., paras. 3.78 to 3.86.

[3] Ibid., paras. 3.91 to 3.99.

"(a) The principle of fair recognition of contributions and disadvantages is that where one party has made contributions which have been to the economic benefit of the other party or has sustained economic disadvantages in the interests of the other party or of the family, he should receive due recognition of those contributions or disadvantages.

(b) In applying this principle the court should have regard to the extent to which such contributions or disadvantages made or sustained by one party have been balanced by contributions or disadvantages made or sustained by the other party, and to the extent to which the contributions or disadvantages have been, or will be, recognised by a share in the net value of the matrimonial property or otherwise.

(c) The court should take into account relevant contributions or disadvantages made or sustained before the marriage.

(d) "Contributions" should include contributions, whether financial or non-financial, direct or indirect and in particular should include contributions made by looking after the home or caring for the family."

4.15. Under our recommendations the court would normally give effect to these principles by ordering payment of a capital sum or a transfer of property.[1] It would have power to order a capital sum to be paid by instalments, without any restriction on the time over which they were payable, so that a remedy could be provided even in cases where there was no capital or property available for an immediate settlement.[2] Under the present law the Scottish courts have no power to order the transfer of property on divorce.[3] Our recommendations would extend their powers in this respect and would also give them various ancillary powers, such as power to regulate the use and occupation of the matrimonial home after divorce.[4]

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[1] Ibid., paras. 3.113, 3.121.

[2] Ibid., paras. 3.117 and 3.118.

[3] They do, however, have power, under s.13 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981, to make tenancy transfer orders.

[4] Scot. Law Com. No. 67, para. 3.113.

4.16. If these recommendations were implemented there would not be a system of fixed rights, which would in our view be undesirable, but there would be a norm of equal division of matrimonial property (as defined) and express provision for the due recognition of relevant contributions and disadvantages even in cases where there was little or no matrimonial property. Given that on the dissolution of a marriage by death the surviving spouse is normally well provided for by Scots law, and very often takes the whole estate of the predeceasing spouse,[1] the result would be not unlike that achieved under a deferred community or participation system. The spouses would be free to own and administer their own property during the marriage, but there would be a norm of equal sharing of the value of acquests on divorce and special provision for the surviving spouse on the dissolution of the marriage by death. There would, however, be a gap in the system, in that there would be no provision for sharing of property or its value, otherwise than by agreement, in circumstances short of divorce. The economically weaker spouse might therefore be at risk in the period between the breakdown of the marriage and the raising of a divorce action - a period which might have to be as long as five years. A spouse who had religious objections to divorce might also be unprovided for. We consider later whether this gap might be closed by enabling a spouse to apply for a property adjustment order in circumstances other than divorce.[2]

Need for separate review of succession law.

4.17. Although the surviving spouse often, in practice, succeeds to the whole or most of the estate of the predeceasing spouse (either under his will or by virtue of the laws on prior rights and legal rights) and although the

[1] See, however, para. 4.17 below.

[2] See paras. 6.17 to 6.27 below.

surviving spouse's legal rights (jus relictae, jus relicti) provide some protection against disinheritance, there is a major gap in the protection afforded to the surviving spouse by the present law. There are now no legal rights in relation to heritable property. It follows that a man can leave the matrimonial home, and any other heritable property he may own, to a third party and, to that extent, disinherit his widow. It would have been possible in this consultative memorandum to put forward proposals to remedy this situation - proposals, for example, which would have had the effect of giving the surviving spouse the right to the matrimonial home in all cases. In our view, however, the question of the rights of a surviving spouse would be better dealt with in a future consultative memorandum on succession law. The rights of the surviving spouse have to be weighed against the rights of children, including sometimes children of the deceased spouse by a former marriage, and of other relatives. The whole balance of legal rights, prior rights and succession rights would have to be considered, as would the very large and important question of fixed rights as opposed to court discretion. We intend to proceed, when resources permit, to a consultative memorandum on succession law in which these and other questions will be examined.

Assessment of need for reform

4.18. It is not easy to determine how much weight to attach to the criticism that, even if the laws on the distribution of property on death and on marriage breakdown were reformed, the law would still fail to deal adequately with the property rights of the spouses during the marriage. On the one hand, it could be argued that so long as the marriage is continuing normally there is no need for the law to intervene. The parties will hold and use their property in whatever way they work out for themselves in the circumstances of their own marriage, and will not care very much what the law says. Only on the breakdown of the marriage will the legal rules

become important. Any new law on fixed property rights during marriage would, in many cases, be of only symbolic value as between the two spouses[1] and would not be worth having if it were at all complex. It would be particularly pointless if the fixed rights were liable to be varied on divorce. On the other hand, it could be argued that the way in which property is held during the marriage will not necessarily reflect the wishes of both spouses. Many non-earning spouses may have no property rights and may resent that without necessarily wishing to make an issue of it or being able to effect any change if they did. It could be argued that it is undesirable to recognise the justice of certain claims by a non-earning spouse but to provide a remedy only on the breakdown or dissolution of the marriage. It could also be said that the conferment of immediate property rights during marriage would manifestly be much more than a symbolic gesture.

4.19. We consider the arguments for and against various options for reform in the following parts of this memorandum. In the meantime we would be grateful for any general comments on the need for reform of the present law. We therefore invite views on the following question. To what extent is the law of Scotland on the property of married persons open to serious criticism when due account is taken of the protections introduced by the Matrimonial Homes (Family Protection)(Scotland) Act 1981, of the legal and other rights conferred on the surviving spouse on the dissolution of the marriage by death, of the present powers of the court to award financial provision on divorce, and of the recommendations on financial provision and sharing of matrimonial property on divorce in our recent Report on Aliment and Financial Provision? (Proposition 1)

[1] It might, however, be different in relation to third parties.

PART V

OPTIONS FOR MAJOR REFORMS

Introduction

5.1. In Part III we described some of the main types of matrimonial property regime found in developed countries today. In this Part we assess the suitability of various options for major reforms in Scots law. In general terms the main options are (1) a full community property system; (2) a community of acquests system; (3) a system in which, as a general rule, the spouses own and administer their own property during the marriage but share certain property or its value equally on the dissolution or breakdown of the marriage;[1] (4) a scheme for statutory co-ownership of the matrimonial home; and (5) a scheme for statutory co-ownership of household goods. All of these options involve the introduction of some element of community property or co-ownership by virtue of marriage. In Part VI of the Memorandum we consider various options for reform which attempt to meet the criticisms made of the present law without introducing community property or statutory co-ownership.

A full community system

5.2. By a full community system we mean a system whereby virtually all the spouses' property, no matter when or how acquired, is merged by the mere fact of marriage into one fund in which both spouses have, in principle, equal rights both during the marriage and on its dissolution by death or divorce. A corollary would be that the community fund would be liable for the debts, including the antenuptial debts, of either spouse. Such a system would not be compatible with the existing law on the rights of spouses on the dissolution

[1] This might be described as a type of "deferred community" system, but that term can be used in different senses. It can be used of systems which are really modified separate property systems. In this Part of the Memorandum we prefer to distinguish between systems based essentially on fixed rights in property and other systems.

of marriage by death or divorce, not with the law on financial provision on divorce recommended in our Report on Aliment and Financial Provision.[1] The question to be considered in relation to this option is therefore whether a full community property system should be introduced which, in those cases where the parties did not contract out of it, would entirely replace the present laws on the property of married persons both during marriage and on death and divorce. The advantage of a full community system is that it gives the fullest possible expression to the idea of marriage as a partnership. The introduction of such a system into Scots law would, however, have two very serious disadvantages.

5.3. First, a full community property regime would probably go further in the direction of sharing of property than would be necessary or desirable. The argument that marriages ought to be treated in law as partnerships, in which the spouses' contributions are regarded as equal, does not lead to the conclusion that all the spouses' property, including property owned before marriage or inherited during the marriage, must be thrown into a common fund and divided equally on the dissolution of the marriage. It leads, at most, to the conclusion that the spouses should share equally in the fruits of their joint efforts during the marriage. By attaching very extensive consequences to the mere existence of a legal marriage, rather than to what happens during the marriage, a full community system would run the risk of benefiting undeserving spouses and fortune-hunters while depriving some married people of half of their property for no very convincing reason. The following questions, in particular, have to be asked about a full community system.

[1] Scot. Law Com. No. 67 (1981).

(i) Is it acceptable that on a divorce, perhaps after a very short marriage, all the spouses' property, including property owned by one spouse before the marriage, should be divided equally? The survey on Family Property in Scotland suggests that this result would not be regarded as acceptable by most people. Informants were asked what the law should say about the family property[1] of a childless married couple on the breakdown of the marriage where one party owned the property before the marriage. Over 64% said that the property should go to the original owner; less than 31% thought that it should be shared equally.[2]

(ii) Is it acceptable that on the death of the first spouse to die, half of the joint property should go to that spouse's heirs? Suppose, for example, that the husband has investments which he owned before the marriage. After a few years of marriage the wife is killed in a road accident. There are no children. Is it acceptable that the wife's brother, say, should be entitled as her heir to half of the husband's investments?[3] We think not. The very first change made by statute to the Scottish common law system of community of goods (communio bonorum) was designed to eliminate precisely this feature of the old law.[4] We would not wish to resurrect it.

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[1] Defined for this purpose as house, furniture and household goods, savings of £3000.

[2] Manners and Rauta, Table 3.5. There was also a clear majority in favour of the view that property inherited by one spouse during the marriage should go to that spouse on the breakdown of the marriage. Ibid., Table 3.7.

[3] It is assumed that the rules on division of the community would replace the present rules on legal and prior rights.

[4] See para. 1.7 above.

(iii) Is it acceptable that all the property of both spouses should be liable for the debts of either, whether these were contracted before or during the marriage? Should, for example, a house owned by the wife before the marriage, or savings from her earnings, or property inherited by her from her parents, be liable for the husband's debts if he turns out to be an irresponsible spendthrift?

We note that in those countries having a full community system it is common for couples to contract out of it. We believe that the effect of introducing such a system as the legal matrimonial property regime in Scotland would be that many spouses would be put to the expense and inconvenience of opting out of it by marriage contract.

5.4. Secondly, a full community system would be immensely complex. It would be necessary to regulate not only the position of the spouses as between themselves, but also their position in relation to third parties. There would have to be choice of law rules to determine when the Scottish community property law applied and to determine whether the parties could, by changing their domicile or habitual residence, bring themselves under the matrimonial property law of some other jurisdiction. These rules would be particularly important, and probably particularly troublesome in practice, if Scotland had a community property system while the other parts of the United Kingdom had separate property systems. There would have to be rules on contracting out of community property. There would probably have to be rules excluding certain property, such as clothing and other "personal" property, from the community. There could be difficulties in deciding what should be regarded as personal property for this purpose. What about damages for personal injuries, alimentary liferents, social security payments? If damages for personal injuries were included, could one spouse sue another for reparation for such injuries? If

substantial amounts of property could be excluded from the community (e.g. by agreement between the spouses or by a donor or testator) there would have to be rules for the situation where separate property was converted into, or expended on, community property, and on the liability of different funds for different debts. There might have to be a special register, open to public inspection, so that third parties would know whether a couple were or were not under the community property regime. The law on the legal rights, prior rights and succession rights of surviving spouses would have to be replaced, for couples coming under the community regime, by an entirely new system. There would not, in any of this, be any existing common law to fall back on. It would all have to be worked out in detail in a statute, which would inevitably be long and complex. It would not merely be a question of replacing the existing rules, difficult though that would be. Some couples, probably many couples, would not be under the community property regime. The existing rules, perhaps improved in certain respects, would have to be retained for them. There would, for example, have to be two sets of rules on the legal position of the surviving spouse, one set for those couples coming under the community property regime and another for those who had contracted out of it or who for some other reason, such as their domicile at the time of the marriage or the fact that they were married before the new law came into force, did not come under community property. There might also have to be two sets of rules on liability for household debts.[1] It would be the same in relation to financial provision on divorce. The Scottish courts would be dealing not only with spouses coming under the community property regime but also with couples not coming under it, either because they had opted out or because the Scottish matrimonial property law did not apply to them. There would have to be two sets of rules on financial provision on divorce. The introduction

[1] Cf. our Consultative Memorandum No. 54 on Some Obsolete and Discriminatory Rules in the Law of Husband and Wife (1982) paras. 10.1 to 10.22.

of a full community system would inevitably involve a very considerable increase in the complexity of several branches of the law.

5.5. If a country has had a full community system for centuries, if the legal institutions of the country are adapted to the system, if the citizens and the legal profession are used to it, and if it has been modified so as to remove the worst features of traditional full community regimes, then no doubt such a system may be found perfectly acceptable by a majority of the population. We have no wish to criticise the solutions adopted by other countries with different traditions in these matters. The question for us, however, is whether the introduction of such a system would be appropriate for Scotland, which has had a separate property system for over a hundred years. Our provisional conclusion is that it would not. We would, however, welcome views on this question. Do you agree with the provisional conclusion that, having regard to the considerations referred to in paragraphs 5.3 and 5.4 above, a full community property system (whereby virtually all the property of both spouses, no matter when and how acquired, would be subject to special rules which would supersede the present laws on the property of married persons both during marriage and on death and divorce) would be inappropriate for Scotland? (Proposition 2)

Community of acquests

5.6. By a community of acquests system we mean a system whereby property acquired by the spouses, otherwise than by gift or inheritance, during the marriage would become community property and would be subject to a special set of rules both during marriage and on the dissolution of the marriage by death or divorce. As one of the chief merits

claimed for such a system is that it confers fixed rights, we shall assume that the court would not have a discretion to modify the principle of equal sharing on divorce. A system of this nature would again not be compatible with the present law on legal rights, prior rights and succession rights on the dissolution of a marriage by death, nor with the present or proposed rules on financial provision on divorce.

5.7. The advantage of a community of acquests system is again that it would give immediate expression to the idea of partnership in marriage. Moreover it would do so in a more refined way than a full community system. The partnership principle would be applied only to what might be called partnership acquisitions. It would not be applied to property, such as property owned at the time of the marriage or inherited during it, which owed nothing to the joint efforts of the spouses. The idea underlying this system is undoubtedly attractive. We have already noted that community of acquests is the legal matrimonial property regime in a large number of jurisdictions in Europe and the Americas and that it was adopted as the legal regime in France in 1965. Nevertheless there would be several objections to the introduction of such a system in Scotland.

5.8. First, there can be no doubt that a regime of community of acquests is inherently complicated, particularly if the spouses are given equal powers of management. There will almost invariably be three funds - (1) the husband's separate property; (2) the wife's separate property; and (3) the community property. The community property may have to be subdivided into property administered by the husband separately; property administered by the wife separately; property administered by the spouses concurrently; and property administered by both spouses jointly. There have to be rules - in practice either very vague or very detailed - on which assets fall into the various funds. There have to be rules on the liability

of the various funds for debts. There have to be rules, if a fair result is to be achieved, on "tracing" property if, for example, an asset is acquired during the marriage with the proceeds of an asset owned before the marriage; and rules on the reimbursement of one fund by another where the first has borne an expense which should properly have been met by the other. There would have to be rules on opting out of or excluding community property. There might have to be a special register for the protection of third parties. There would have to be choice of law rules and special rules for those couples who, for one reason or another, did not come under the community property regime. The introduction of a community of acquests system would in fact involve most of the problems which would be involved in a full community system and which we have discussed in paragraph 5.4. We do not say that a system of community of acquests could not be made to work. Manifestly such systems do at present work for millions of couples throughout the world. We do say, however, that the legislation required to introduce such a system would be highly complex and technical and that the burden on those required to administer it would be heavy. This is our first objection to a community of acquests system. It is an objection, we should point out, which does not apply with the same force to a system which does not confer immediate property rights during the marriage but which confers a right to apply to a court for a sharing of the value of acquests on divorce. Under such a system a broader axe can be taken. A principle can be laid down in general terms and the court can be given a discretion to depart from it in special circumstances.[1] There is no need to legislate on all the esoteric problems which have to be dealt with if property rights during marriage are to be regulated directly.

[1] This is the approach recommended in our Report on Aliment and Financial Provision (Scot. Law Com. No. 67, 1981) paras. 3.69 to 3.90.

5.9. A second objection is that a rule of equal sharing on divorce, even if confined to acquests, would be liable to produce unfortunate results unless it were tempered by a discretion to depart from equal sharing in special circumstances. It is significant that the informants in the survey on Family Property in Scotland, who strongly supported equal sharing of the acquests of a childless couple, were generally prepared to qualify this support where there were children. A substantial majority, 70%, thought that the division of property should be affected by the presence of dependent children and, of these, 81% thought that the person with custody of children should receive a larger share.[1] Many mentioned the children's need for accommodation as an important factor.[2] Other special circumstances which might justify a departure from equal sharing can readily be imagined.[3] The recent reforms of matrimonial property law in Canada and New Zealand all confer a power to depart from the norm of equal sharing in special circumstances. We have recommended a similar power in our Report on Aliment and Financial Provision.[4] A community of acquests system without such a power would, in our view, be too rigid. A community of acquests system with such a power would have few advantages over a system of separate property with provision for a norm of equal sharing of acquests on marriage breakdown.

5.10. A third objection might be that the system would not be seen as an improvement on the present rules on the legal consequences of the dissolution of a marriage by death. As we have noted in relation to a full community system, it

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[1] Manners and Rauta, Tables 3.12 to 3.15.

[2] Ibid., p.16.

[3] See our Report on Aliment and Financial Provision (Scot. Law Com. No. 67, 1981) paras. 3.78 to 3.86.

[4] Ibid.

seems doubtful whether there would be much support for the idea that on a husband's death half of the property acquired by his wife during the marriage should pass to his heirs or vice versa.

5.11. Again we have no wish to criticise the solutions adopted in other countries with a long tradition of community property or to imply that a community of acquests systems is an inherently inappropriate solution. The principle underlying it is, on the contrary, inherently attractive. Our provisional conclusion is, however, that given the way in which Scots law has developed over the last hundred years or so, a simpler and less rigid method could be found to remedy the defects of the present law. We therefore invite comments on the following question. Do you agree with the provisional conclusion that, having regard to the considerations referred to in paragraphs 5.8 to 5.10 above, a community of acquests system (whereby property acquired during the marriage, otherwise than by gift or inheritance, would be subject to special rules which would supersede the present laws on the property of married persons both during the marriage and on death and divorce) would be inappropriate for Scotland?
(Proposition 3)

A system of fixed rights on divorce or marriage breakdown

5.12. Under this type of system the spouses would own and administer their own property during the marriage but would share certain property or its value equally on the breakdown or dissolution of the marriage. We are concerned here only with the type of system which confers fixed rights on divorce or marriage breakdown. We would regard a system where sharing on breakdown is at the discretion of a court, even if the discretion has to be exercised in accordance with certain principles or having regard to certain factors, as a modified separate property system. There is no fixed usage in these matters but it seems to us that the important

distinction is between a system based on fixed rights and a system based on judicial discretion. Systems based on fixed rights may take various forms.

5.13. One form is what might be called automatic full deferred community. The sharing on breakdown would apply to virtually all the spouses' property, wherever and howsoever acquired, and it would take place by operation of law rather than by means of an application to the court. Such a system would be open to most of the objections which can be made to a full community system.[1] It would go too far, it would be too rigid and it would be too complex.

5.14. Another form is what might be called automatic deferred community of acquests. Here the sharing would be limited to property acquired during the marriage, otherwise than by gift or succession, but would again be automatic on the occurrence of certain events. Property rights would crystallise on, say, divorce or separation without the need for any application to a court. Such a system would to be open to most of the objections which can be made to a community of acquests system.[2] It would, in particular, be too rigid and complex.

5.15. Another option would be to confer a fixed right to a share in the value of certain property on the breakdown of the marriage. There would be no automatic vesting of rights in specific items of property but rather the emergence of a claim against the other spouse. Again various options are open as to the nature of the claim. It could be a claim for such a sum as would equalise all the property of the spouses. This, in our view, would go too far and, as in the

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[1] See paras. 5.3 and 5.4 above.

[2] See paras. 5.8 to 5.10 above.

case of full community systems, could produce unfair results, particularly in the case of a short marriage. The claim could be for equalisation of gains made during the marriage. This would, however, involve sharing mere paper increases in the value of separate property: a wife who owned a house at the date of the marriage, or who inherited some antique furniture during the marriage, would have to share any increase in the value of these items on divorce, even though the increase would not be due in any way to the joint efforts of the spouses. It would also involve keeping records of the value of property at different dates. The claim could be for a sharing of the net value of property acquired, otherwise than by gift or inheritance, during the marriage. This, however, would give rise to difficulty if property was acquired after the marriage out of the proceeds of property owned before the marriage or out of funds donated by a third party. "Tracing" rules would be immensely complex in their operation. We considered these various problems, in the context of divorce, in preparing our Report on Aliment and Financial Provision.[1] We concluded that no solution whereby fixed rights were conferred on divorce[2] would be satisfactory. We remain of this view.

5.16. Overlapping the above options is the question whether the same rules should be applied on divorce (or marriage breakdown) and on death. In some deferred community systems different rules apply to these situations. This seems to us to be justifiable. The two situations are very different. On divorce or marriage breakdown there are two spouses with competing claims. On death there is only one surviving spouse and there may or may not be other relatives or beneficiaries

[1] Scot. Law Com. No. 67 (1981) paras. 3.69 to 3.90.

[2] As opposed to a solution where there was a norm or principle of equal sharing of acquests on divorce with power to the court to depart from the norm in special circumstances.

with competing claims. The idea that the surviving spouse should have to give up half of his or her property to the executors of the predeceasing spouse seems likely to be unacceptable. Moreover, as the surviving spouse would often, under the present law, take the whole estate of both spouses anyway there is a strong argument on practical grounds for having a simpler set of rules for death than for divorce. We would therefore prefer a system which had separate rules for death and divorce or separation to one which rigidly applied the same rules.

5.17. We can see many advantages in a system which allows the spouses to own and administer their own property during the marriage (with perhaps special rules for certain types of property); which enables them to apply on divorce, and perhaps also in certain other events, for a sharing of property in accordance with certain rules that combine a clear statement of principle with a measure of discretion in the application of that principle to special circumstances; and which does not apply the same rules on divorce and on death. We would, however, describe such a system not as a community property system but rather as a modified separate property system. We have already recommended one step towards such a system in our Report on Aliment and Financial Provision where we dealt with the division of property on divorce.[1] Later in this Memorandum we discuss possible further modifications to the separate property rule, and also the question whether a spouse should be able to apply for a sharing of matrimonial property in circumstances falling short of divorce. In the meantime we invite views

[1] See Scot. Law Com. No. 67, 1981. The present law could also be described as a modified separate property system. The main difference between the existing law and the proposals in our Report on Aliment and Financial Provision is that under the latter the basis on which property is to be divided would be defined more clearly than under the present law, which gives the court a quite general discretion.

on the following question. Do you agree with the provisional conclusion that a system which confers fixed rights (whether rights in specific items of property or a right to a monetary claim) on divorce or marriage breakdown, without any provision for modifying these rights to take account of special circumstances, would be inappropriate for Scotland? (Proposition 4)

Statutory co-ownership of the matrimonial home

5.18. Introduction. The Law Commission have recommended for England and Wales a scheme of statutory co-ownership of the matrimonial home.[1] Their recommendations, made after wide consultation, have had a mixed reception.[2] The Council of Europe has recommended that governments of member states should take into consideration the possibility of adopting systems of co-ownership of the matrimonial home as one of the means of strengthening the right of occupation of the matrimonial home.[3] In the following paragraphs we consider the arguments for and against a statutory scheme of co-ownership

[1] Law Commission, First Report on Family Property: A New Approach (Law Com. No. 52, 1973); Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (Law Com. No. 86, 1978). See also the Law Commission's Report on Property Law: The Implications of Williams & Glyn's Bank Ltd. v. Boland (Law Com. No. 115, 1982).

[2] See Hansard, (H.L.) 18 July 1979, vol. 401, col. 1432 and 1455; 12 Feb. 1980, vol. 405, col. 112 and 15 Dec. 1982 vol. 437, col. 640; Cretney 154; Cretney, Principles of Family Law (3rd edn. 1979) pp.417 to 422; Deech, "A Tide in the Affairs of Women" (1972) 122 N.L.J. 742; Hewitt and Levin, "Social Policy and the Matrimonial Home" (1973) 36 M.L.R. 345; Baxter, (1974) 37 M.L.R. 175; Zuckerman, "Ownership of the Matrimonial Home - Common Sense and Reformist Nonsense" (1978) 94 L.Q.R. 26; Stone , (1979) 42 M.L.R. 192; Deech, "Williams and Glyn's and Family Law" (1980) N.L.J. 896; Murphy and Rawlings, "The Matrimonial Homes (Co-ownership) Bill: The Right Way Forward?" (1980) 10 Family Law 136; Temkin, "Property Relations during Marriage in England and Ontario" (1981) 30 I.C.L.Q. 190.

[3] Recommendation R(81)(15) of the Committee of Ministers to Member States of the Council of Europe, adopted by the Committee of Ministers on 16 October 1981 at the 338th meeting of Ministers' Deputies.

of the matrimonial home. To some extent the arguments must depend on the precise nature of the scheme proposed. Undue complexity or undue risks for third parties might, for example, be features of some schemes but not others. To make consultation meaningful we set out in the Appendix a possible scheme for co-ownership.[1] As one of the main criticisms directed at such schemes is their complexity we have deliberately tried to keep this scheme as simple as possible, even at the cost of some loss of protection for the non-owner spouse. As will be seen from the Appendix, however, even this "simplified" scheme is complex enough. We must stress that we are not in any way committed to this scheme or to any other scheme for statutory co-ownership of the matrimonial home.

5.19. Outline of possible scheme. The main features of the scheme described in the Appendix might be as follows.[2]

Registration of notice required

1. Statutory co-ownership would not be automatic. It would depend on registration of a matrimonial home notice by the non-owner spouse. Until registration the non-owner spouse would have no rights, other than his or her occupancy rights, in the home. The non-owner spouse could, subject to the exceptions noted below, register a notice at any time during the marriage.

Effect of registration

2. The effect of registering a notice would be that the spouses would become direct[3] co-owners of the matrimonial home just as if the owner spouse had transferred a half-share to the other. There would be no deemed survivorship clause.

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[1] We gratefully acknowledge the assistance of Mr K.G.C. Reid of the Faculty of Law, Edinburgh University in the preparation of this scheme. The scheme as presented, however, does not in all respects represent Mr Reid's views.

[2] The exact form of the scheme would depend on the decisions reached on the, sometimes quite difficult, questions discussed in the Appendix.

[3] I.e. the technique used would be direct ownership rather than a provision deeming one spouse to hold the property as trustee for both.

Exclusions

3. The owner spouse could exclude the scheme in relation to (a) a home owned before the scheme came into operation; and (b) a home owned before the marriage. A donor or testator could exclude the scheme in relation to the subject of his gift or bequest. It would be for consideration whether the non-owner spouse should be able to renounce the right to register a matrimonial home notice in relation to a specified home.

Separated spouses

4. A separated spouse could not register a notice in relation to a home acquired by the other spouse after the separation. There would be special rules to deal with temporary resumptions of cohabitation after separation.

Divorce

5. The scheme would co-exist with the courts' powers to redistribute property on divorce. The situation would be the same as if the parties were voluntary co-owners of the matrimonial home.

Third parties

6. Third parties who acquired the home and completed their rights by registration before a matrimonial home notice was registered would not be exposed to any claims by the non-owner spouse other than those available under the existing law. It would be for consideration whether any further protection for third parties was required.

Successive homes

7. There might have to be a special provision to deal with the following situation. A wife registers a matrimonial home notice. The home is sold by both spouses and the wife takes her half share of the proceeds and puts it in the bank. The husband buys a new home. The wife registers a new matrimonial home notice. The special provision might take the form of a right on the part of the owner spouse to seek a contribution out of the proceeds of the first house towards the price of the second.[1]

[1] See, however, the doubts expressed in para. 65 of Chapter 1 of the Appendix.

Cohabiting couples

8. The scheme would not apply to unmarried cohabiting couples.

5.20. Arguments for a co-ownership scheme. The main arguments for a scheme of statutory co-ownership of the matrimonial home are as follows.[1]

1. It would give expression to the idea of marriage as an equal partnership.
2. It would recognise the contributions in unpaid work by a non-earning spouse, particularly a housewife.
3. It would bring the law more into line with the views of most married people.
4. It would give effect to the view that certain types of property, including the matrimonial home, are by the very nature of the use made of them "community property".

5.21. Arguments against a co-ownership scheme. The arguments against a scheme of statutory co-ownership are as follows.

1. It would not be a good way of giving effect to the idea of marriage as an equal partnership.
2. It would not be a good way of recognising contributions in unpaid work by a non-earning spouse.
3. It would not necessarily bring the law into line with the views of most married people.
4. It would not be a good way of giving effect to the view that certain assets are by the very nature of the use made of them "community property" (even if that view is accepted).

[1] See also paras. 4.2 to 4.9 above.

5. It would be very complex.
6. It would not benefit many people.
7. It would be fundamentally incompatible with the actual and proposed law on financial provision on divorce.
8. It could contribute to, or exacerbate, marital disharmony.

We proceed to consider these arguments in more detail.

5.22. Statutory co-ownership would not be a good way of giving expression to the idea of marriage as an equal partnership. In some cases it would go too far, particularly if it applied to homes owned before marriage, or acquired with funds derived from assets owned before marriage, or acquired by gift or inheritance during the marriage. In other cases it would not go far enough. Spouses might rent their home, or burden it heavily with debt, and yet have other assets representing the fruits of their joint efforts during their marriage. There would be no statutory sharing of those assets. The scheme (like any scheme confined to a single asset) would be liable to produce results which were unfair as between the two spouses and as between one married couple and another. If the husband, say, owned the home and the wife owned, say, shares in a business, the wife could acquire half of the husband's property without having to share any of her own. Similarly, if husband A had invested all his money in the matrimonial home while his next door neighbour B had borrowed money on his home in order to finance his business, the law would operate very unevenly for the benefit of A's wife and B's wife. It would be a hit or miss way of giving effect to the idea of economic equality in marriage.

5.23. A scheme of statutory co-ownership of the matrimonial home would not be a good way of recognising contributions in unpaid work by a non-earning spouse, because it would benefit undeserving as well as deserving spouses. A spouse who had made negligible contributions, if any, could acquire a half-share in a matrimonial home. Extreme cases can readily be

imagined. An unscrupulous man, for example, could marry a widow, acquire a half share in her house by registering a notice, and then leave her a week later. It is not an answer to say that the owner spouse could exclude the scheme in relation to a house owned before the marriage. Many would not do so. Moreover, the same unfairness could arise in relation to a house bought after the marriage with funds owned before the marriage. Again, a wife who had left her husband after a short marriage and whose husband had acquired a house since the separation could resume cohabitation for an appropriate time, register a notice and then leave again. It is not a complete answer to say that both of these situations could be rectified on divorce. There might not be grounds for an immediate divorce: indeed in some cases the owner spouse might have to wait five years before there would be grounds for divorce. In the meantime one spouse might have died or become bankrupt or sold his or her share to a third party. At the very least a compulsory acquisition by an undeserving spouse would expose the other spouse to inconvenience: at the worst it would deprive him or his successors of half the home. Quite apart from such extreme cases, statutory co-ownership of the matrimonial home would not, in the general run of cases, be a good way of rewarding unpaid work. The rewards would bear no relation to the value of the work. The majority of housewives would get nothing from the new law because its effects would be confined to those married to owner-occupiers. Wives who had contributed by unpaid work to an increase in the value of the husband's business would get nothing from the new law if the matrimonial home was rented or burdened with debt. Even among those who would benefit from statutory co-ownership the results would be totally arbitrary. Not only would the net value of the matrimonial home vary enormously from case to case, and from time to time, but so too would the respective values of the spouses' contributions. The housewives who did most might get least, and vice versa.

5.24. Statutory co-ownership of the matrimonial home would not necessarily bring the law into line with the views of most married people. Although couples could contract out of the scheme if they both agreed to do so, there would be only limited opportunities for the owner spouse to opt out unilaterally.[1] There would be a strong element of compulsion in the scheme. Co-ownership could be forced on an unwilling spouse against his or her will. This is the very essence of the scheme. We have no evidence that this would be in line with the views of most married people in Scotland.[2] The fact that many married people take their houses in joint names is not evidence that they would wish this solution to be forced on others against their will and regardless of the circumstances of their marriage. Neither is the fact that most married people claim to regard their own house as belonging to both spouses, whatever the title may say. Indeed there is evidence that people do not wish to force on others the solutions they regard as appropriate for themselves. When informants in the survey on family property in Scotland were asked how property should be divided on divorce, in various specified circumstances, they did not say the matrimonial home should always go to both spouses equally. They distinguished clearly between different situations. Where the house was bought during the marriage and both spouses had helped to pay for it, 95% thought it should go to both

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[1] See Appendix, chapter 1, paras. 41 to 45.

[2] There is evidence of strong support for the general idea of co-ownership in England and Wales. In a survey in 1971 married people were asked the following question in the presence of their spouses. "Some people say that the home and its contents should legally be jointly owned by the husband and wife irrespective of who paid for it. Do you agree or disagree with that?" 91% of husbands and 94% of wives agreed. See Todd and Jones, Matrimonial Property (Office of Population Censuses and Surveys, 1972) p.38. It is not obvious, however, that the results would have been the same if the question had placed more stress on the element of compulsion in a statutory co-ownership scheme - if, for example, it had been: "Some people say that husbands and wives should be free to own their home jointly if they so wish but that joint ownership should not be forced on anyone against his or her will, regardless of the facts of the particular marriage. Do you agree or disagree with that?"

equally.[1] Where the house was bought during the marriage and only the husband paid for it, 64% still thought it should go to both equally.[2] But where the house had been owned by one spouse before the marriage, 67% thought it should go to the original owner,[3] and where it had been inherited 59% took this view.[4] All of the above situations were presented to informants as questions relating to a hypothetical childless couple. When they were asked if they considered that dependent children should affect the allocation of property on divorce, 70% said that it should, most taking the view that the children's custodian should get a larger share.[5] There was, in short, a very clear difference between the views of informants on the general question of how they regarded their own house and their views on how the law should deal with the house of a hypothetical couple in various specified situations. This difference emerged most clearly when the attention of informants was focussed on a house owned by one spouse at the time of the marriage. Married informants who had owned a house at the time of the marriage were asked how they thought of the ownership of the house after the marriage: 77% said they thought of it as belonging to both spouses jointly.[6] Yet, as we have seen, when they were asked what should happen to the house of a hypothetical childless couple on marriage breakdown where the house had been owned by one spouse before the marriage, 67% said that it should go to the original owner. It would, we think, be wrong to assume that the answers given by married informants to general questions about how they look on the ownership of their own home necessarily reflect their views about the solutions which the law should impose on others.

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[1] Manners and Rauta, Table 3.2.

[2] Ibid., Table 3.3. Married and formerly married people were more likely than single people to take this view.

[3] Ibid., Table 3.5. As many as 78% of divorced or separated people took this view, compared to 63% of married or cohabiting people. Table 3.6.

[4] Ibid., Table 3.7.

[5] Ibid., Tables 3.12 to 3.15.

[6] Ibid., Table 2.19.

5.25. Statutory co-ownership by the spouses of the matrimonial home would not be a good way of giving effect to the view that certain assets, including the home, are by the very nature of the use made of them "community property". Even if the view is accepted that certain property should belong equally to the members of the group which uses it (and acceptance of that view has interesting and far-reaching implications) the groups which use houses do not all consist of a husband and a wife. Many houses are inhabited by families consisting of a husband, wife and children. Many are inhabited by one-parent families. Many are inhabited by other combinations of people. A co-ownership scheme limited to married couples would be an incomplete way of giving expression to the view that certain houses ought to be community property because of the use made of them.

5.26. A scheme for statutory co-ownership of the matrimonial home would be very complex. The scheme which we have outlined above and which we develop more fully in the Appendix is as simple as we can make it. Indeed it may well be open to the criticism that in the interests of simplicity it sacrifices protection for the non-owner spouse: the view may well be expressed on consultation that the scheme does not go far enough and that there should be automatic co-ownership without the need for registration of a notice. Even the scheme suggested would, however, add complexity to the law. There would be a new set of statutory provisions which, on certain points, would have to be quite detailed and elaborate.[1] There would be new rules for professional advisers to learn and keep in mind. There would be more work for conveyancers and for the officials in charge of the Register of Sasines and the Land Register. If the new

[1] The draft Matrimonial Homes (Co-ownership) Bill appended to the Law Commission's Third Report on Family Property (Law Com. No. 86, 1978) has 34 sections and 3 Schedules.

law were to lead to much greater justice, complexity of this order would be a small price to pay. If, however, its effect on the balance of fairness were likely to be slight it would have to be considered whether any slight gain in fairness was worth the added complexity and expense.

5.27. Statutory co-ownership of the matrimonial home would not benefit many people. Its effect on the balance of fairness and unfairness would be very slight. The new law would have significant effects in only a small minority of cases. Only 37% of married couples in Scotland are owner occupiers.[1] Of these only 43% do not already have their house in joint names.[2] The new law would, therefore, on current figures, be applicable to only 16% of married couples at most. Of those 16% a number of owner spouses would exclude the scheme and a number of non-owner spouses (e.g. where the house is in the wife's name to protect it from the husband's business creditors)[3] would not wish to take advantage of it. The scheme would therefore apply to a fraction of 16% of married couples. In some of these cases the house might be so burdened with debt that its net value would be very low. Whatever the net value of the house, the scheme would often confer no real financial benefit on the non-owner spouse in the long term because he or she would succeed to the house on the death of the other spouse or would receive as much by way of financial provision on divorce as he or she would have received if the scheme applied.

5.28. A scheme for statutory co-ownership of the matrimonial home would be fundamentally incompatible with the present and

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[1] Manners and Rauta, p.4, Table 2.4.

[2] Ibid., Table 2.4. This proportion is very much lower where the house has been recently purchased - as low as 22% for houses purchased in 1977-9.

[3] 5% of couples have their house in the wife's name. Manners and Rauta, p.4, Table 2.4.

proposed law on the financial and property consequences of divorce. This criticism has some force in relation to the present law on financial provision on divorce. It makes little sense, it might be said, to set up a complicated system of co-ownership of the matrimonial home during marriage if the court has an unfettered discretion to make an award of a capital sum which would result in some quite different distribution of the spouses' property as between themselves. The alleged benefit of fixed property rights would be illusory. It would be most useless when most needed. The criticism has even more force in relation to the rules on financial provision and property readjustment on divorce which we have recommended in our Report on Aliment and Financial Provision.[1] One of the governing principles in the new law would be that the net value of matrimonial property should be shared equally between the spouses on divorce unless there were special circumstances justifying some other division. Matrimonial property would not be confined to the matrimonial home but would extend to property of any kind acquired, otherwise than by gift or succession from a third party, in the period between the marriage and the final separation. It would also include property purchased before the marriage for use by the couple as a family home or as furniture or plenishings for such a home. Subject to this exception, justified by the consideration that many couples in fact buy a house and furniture before their marriage but with a view to their marriage, the governing principle would be equal sharing of acquests. It would be technically possible to combine a scheme of statutory co-ownership of the matrimonial home during the marriage with a norm of equal sharing of acquests on divorce. Most married couples, after all, already take the title to their home in joint names. It might be thought, however, that there would be a certain underlying incoherence in enacting

[1] Scot. Law Com. No. 67, 1981.

one rule for sharing property during marriage and a quite different rule for sharing property on divorce. The two approaches would be technically compatible but fundamentally incompatible.

5.29. We have assumed in the previous paragraph that if a scheme of statutory co-ownership of the matrimonial home were introduced it would have to co-exist with judicial powers to redistribute property on divorce. This seems inescapable. It would, in our view, be unacceptable to leave questions of property redistribution on divorce to depend solely on the results of a scheme for co-ownership of the matrimonial home. In many divorce cases the spouses would not own a home. Yet there would still often be a justification for a capital sum or property transfer. In many they would own a home and also other assets. To confine the process of economic adjustment on divorce to the home would produce distorted and indefensible results. In some cases the spouses would own a home but it would not come under the scheme. Again it would often be unjustifiable to refuse to make any adjustment of property or capital in such cases. Even in cases where the only asset of any value was the home there would often be special factors (such as the source of the funds used to pay for the home, or the date or manner of its acquisition, or the need for one spouse to retain the use of the home as a family home for the children of the marriage, or deliberate dissipation of other assets by one party) which would suggest a departure from equal sharing. We have no doubt that if co-ownership of the matrimonial home were introduced it would still be essential for the courts to have power to redistribute property on divorce.[1] This brings us back to the criticism referred to

[1] The Law Commission came to the same conclusion. See Law Com. No. 86 (1978) para. 1.182 - "the justice done on divorce needs to be precise rather than broad and needs to take account not only of particular factors affecting the position of individual spouses, but of the situation of the children as well; and all the family assets have to be available for the exercise of the court's discretion.".

in the previous paragraph, namely that it might not be wise to introduce a complex scheme of statutory co-ownership of the matrimonial home if the results are liable to be set aside and undone on divorce. We would add two further observations. First, if statutory co-ownership resulted only from registration of a notice, the period of statutory co-ownership would probably be short in many cases. This is because the non-owner spouse might decide to register a notice only when the marriage began to run into serious difficulties - perhaps only when he or she consulted a solicitor about divorce. Secondly, the fundamental incompatibility between the two approaches to the allocation of matrimonial property would become even more obvious if spouses were empowered to apply to the court for a sharing of property in circumstances short of divorce. Yet, as we shall see later, there are fairly strong arguments for conferring such a power.[1]

5.30. It could be argued that a co-ownership scheme could contribute to, or exacerbate, marital disharmony, particularly if the scheme were based on registration of a notice. It might not be thought to be desirable, from this point of view, that one of the spouses should have the power at any time during the marriage at his or her own volition, and by the simple expedient of registering a notice, to encroach materially on the other spouse's property. In most marriages there is probably, from time to time, some disharmony between the spouses. A non-owner spouse might register a notice during a period of temporary displeasure with the other spouse, in a spirit of distrust or revenge, and later come to regret it. In the meantime, however, the relationship could have been further damaged. This would, perhaps, be particularly likely if both spouses, in their reasonable moments, would agree that their resources, before the notice, were fairly

[1] See paras. 6.17 to 6.27 below.

divided between them. In short, a matrimonial home notice might be used in haste and repented of at leisure and might contribute to marital breakdown. Registration of a notice might be seen by the other spouse as a very definite escalation of the level of a domestic dispute. The same criticism could be made in relation to opting out notices.[1]

5.31. Some difficulties. If it were to be decided that a scheme of statutory co-ownership of the matrimonial home should be introduced, a number of difficult questions would have to be answered about its form. The possible scheme put forward by way of illustration in the Appendix is merely one possible model. Many variants could be devised. The drafting of a suitable scheme would not be simply a question of legal technicalities. Important questions of policy would have to be answered. Should, for example, co-ownership come about automatically[2] or only on registration of a notice? Should one co-owner's share pass automatically to the other spouse on death? Should the scheme apply to a home owned by one spouse before the marriage? Should it apply only to the principal family residence, or also to second homes? Should it apply to a holiday home in Scotland, even if the parties are governed by the matrimonial property law of some other country? What should be the rules on contracting out, opting out or excluding the scheme? Should the scheme apply, or not apply, to a home bought by a separated spouse? How should conflicts between spouses and third parties be resolved? What rules would be necessary to prevent abuse by an unscrupulous spouse? We set out below a number of questions of this nature on which we would welcome views. We would suggest that these detailed questions should be answered only after Chapter 1 of the Appendix has been read. We do not

[1] See Appendix, Chapter 1, para. 19.

[2] See Appendix, Chapter 1, paras. 4 and 5 for a discussion of the fundamental difficulties involved in this solution.

expect all readers of this Memorandum to answer all of these questions. We feel, however, that no-one should support a scheme for statutory co-ownership of the matrimonial home unless satisfied that the more important questions as to the form of the scheme could be resolved in a satisfactory way. We would welcome comments on the detailed questions relating to the form of the scheme even from those opposed to the introduction of a scheme of statutory co-ownership, and we would be particularly grateful for comments on the conveyancing aspects from those with expertise in this field.

5.32. Questions for consideration. The arguments against a scheme for statutory co-ownership of the matrimonial home are such that we would not wish to make a provisional recommendation that such a scheme be introduced. On the other hand the idea of statutory co-ownership of the matrimonial home has attracted support, as well as criticism, in England and Wales and we think it would be wrong to reach the provisional conclusion, in advance of consultation, that such a scheme should not be introduced. We prefer, therefore, to reserve our position until we have had the benefit of comments from interested persons and organisations. There may be considerations, one way or the other, which we have overlooked or insufficiently stressed. We would be grateful, therefore, for responses to the following invitation for views.

(a) We invite views on whether, having regard to the arguments for and against such a solution in paragraphs 5.20 to 5.31 above, there should be a scheme of statutory co-ownership of the matrimonial home.

(b) If such a scheme were to be introduced:-

(i) Should the scheme apply not only where the home is initially owned by one spouse but also where it is initially owned by both spouses but in unequal shares?

(ii) Should co-ownership come about only at the option of the non-owner spouse (e.g. on registration of a notice) or automatically by operation of law? If the latter, is there any practicable way of conferring a real right on the acquiring spouse while sufficiently protecting third parties?

(iii) Should the scheme apply to a home which is co-owned with a third party?

(iv) Should the scheme apply to any matrimonial home (including a second home or holiday home) or only to the principal family residence?

(v) Should the scheme apply to a home in Scotland even if the spouses are domiciled and habitually resident abroad?

(vi) Should the scheme apply to a home already owned by one spouse at the time when the implementing legislation comes into force? (See also (xiii) below.)

(vii) Should the scheme apply to a home already owned by one spouse at the time of the marriage? (See also (xiii) below.)

(viii) Should the scheme apply to a home acquired by one spouse by gift or succession from a third party during the marriage? (See also (xiv) below.)

(ix) Should the scheme apply to homes used partly for business purposes or forming part of other property and, if so, how?

(x) Should a statutory co-owner's share of the matrimonial home pass automatically, on his or her death, to the surviving spouse, or should it simply form part of his or her estate to be dealt with by the general law on testate or intestate succession?

(xi) If statutory co-ownership comes into operation in relation to a home, should both spouses become equally liable for any loan secured over the home? If so, should heritable creditors of the owner spouse be under a statutory duty to supply the acquiring spouse, on request, with information about the amount of indebtedness outstanding?

(xii) Should a spouse be able to renounce his or her rights under the scheme in relation to a specified home?

(xiii) If the scheme applies to a home owned by one spouse before the implementing legislation comes into force or before the marriage, should the owner spouse be able to opt out of the scheme unilaterally in relation to any such home?

(xiv) If the scheme applies to a home acquired by gift or succession from a third party, should a donor or testator be able to exclude the scheme in relation to a home given or bequeathed to one spouse?

(xv) If the scheme applies to a house co-owned with a third party, should it be excluded where the acquiring spouse had previously transferred to a third party a half share (or some other share) in the house? (The object of this exclusion would be to prevent a spouse acquiring a half share of the other's house, transferring that half share to a third party, and then repeating the process so as to acquire a further quarter share, and so on.)

(xvi) Should there be any other provisions for opting out of, or excluding, the scheme?

(xvii) Should the scheme apply to a home acquired by a spouse after the spouses have separated? If not, is there any satisfactory way of dealing with the problem of temporary resumptions of cohabitation?

(xviii) If the scheme is based on registration of a matrimonial home notice, should it be possible to register such a notice after the dissolution of the marriage by the death of either spouse?

(xix) If the scheme is based on the registration of a matrimonial home notice, should registration be possible after the house has vested in a trustee in sequestration or an adjudging creditor? Should a registration shortly before the owner spouse's bankruptcy be challengeable by his creditors?

(xx) If the scheme is based on registration of a matrimonial home notice, would it be acceptable to resolve conflicting claims by an acquiring spouse and third parties (i.e. third parties who had acquired a house or an interest in it from the owner spouse) by simple priority of registration?

(xxi) If the scheme is based on registration of a matrimonial home notice, should there be any provision to enable the non-owner spouse to reduce a gratuitous alienation of the home, or an interest in it, by the owner spouse made without the consent of the non-owner spouse?

(xxii) Is there a need for any special protection for the acquiring spouse against the owner spouse diminishing the value of the property by obtaining further advances under a heritable security over the property? If so, what form should this protection take?

(xxiii) Should there be a special statutory provision enabling a spouse to apply to the court for a forced contribution by the other spouse, out of the proceeds of a co-owned

home, towards the purchase price of a replacement home? If so, are there any other circumstances where one spouse should be entitled to exact a contribution from the other towards the cost of a matrimonial home?

(xxiv) Should there be a special statutory provision enabling an acquiring spouse to apply to the court to have the other spouse ordained to complete title to the matrimonial home?

(xxv) Should it be provided that a minor spouse would be deemed to be of full age for the purpose of opting out of the scheme, renouncing rights under it, and registering a matrimonial home notice?

(xxvi) Where the owner spouse is a minor, or is mentally incapable, should the statutory transfer effected on registration of a matrimonial home notice be deemed to take place as if he or she were of full age and mental capacity?

(xxvii) Is any special provision necessary in relation to the insurance of a home which becomes subject to statutory co-ownership?

(xxviii) Should the scheme apply to unmarried cohabiting couples? (Proposition 5)

Statutory co-ownership of household goods

5.33. Introduction. One of the criticisms of the present separate property rule is that it is artificial and difficult to apply in relation to household goods. A possible response to this criticism would be a scheme of statutory co-ownership of such goods. This was referred to as a possibility by the Law Commission in their Working Paper on Family Property Law.[1]

[1] Working Paper 42, 1971, paras. 2.25 and 2.26.

They considered, however, that such a scheme would involve considerable difficulties, because household goods were numerous and liable to rapid change.[1] They also thought that the main requirement was to establish the right of a spouse to the continued use and enjoyment of the household goods. For these reasons they made no proposals at that time for reform of the law relating to ownership of the household goods.[2] In their Third Report on Family Property the Law Commission adhered to these views. They did not recommend a scheme for co-ownership of the household goods but did recommend a scheme whereby a spouse could apply to the court for an order giving him or her the right, as against the other spouse, to use and enjoy the household goods or some of them.[3] So far as Scotland is concerned, the Matrimonial Homes (Family Protection)(Scotland) Act 1981[4] implemented recommendations made by us[5] that a spouse with occupancy rights in a matrimonial home should be able to apply to the court for an order for the use and possession, in the home, of such furniture and plenishings of the other spouse as are reasonably necessary to enable the home to be used as a family residence.[6]

5.34. Arguments for and against statutory co-ownership of household goods. The arguments are similar to those discussed in relation to co-ownership of the matrimonial home. In favour, it can be said that statutory co-ownership would resolve uncertainty; recognise the unpaid contributions of the non-earning spouse; give expression to the idea of marriage

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[1] Ibid., para. 2.25. "Spouses seldom have more than one matrimonial home at any one time, but the household goods are numerous, and are liable to rapid change. Whatever definition were chosen, there would be difficult problems of identification, and of tracing funds where old items were sold or part-exchanged for new items."

[2] Ibid., para. 2.26.

[3] Law Com. No. 86, 1978, paras. 3.5 to 3.7 and 3.31 to 3.160.

[4] S.3(2).

[5] See our Report on Occupancy Rights in the Matrimonial Home and Domestic Violence (Scot. Law Com. No. 60, 1980) paras. 2.36 to 2.44.

[6] S.3(2).

as an equal partnership; and bring the law more into line with the views of married people, most of whom appear to regard most of their household goods as belonging to both spouses equally.[1] Against, it can be said that the scheme would benefit undeserving as well as deserving spouses; that it would produce arbitrary results, depending on how much spouses chose to spend on household goods as opposed to other assets; that it would not necessarily bring the law into line with the views of married couples on the compulsory division of other couples' goods in all circumstances; that it would add considerable complexity to the law; that it would, unless carefully restricted, deprive some spouses of half of certain items of property (for example, furniture owned before the marriage or inherited from a parent) for no good reason; and that it would be incompatible with the rules on financial provision on divorce. Perhaps the strongest argument against a scheme for automatic statutory co-ownership of household goods is that the difficulties would be out of all proportion to the benefits. The difficulties would include the devising, and application in practice, of a suitable definition of household goods; of suitable rules on exclusions from the scheme and rights to opt out of it; and of suitable rules on the choice of the applicable law if, for example, the spouses are domiciled in Scotland but have household goods abroad or vice versa. The benefits would often be insubstantial. Ordinary household goods usually have a very low resale value and are depreciating assets. In most matrimonial homes some of the goods will in any event be owned by one spouse and some by the other, and most of the goods will be thought of as belonging (in a non-legal sense) to both spouses equally.[2]

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[1] Manners and Rauta, p.6. It is possible, of course, that the views given when spouses are in amity may not correspond to the views which might be expressed in a dispute over the the ownership of household goods.

[2] See Manners and Rauta, Table 2.9.

So far as ordinary household goods are concerned, statutory co-ownership would probably not make very much difference to the way spouses perceive their situation or regulate their affairs. Where statutory co-ownership might make a difference would be in relation to items of outstanding value. Yet these are precisely the cases where the results of a co-ownership scheme might be regarded as unfair and unacceptable, and where there is a case for allowing unilateral opting out.[1] It could also be argued that the operation of opting out rules might increase rather than decrease domestic difficulties.[2] The thought of husbands and wives passing each other signed and witnessed opting out intimations in relation to particular items of furniture is not a happy one.

5.35. Provisional conclusion. Our provisional conclusion is that the arguments against introduction of a scheme of statutory co-ownership of the household goods outweigh the arguments in favour of it. We have, however, given this matter detailed consideration, and we include in the Appendix details of a possible scheme which might form the basis of proposals for legislation if there were strong support on consultation for the introduction of statutory co-ownership. We would urge those who might be tempted to favour statutory co-ownership of household goods in principle to address themselves to the detailed questions raised in the Appendix before coming to a final conclusion. Our provisional opposition to a scheme of statutory co-ownership of household goods does not mean that we think that the application of strict separate property rules to such goods is a satisfactory solution. We would stress, however, that orders for the use and possession of furniture and plenishings in the matrimonial

[1] See Appendix, Chapter 2, para. 21.

[2] See ibid., paras. 20 to 24.

home can already be obtained under the 1981 Act.[1] The strongest remaining criticism of the present law is that separate property rules can be difficult to apply to household goods and can lead to artificial results. It may be, however, that a presumption of co-ownership of household goods would be a simpler and safer way of remedying this defect. We return to this later.[2] In the meantime, we invite views on the following question. Do you agree with the provisional conclusion that the disadvantages of a scheme whereby the household goods in a matrimonial home are automatically co-owned by operation of law would outweigh the advantages? (Proposition 6)

[1] S.3(2). The order can only grant possession or use in the matrimonial home, can be applied for only by a spouse with occupancy rights in the home, and applies only to articles "reasonably necessary to enable the home to be used as a family residence". (s.22). The court has a discretion to make such order as appears to it to be just and reasonable. It remains to be seen how the courts will exercise this discretion.

[2] See paras. 6.2 to 6.9 below.