DIVISION OF FAMILY PROPERTY

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I. INTRODUCTION

The disruptive economic consequences associated with marital breakdown have prompted both Parliament and the Provincial Legislatures to develop statutory frameworks in an attempt to ameliorate these problems. More specifically, the issue of dividing property accumulated during the relationship has been addressed in this jurisdiction through *The Family Property Act*.\(^1\) The purpose of this paper is to provide an overview of the fundamental issues addressed through this piece of legislation in a chronological fashion. This paper is intended to be an aid to legal research, not in substitution for it.

II. *THE FAMILY PROPERTY ACT*

A. APPLICATION

1. Definition of “Spouse”

   Interpretation

2(1) In this Act:

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   “spouse” means either of two persons who:

   (a) at the time an application is made pursuant to this Act, is legally married to the other or is married to the other by a marriage that is voidable and has not been voided by a judgment of nullity; or

   (b) has, in good faith, gone through a form of statutory marriage with the other that is void, where they are cohabiting or have cohabited within the two years preceding the making of an application pursuant to this Act;

   (c) is cohabiting or has cohabited with the other person as spouses continuously for a period of not less than two years;

   and includes:

   (d) a surviving spouse who continues or commences an application pursuant to section 30 and who was the spouse, within the meaning of clause (a), (b) or (c), of the deceased spouse on the day of the spouse’s death; and

   (e) where the applicant is a spouse within the meaning of clause (b), the other party to the void marriage;

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While married couples had, since 1980, enjoyed recourse to *The Matrimonial Property Act* and its successor, *The Matrimonial Property Act, 1997*, it had become increasingly apparent that the legal distinction between married, non-married opposite sex cohabiting partners, and same sex cohabiting partners, may infringe constitutional guarantees provided to individuals by the *Canadian Charter of Rights and Freedoms*.

In response to the decision of the Supreme Court of Canada in *M. v. H.* \(^2\) and subsequent decisions such as *Watch v. Watch* \(^3\) and the Nova Scotia Court of Appeal decision in *Walsh v. Bona* \(^4\), the Province of Saskatchewan passed *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001* and *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*, both of which received Royal Assent on July 6, 2001 and, save for a rather dramatic amendment to *The Wills Act*, came into force on that day. Perhaps the most fundamental change has occurred in the area of possession and division of family property as between partners who reside together as spouses. By these amendments, *The Matrimonial Property Act, 1997* is now entitled *The Family Property Act*.

On December 19, 2002, the Supreme Court of Canada released its decision in *The Attorney General of Nova Scotia v. Susan Walsh and Wayne Bona* \(^5\). The Supreme Court overturned the Nova Scotia Court of Appeal in *Walsh v. Bona* effectively ruling that family property legislation which purports to treat married spouses differently from partners (whether it be same sex partners or opposite sex partners) is not discriminatory within the meaning of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The impact of this decision cannot be overstated. Prior to amending any legislation, most provinces (Saskatchewan and Nova Scotia excluded) waited for the outcome of the *Walsh* decision from the Supreme Court of Canada and, in all likelihood, will not amend their legislation in light of that decision. Of interest, the Supreme Court of Canada did

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\(^3\) (1999), 182 Sask. R. 237 (Q.B.).
suggest that any attempt on their part to restrict the freedom of choice among persons in conjugal relationships may, in and of itself, offend the liberty interest enshrined in the *Canadian Charter of Rights and Freedoms*. Those comments by the majority in *Walsh* have, of recent date, resulted in constitutional challenges to Saskatchewan’s *Family Property Act*. To date, there have been no decisions with respect to the constitutional validity of *The Family Property Act*.

Insofar as the application of the *Act* is concerned, the most interesting question in contemporary terms is not “who does the *Act* apply to?” but rather “who does the *Act* exclude?” It is readily apparent by the definition of spouse as set forth above, that a married couple does enjoy recourse to the legislation provided that they are still married and provided that they do not fit under the other criteria as set forth in s. 2(1). The problem, if you can call it a problem, comes into play when one attempts to identify whether or not a particular couple (opposite sex or same sex) who are not married fit within the definition of “spouse”.

Insofar as non-married couples are concerned, the aforementioned amendment raises three criteria which must be examined to determine whether or not a particular couple falls within its parameters - is the couple cohabiting or have they cohabited; is the couple cohabiting or did they cohabit as spouses; and thirdly, did the couple cohabit as spouses continuously for a period of not less than two years.

a. Is Cohabiting or Has Cohabited?

The *Act* fails to define cohabitation. The term, however, connotes a physical arrangement of two people residing in a common residence. What of the common law couple who do not reside in the same house? What of the couple who are separated for employment reasons or for health reasons for that matter? Has the legislature excluded such parties from the statutory regime?

In *Molodowich, infra*, reference is made by Kurisko, D.C.J. equating the word “cohabit” and “conjugal”. It should be noted, however, that in *Molodowich*, Judge Kurisko was focusing upon
Part II of the Family Law Reform Act, 1978. In that Act, “cohabit” was specifically defined as “means to live together in a conjugal relationship, whether within or outside marriage”.

The Molodowich decision has received some attention by courts in Saskatchewan. In Nichols v. Hawes, the Petitioner was attempting to obtain spousal maintenance under The Family Maintenance Act against the Respondent. The evidence of the Petitioner was that in the summer of 1991, she and her two children moved in with the Respondent and his two children. In the summer of 1992, she and her children moved out of that accommodation and took up residence in the same district as the Respondent. She indicated that after she had moved out, they had spent evenings with each other and he sometimes stayed overnight with her. She indicated that the reason why she moved away from his residence with her children was that the Respondent’s children were not compatible with hers and that the Respondent’s parenting methods differed from hers. She also deposed that the Respondent kept his belongings at her place.

The Petitioner’s counsel argued that even though the Petitioner and the Respondent did not reside together under the same roof for the required period of three years as set out in The Family Maintenance Act, the couple could still be considered spouses and could still be considered to have cohabited during that period of time based upon the other components as outlined by Judge Kurisko in Molodowich. Madam Justice Carter states as follows:

Seven descriptive components involved in cohabitation were set out in Molodowich v. Penttinen (1980) 17 R.F.L. (2d) 376 (Kurisko, D.C.J., Ontario District Court). One of the first components was:

- Did the couple live under the same roof? In the case before me they did live under the same roof, but indeed evidently lived together under the same roof for at most a year and some months - not taking into account that they would spend nights in one residence or the other from time to time.

There is a total of seven “descriptive components” judges ought to consider when determining if the parties who are not married were “cohabitants” and among those seven components at least 23 considerations in total which should be made. I do not set them out in full here because as I set out above I do not find that the relationship between this couple satisfied the definition of “spouse”, and I need not go into the other components suggested by Judge Kurisko.

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It appears that Madam Justice Carter decided that the couple did not cohabit continuously for a period of not less than three years because they were not living under the same roof. She considered this “component” as seemingly exclusive from the other components as outlined by Judge Kurisko.

A review of case law from outside this jurisdiction supports the proposition that parties can live in separate residences but nevertheless be deemed to have “cohabited” during that period of time. A clear example of this is the decision of Mr. Justice Sheppard in *McEachern v. Fry Estate.* In this case, the Applicant sought a support award under s. 58 of *The Succession Law Reform Act* in Ontario from the estate of the deceased on the basis that she had cohabited with him continuously for a period of not less than three years. The couple had remained constant companions and lovers for a period of 15 years until the deceased passed away in 1991. They maintained their own separate residences but spent most of their free time together. Mr. Justice Sheppard ruled that even though the Applicant and the deceased maintained separate residences while they co-existed during their 15 year relationship, it did not mean that they did not cohabit. He states as follows:

> I do not see that the fact that each maintained a separate residence throughout their relationship as terribly significant when one looks at the fact that when Harry and Jean established a relationship, she was 48 and he was 62 and each of them had been married and had children. Obviously, they found love and companionship in each other. Had they not, then I should think they would not have spent all their free time together at either Jean’s place or Harry’s place. And it has to be remembered that Jean maintained a job in Barrie which is far enough from Aurora as to make the prospect of traveling back and forth daily unattractive.

The decision in *McEachern v. Fry Estate* underscores the problem. How can practitioners advise their clients to order their affairs such as to avoid unwanted consequences of relationships? Presumably couples may feel that they do not need to have a cohabitation agreement or interspousal contract because they are not living together but rather seeing each other on a regular basis. Such uncertainty makes it exceedingly difficult to advise clients.

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b. Cohabiting as Spouses

The Ontario District Court in *Molodowich v. Penttinen*\(^8\) attempted to create some criteria to look at in determining whether a couple was cohabiting. At page 380, Kurisko, D.C.J. stated:

> However, there must be, indeed there has to be some touchstone for guidance. Through the maze of my investigation I have come to the conclusion that “cohabit” and “conjugal” involve overlapping and interwoven concepts, each word, in a sense, an echo of the other and both an integral and essential element encompassed by the modern day concept of marriage.

In *Re Feehan and Atwells* (1979), 9 R.F.L. (2d) 248 at 249 (quoted with approval by Morden, J.A. in *Sanderson v. Russell* (1979), 9 R.F.L. (2d) 81 at 87 (Ont. C.A.)), Honey, Co. Ct. J. went straight to the heart of the matter by applying the Shorter Oxford Dictionary meaning of “conjugal” to the definition of “cohabit” in s. 1(b) of the Act as including “living together in a ‘marriage-like’ relationship outside marriage”, which is helpful but requires amplification for which I turn to the following statement of Blair, J.A. in *Warwick v. Minister of Community and Social Services* (1978), 21 O.R. (2d) 528, 5 R.F.L. (2d) 325 at 336, 91 D.L.R. (3d) 131 (C.A.):

> “Marriage involves a complex group of human interrelationships – conjugal, sexual, familial and social as well as economic. In more than the romantic sense, cohabitation and consortium are regarded as basic elements of marriage. It would be wrong to say that these elements are not present when persons, not legally married, live together as husband and wife.

Kurisko, D.C.J. went on to identify seven components and 23 questions to ask in determining whether a couple in fact cohabited. The question is whether these will be adopted by our courts to determine the issue.

In *Tanouye v. Tanouye*\(^9\), Madam Justice Hunter, after a careful analysis of existing case law dealing with common law relationships, including the *Molodowich* decision, stated:

> The authorities seem to indicate that a common law relationship or marriage requires perhaps not all but at least a majority of the following characteristics: economic interdependence including an intention to support; a commitment to the relationship, express or implied, for at least an extended period of time; sharing of a common principle residence; a common desire to make a home together and to share responsibilities in and towards that home; where applicable, shared responsibilities of child rearing, and a sexual relationship. As well, it appears that, superimposed on the relationship, there should be the general recognition of family, friends, and perhaps to some extent the larger community, that the particular man and woman appear as a “couple” i.e. a family unit.

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A review of decisions in this province that have considered the *Tanouye* decision clearly illustrate how fact sensitive this issue truly is. In *Davidson v. Reynolds*\(^\text{10}\), Mr. Justice McIntyre of the Court of Queen’s Bench, Family Law Division, dealt with a situation where the male cohabiting partner suggested that his relationship with the Plaintiff was akin to that of a landlord and tenant. The Plaintiff understandably took the view that it was a common law relationship with the usual indices of marriage. Mr. Justice McIntyre states at paragraph 51:

I adopt the reasoning set forth in *Tanouye*, supra. However, I cannot conclude that this relationship had enough of the characteristics outlined so as to constitute a common law relationship. I cannot conclude there was economic interdependence and an intention to support one another. While rejecting the characterization of a landlord and tenant relationship, I am satisfied that Lisa requested a place to live and offered to pay for the groceries and utilities. There was no evidence of any intermingling of economic affairs or that, on any objective standard, one could be said to be supporting the other. Nor can I find that there was a commitment to the relationship, at least insofar as Paul was concerned. I accept the evidence of Barbara Davidson, Lisa’s mother, that there was no relationship, no sign of affection. Similarly, I cannot find that there was any common desire to make a home together. There was no evidence of any recognition by family, friends, or the community that they were a family unit. The parties shared a residence. There was a sexual relationship, to a minor extent. I am satisfied these people did not share a residence because of any commitment to one another. They fought before, during and after the time they resided together. I am satisfied the only reason they resided together was because of the fact that they had created a child. This does not make a common law relationship.

In *R. v. Timmons*\(^\text{11}\), the accused had been charged with defrauding the Government of Canada Student’s Loan Program and the Government of Saskatchewan Student Loan Assistance and Student Aid Program, of a considerable sum of money. The Crown alleged that throughout a period of seven years, she had lived in a common law relationship with a man. While there was some inconsistency in the evidence between the accused and her alleged common law husband, the court did accept the fact that both individuals resided together in the same residence, both had an informal financial arrangement resulting in the accused paying all of the rent whereas the alleged common law husband paid various utilities and other expenses. The accused stated that both her and the alleged common law husband had agreed that there would be no commitment between them with respect to their relationship. Mr. Justice Laing, in acquitting the accused, found that the couple were not residing together in a common law relationship as

\(^{10}\) (2000), 200 Sask. R. 178.

\(^{11}\) (1999), 179 Sask. R. 213.
defined in the Student Loan Guide and further found that they were not residing together as husband and wife based upon his review of case law. Mr. Justice Laing referred, with approval, to the decision of Hall, Co. Ct. J. in *Janzen v. Montgomery*, wherein Judge Hall stated as follows:

From the foregoing, it will be seen that “to live together as husband and wife” connotes an element of permanence and commitment to each by the parties to the relationship to a substantial degree. Certainly, it should not be thought that every arrangement where a man and woman share the same living accommodation and engage in sexual activity to some extent should be regarded as living together as husband and wife. In these times, men and women have a much more casual attitude toward sexual conduct than was prevalent even two decades ago. Now it is not unusual for a man and a woman to live in the same apartment, share expenses, and engage in sexual activity with one another, knowing full well that the relationship will not last for the rest of their lives and will likely end when another person comes along or circumstances change. In my opinion, such a relationship does not come within the definition of spouses set out in *The Family Maintenance Act*.

The courts are now called upon to decipher which of the components are necessary to make the finding that a couple has in fact cohabited as spouses. It appears from these decisions that the concept of commitment to a relationship plays a fundamental role. As most practitioners are aware however, this concept is ill defined and results in a great deal of uncertainty in advising clients.13

c. Continuously

The concept of continuous cohabitation has been considered in several decisions which may be of some assistance to counsel.

It appears from a review of case law outside this jurisdiction that short periods of separation do not necessarily affect the “continuous” nature of the relationship. As Mr. Justice Morton from the Ontario Court of Appeal stated in *Sanderson v. Russell* at pp. 87 - 88:

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13 See also *Ruskin v. Dewar* (2003), SKQB 514 and *Romanchuk v. Robin* (2003), SKCA 50 for discussion of the requirements of cohabitation.
Without in any way attempting to be detailed or comprehensive, it could be said that such a relationship has come to an end when either party regards it as being at an end and, by his or her conduct, which has demonstrated in a convincing manner that this particular state of mind is a settled one. While the physical separation of parties following “a fight” might, in some cases, appear to amount to an ending of cohabitation, the test should be realistic and flexible enough to recognize that a brief cooling off period does not bring the relationship to an end. Such conduct does not convincingly demonstrate a settled state of mind that the relationship is at an end.

Similarly, in *Hohn v. Coppin*\(^{15}\), Mr. Justice Hardinge of the British Columbia Supreme Court stated at pp. 10 - 13 of the decision:

> I do not doubt that relatively brief periods of separation between a male and a female who generally live together as husband and wife do not necessarily result in the cessation of the relationship. So where, as in Re: Feehan and Attwells (1979) 24 OR (2d) 248, a woman leaves the home in which she has been living with a man for a period of between one to three weeks for the purpose of “reassessment” of her relationship, it was held that the period of cohabitation was not interrupted. I have applied the same rule in respect of the October, 1981 separation of the parties to these proceedings.

Two recent decisions from the Court of Queen’s Bench in this province also focus on the concept of temporary periods of separation and whether or not those periods constitute a break in the continuity of the relationship.

In *McDonald v. Stone*\(^{16}\), Madam Justice M-E. Wright considered a situation where a Respondent had applied by way of motion to have a family property claim dismissed on the basis that that claim was statute barred. The issue before the Court was whether or not the parties had last cohabited continuously for a period of not less than two years within 24 months prior to the commencement of the proceeding. If there was no continuity, the limitation period found in s. 3.1 of *The Family Property Act* would apply and the claim by the Petitioner would effectively be statute barred. Madam Justice Wright reviewed the *Sanderson* case as well as various other decisions from Ontario and concluded that short periods of separation do not necessarily interrupt or terminate the continuity of cohabitation for the purposes of s. 2(1)(c) of *The Family Property Act*. She concluded as well that the issue of whether or not a separation actually terminates the relationship is a question of fact involving a number of considerations. Those considerations include:

\(^{15}\) (July 25, 1984) Doc. 1204/83 B.C.S.C.

\(^{16}\) 2004 SKQB 69.
(i) the overall length of the relationship;
(ii) the frequency and duration of any temporary separation;
(iii) the purpose of the separation;
(iv) the conduct of the parties towards each other, both during and after separation;
(v) most importantly, the intention of the parties.

She posed the question “Did one or both of them regard the relationship to be at an end ... and demonstrate in a convincing manner that this was a settled intention?” [emphasis added]. She could not determine this on affidavit evidence and directed a trial of the issue.

In McDonald, it was the position of the Respondent that he and the Petitioner had separated in July of 2000. He had formed a new relationship in the autumn of 2000 and as a result had another child born in 2001. The Respondent’s position was that as the Petition had issued well beyond the 24 month limitation period, it was effectively statute barred. It was the Petitioner’s evidence that the separation actually occurred in May of 2002 although there were times even after that when she says the parties were together as man and wife. The Petitioner indicated that the separation lasted only for a period of approximately six months and that the parties had reconciled.

In Taman v. Taman17, Mr. Justice R. S. Smith considered the following fact scenario. He found that the parties began cohabiting sometime in late 1989 or 1990. The Respondent was employed with the Canadian National Railway and had been so employed as a locomotive engineer from approximately 1979. The Petitioner had two children in her care from a previous marriage and two children were actually born of the relationship. In August of 1997, the parties separated. The Petitioner brought an application before court pursuant to The Family Maintenance Act and The Children’s Law Act seeking custody of the children, maintenance for the children, as well as a restraining order and division of asset application. The Petitioner actually obtained an interim order to this effect. Although the date of reconciliation was somewhat vague, Mr. Justice Smith

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17 2004 SKQB 162.
concluded that a reconciliation occurred no later than October of 1997. The Respondent’s position was that the separation of approximately three months or slightly longer in 1997 constituted a break in the continuity of the spousal relationship which had the result of “restarting” the clock on the two year cohabitation contemplated by s. 2(1)(c) of The Family Property Act. (Interestingly enough, the parties married after they reconciled but then separated in the early part of 2000). It was important to the Respondent to raise this issue as it was his view that he was entitled to an exemption of the fair market value of his pension plan based upon its value at the two year point beyond October of 1997.

Mr. Justice Smith concluded (after a careful review of the case law) that the 1997 separation was singular only in that a Petition issued. It was consistent with the other separations in that within a very short period of time thereafter, the couple resumed cohabiting. He concluded that no reasonable observer could conclude that the separation in 1997 was a break in cohabitation for the purposes of terminating the Petitioner’s status as a spouse pursuant to s. 2(1)(c) of The Family Property Act. He as well concluded that the evidence consistently showed that the Respondent felt remorse after a violent episode and would seek to reconcile. Mr. Justice Smith appears to have focused on the number of prior separations resulting in reconciliation. The fact that the Petitioner had actually applied in 1997 for interim custody, maintenance, division of assets and the like appears not to have convinced the judge that it was her settled intention to end the relationship. This decision of Mr. Justice Smith does appear to focus on an objective retrospective analysis. If, in fact, no reasonable observer could conclude that the separation in 1997 was a break in cohabitation, one has to question whether or not most cases of reconciliation would result in the same analysis.

On focusing upon the continuity of the relationship, all cases reviewed center upon the settled intention of the parties (or at least one party) to end the relationship.

It is imperative to note that if a couple who are not married separate after being in a cohabitation arrangements (presumably one that has lasted longer than two years), either one of the parties
must bring an application within two years after the cohabitation ceases. Section 3.1 of *The Family Property Act* states as follows:

Subject to section 8 and subsections 26(4), 29(3) and 30(2), an application by a person who is a spouse within the meaning of clause (c) of the definition of “spouse” in subsection 2(1) must be brought within 24 months after the cohabitation ceases.

One potential problem with the time limitation imposed to bring an application under the *Act*, lies in the determination of appropriate dates to decide whether the parties are covered by the legislation or are excluded by it. Practitioners have become accustomed to certain key dates in matrimonial disputes, those being the date of marriage, the date of separation, the date of petition, and potentially the date of trial.

The two most important dates have always been the date of marriage and the date of petition. While the other dates mentioned can have some limited bearing on the outcome of a matrimonial property division, it is the date of marriage and the date of petition that are the most important dates in the vast majority of cases. These dates are fixed and easily ascertainable. There can be no dispute as to either of these dates as both are determined with certainty. Certainty is the key in the division of family property. The more uncertain the situation, the more lengthy, difficult, and litigious the situation becomes.

As important as the issue of when the clock starts to determine commencement of cohabitation is when does the clock start at the cessation of the cohabitation. Most people do not record the exact date they began cohabiting nor the exact date that they cease to cohabit. Is the cessation of cohabitation to be taken as the date one of the parties had a fixed determination to end the relationship? Is it the date that both parties physically separated? People who are not married tend not to act like married people. The amendments clearly attempt to impose rules that fit well with people who are married onto people who are not. This issue rears its head again in the context of exemptions.
B. POSSESSION ORDERS AND ORDERS FOR PRESERVATION

1. Possession Orders

   Exclusive possession of family home
   5(1) For the purposes of this section, “exclusive possession” includes the right of occupancy.
   (2) Notwithstanding any order made pursuant to Part IV, V or VI, and subject to section 7, the court may, on application by a spouse, make any order it thinks fit, including any of the following:
   (a) order that spouses are no longer bound to cohabit;
   (b) subject to any terms and conditions that the court thinks fit, direct that a spouse be given exclusive possession of a family home or part of it for life or for any shorter period that the court directs, regardless of whether the spouses cease to be spouses;
   (c) direct that a spouse vacate a family home;
   (d) restrain a spouse from entering or attending at or near a family home;
   (e) fix any rights of spouses that may arise as a result of the occupancy of a family home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition or sale or to sell or otherwise dispose of or encumber the family home;
   (f) authorize the disposition or encumbrance of the interest of a spouse in a family home subject to the right of exclusive possession contained in the order;
   (g) fix the obligation to repair and maintain a family home;
   (h) fix the obligation to pay, and the responsibility for, any liabilities that may arise out of the occupation of a family home;
   (i) direct a spouse to whom exclusive possession of a family home is given to make any payment to the other spouse that is prescribed in the order;
   (j) where a family home is leased by one or both spouses pursuant to an oral or written lease, direct that the spouse to whom exclusive possession is given is deemed to be a tenant for the purposes of the lease;
   (k) release any other family home from the application of this Part.

   Exclusive use of household goods
   6(1) Subject to section 7, the court, on application by a spouse, may by order direct that a spouse be given the exclusive possession, use and enjoyment of any or all of the household goods regardless of their location at the time the order is made.
   (2) An order pursuant to subsection (1) may be made subject to any terms and conditions and for any period that the court considers necessary.
   (3) In making an order pursuant to this section, the court shall consider any possible rights, obligations or liabilities that may arise as a result of the order and may:
   (a) fix the rights and the responsibility for any of those obligations or liabilities; and
   (b) make any order the court thinks fit in order to give effect to the fixing of those rights and responsibilities.

   Powers of court
   7 In exercising its powers pursuant to this Part, the court shall have regard to:
   (a) the needs of any children;
   (b) the conduct of the spouses towards each other and towards any children;
   (c) the availability of other accommodation within the financial means of either spouse;
   (d) the financial position of each spouse;
   (e) any interspousal contract or, where the court thinks fit, any other written agreement between the spouses;
(f) any order made by a court of competent jurisdiction before or after the coming into force of this Act or The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2) with respect to the distribution or possession of family property or the maintenance of one or both of the spouses or with respect to the custody or maintenance of any children; and
(g) any other relevant fact or circumstance.

Given the factors outlined in s. 7 to be considered in an application of this nature, the determination is understandably fact sensitive.\(^{18}\) What case law that has derived from s. 5, s. 6 and s. 7 of the Act seems to focus on the parties ability to cohabit, or lack thereof. Cameron J.A., speaking for the Court, affirmed an exclusive possession order in *Korolchuk v. Korolchuk*\(^ {19}\) stating:

> Given the hostility that exists between these parties it is futile to expect them to agree on interim possession of the house or to live together pending trial; they will contest possession until that issue is resolved by court order. The failure to make an order on the first application not only intensified the struggle but led, predictably, to the further applications. It seems to me that where, as here, the parties are separated, warring and engaged in litigation, an order ought to be made, irrespective of which of them makes the application, giving one or the other exclusive possession of the home pending trial.

These concerns may be augmented in situations where a party has exhibited a propensity for violence or excessive consumption of alcohol which results in erratic behaviour.\(^ {20}\) The courts have also exercised this discretion in favour of the custodial parent.\(^ {21}\)

Notwithstanding these comments, it would appear that the discretion to grant exclusive interim possession will not be exercised lightly. Wright J. recently revisited the issue in *Hudson v. Hudson*\(^ {22}\):

> Barring exceptional circumstances" s. 4 of The Matrimonial Property Act, 1997, S.S. 1997, c. M-6.11 provides each spouse with an equal interest in the matrimonial home and an equal entitlement to possession. (See: *Korolchuk v. Korolchuk* (1982), 28 R.F.L. (2d) 216 (Sask. C.A.). That equal interest or entitlement is subject inter alia to an order made pursuant to ss. 5 or 6 of the Act whereby one spouse is given exclusive possession of the home or household goods, to the exclusion of the other.

> In this case, there is no interspousal contract or written agreement between the parties. There is similarly no previous court order with respect to property, support or custody. Accordingly, ss. (e) and (f) of s. 7 have no applicability. While neither spouse presently has alternate accommodation available, they each are employed and have sufficient financial resources to locate such accommodation if required to do so. Consequently, neither ss. (c) nor (d) tips the balance in favour of granting exclusive possession of the home and household goods to one over the other.


\(^{19}\) (1982), 16 Sask. R. 56 at para. 10 (C.A.).


\(^{21}\) *Ball v. Ball*, 1998 Carswell Sask 305 (Q.B.).

The parties' conduct towards each other is relevant. There can be no question that given their present situation, the applicant and the respondent find themselves in circumstances that may at times be unpleasant, and perhaps even stressful. Their marriage has broken down and they find themselves at an impasse as to which of them should leave the home. This has led, not unexpectedly, to angry confrontations, harsh words and the occasional empty threat. There has been one unfortunate act of violence at the end of January, 2000 when the applicant kicked and punched the respondent. He reacted by spitting on her. This is an aberration in the conduct of these two people, who by all other accounts, are generally mature and responsible individuals. As noted in Plosz v. Plosz, [1997] S.J. No. 715 (QL) (Q.B.), "... violence is not a prerequisite to the granting of an interim order for exclusive possession of the matrimonial home. ..." (at para. 4). However, in the circumstances of this case, I am not persuaded that even the cumulative nasty conduct of the parties one to the other is, in and of itself, sufficient to warrant such relief. The corollary of such an order, by necessity, is an order that the other vacate the home. The situation here is not similar to that found in Korolchuk, supra, where the parties were "...separated, warring and engaged in litigation ..." (at page 218).

The children are no doubt affected to varying degrees by the discord between their parents. Tanya is now living with her paternal grandparents. The two younger children appear, from the material filed, to be relatively unaffected by the disharmony in the home, perhaps because their parents have wisely not involved them in their dispute to the same extent that they did Tanya. The circumstances in this case are not dissimilar to those described in Muir v. Muir (1987), 9 R.F.L. (3d) 145 (Sask. Q.B.) and MacLennan v. MacLennan (1997), 153 Sask. R. 238 (Q.B.). The parties may not be happy living with one another, but neither has met the burden of persuading me that the other should be compelled by law to leave the home.23

Section 5 has also been engaged at the conclusion of a family property trial. By making an exclusive possession order in this context, the court effectively delays distribution of the family home, usually to preserve the home until the youngest child ceases to be a “child” pursuant to the applicable legislation. Maurice J. made such an order in Stankov v. Stankov24:

The wife and children have resided in the matrimonial home at 14 Lormier Crescent, Regina, Saskatchewan since the parties' separation. Now that the husband is entitled to a decree nisi of divorce, he requests that I exercise my powers under The Matrimonial Property Act by ordering the wife to buy out his interest in the matrimonial home. The wife asks that I grant her exclusive possession of the matrimonial home as long as the children are children within the meaning of The Matrimonial Property Act and are residing with her in the matrimonial home.

Section 24(1) of The Matrimonial Property Act reads as follows:

24.(1) Notwithstanding any provision of this Act, matrimonial property, including a matrimonial home and household goods, that is distributed or disposed of by an interspousal contract, or with respect to which an interspousal contract provides for possession, status or ownership, is exempt from distribution under this Part, unless at the time the interspousal contract was entered into it was, in the opinion of the court, unconscionable or grossly unfair and, in that case, the court shall distribute the property or its value in accordance with the provisions of this Act as though there were no interspousal contract, but the court may take the interspousal contract into consideration and give it whatever weight it considers reasonable. (the italics are mine)

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In paragraph 11 of the interspousal contract, the parties agree what is to happen to the matrimonial home, therefore, the matrimonial home is exempt from distribution under the Act, and I have no power to make a distribution as requested by the husband. (There being no basis for finding that the contract is unconscionable or grossly unfair in my opinion) The husband will have to rely on his rights in the contract.

It should be noted in passing that s. 24(1) does not limit my powers under s. 5. Section 4(1) refers to distribution; so if I grant the wife relief under s. 5, I will not be distributing the matrimonial home; I will be granting her exclusive possession which will only have the effect of postponing the husband's rights in the matrimonial home.25

2. Orders for Preservation

Prevention of gift or sale

29(1) The court has the powers conferred by subsection (2) where the court is satisfied that a spouse:
   (a) is about to commit an act amounting to dissipation, and that action may defeat a claim of the other spouse pursuant to this Act;
   (b) is about to abscond with any family property, and that action may defeat a claim of the other spouse pursuant to this Act;
   (c) intends to transfer family property to a person for less than adequate consideration, and that action may defeat a claim of the other spouse pursuant to this Act; or
   (d) intends to make a substantial gift of family property, and that action may defeat a claim of the other spouse pursuant to this Act.

(2) For the purposes of subsection (1), the court may do any of the following:
   (a) make an order restraining the making of the transfer or gift or the absconding with the property;
   (b) make a receiving order or any other order that it thinks fit for the purpose of restraining the dissipation or further dissipation of the property or for the possession or delivering up, safekeeping and preservation of the property.

(3) An application for an order pursuant to subsection (2) may be made as an application in proceedings commenced pursuant to this Act, by notice of motion or in any other manner that may be prescribed in the rules of court.

(4) An application for an order pursuant to subsection (2) may be made ex parte and, where an application is made ex parte, the court may:
   (a) dispense with service of the notice of the application; or
   (b) direct that the notice of the application be served at any time and in any manner that the court thinks fit.

(5) Every person who knowingly and wilfully refuses or neglects to comply with an order made pursuant to subsection (2) is, in addition to any other liability that person may incur, guilty of an offence and liable on summary conviction to a fine of not more than $1,000.

Section 29 provides a party with the means to prevent anticipated or imminent transfers of family property which amount to dissipation whereas s. 28 allows the court to reverse transfers which have occurred in the two year period prior to application. Madam Justice Wright discussed the application of s. 29 in *Bzdel v. Bzdel*:

As stated by Pritchard J. of this Court in *Anderson v. Anderson* (1999), 184 Sask. R. 125 (Q.B.) at para. 9, this section "...carefully circumscribes the authority of the Court to restrain the conduct of a property holding spouse....". To be entitled to the relief requested, a Court must first be satisfied that one of the pre-conditions enumerated in ss. 29(1)(a) through (d) exists and second, that the actions of a respondent are designed to defeat an applicant's claim under the Act. There is no evidence whatsoever that the respondent in this case is about to dissipate, abscond with, transfer or gift any matrimonial property. He has, prior to the commencement of this proceeding, disposed of grain inventories in the ordinary course of the farming operation and has accounted for the proceeds of those sales. He intends to continue to liquidate, as necessary, his remaining grain on hand. These are not the type of transactions that s. 29 of the Act was designed to prohibit. Rather, this section is designed to protect a spouse's claim under the Act from being defeated by the improper actions of the other spouse. There is nothing to suggest that this is the intention of the respondent in this case. Accordingly, this aspect of the applicant's motion is dismissed.

C. DIVISION OF FAMILY PROPERTY

1. Methodology

The general approach to the division of family property was articulated by the Saskatchewan Court of Appeal in *Benson v. Benson* wherein Cameron J.A. stated:

Section 21(1) of the Act requires that the "matrimonial property or its value," both as defined in s. 2, be distributed and distributed equally, subject only to the exceptions, exemptions, and equitable considerations mentioned elsewhere in the statute. "Matrimonial property" is defined by s. 2(h) to mean all manner of property that, "at the time an application is made under this Act," is owned by one or other of the spouses or in which either has an interest. "Value," on the other hand, is defined by s. 2(l) to mean the fair market value "at the time an application is made under this Act, or at the time of adjudication, whichever the court thinks fit."

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26 See note 76, *infra*.


In the light of these and other provisions of the Act, the practice is to resolve these cases along the lines suggested by Carter L.J.Q.B. in Rathie v. Rathie (1980), 17 R.F.L. (2d) 265 (Sask. Q.B.), determining, first, the property and its value subject to distribution. This ordinarily entails compiling an inventory of the property owned by the spouses as of the time of application and establishing the net value of that property as of that time or the time of adjudication. Exceptions aside, this is the property and its value which is subject to distribution. It is the practice to go on from there to next determine whether any of that property or its value is exempt from distribution; then to determine whether any of it ought not to be distributed equally having regard for the equitable considerations mentioned in the statute; and, finally, to decide how the distribution should be effected.

The foregoing passage suggests the following methodology:

(a) determine the property and its corresponding value which is subject to distribution;
(b) determine whether any of the property identified is exempt from distribution;
(c) determine whether an unequal distribution of property should be ordered, having regard for the equitable considerations outlined in s. 21(3) of the Act; and
(d) determine the manner in which the division is to be given effect.

2. Property Subject to the Act

Interpretation

2(1) In this Act:

“family property” means any real or personal property, regardless of its source, kind or nature, that, at the time an application is made pursuant to this Act, is owned, or in which an interest is held, by one or both spouses, or by one or both spouses and a third person, and, without limiting the generality of the foregoing, includes the following:

(a) a security, share or other interest in a corporation or an interest in a trust, partnership, association, organization, society or other joint venture;
(b) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse;
(c) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to consume, invoke or dispose of the property;
(d) property mentioned in section 28;

The foregoing definition of family property encompasses virtually every form of real and personal property owned by either spouse at the time of application. This definition has no distinct boundaries, and is quite inclusive. This definition clearly includes pension benefits.
which accrue during the relationship. Some examples of items which do not fall within the ambit of the definition include:

(a) family debts;
(b) university degrees; and
(c) contingent interests in an estate.

3. Valuation of Property

The definitive authority in this jurisdiction regarding the issue of valuation is Russell v. Russell. In that case, an issue arose regarding the appropriate value to be ascribed to certain farmland.

As for the first ground, we are of the unanimous opinion that the trial judge was correct in concluding that the appellant's pension entitlement constituted matrimonial property. The entitlement is both vested and matured (see Tataryn) and the appellant's contractual right to receive the pension from his former employer is a chose in action forming personal property subject to the Act.

31 See, for example, Gardiner v. Gardiner (1987), 54 Sask. R. 246 (Q.B.) where the debts accumulated during the marriage exceeded the assets available for distribution. The husband applied for equal division of the matrimonial debts pursuant to the Act. Walker J. dismissed this aspect of the husband’s claim, stating at paras. 31 - 33:
Here, the husband contends that, following the general philosophy of equality between the spouses contained in the Act, these debts should be divided equally. He reaches this conclusion by arguing that such debts are matrimonial property, referring to them as "negative property".
I decline to apportion debts in a manner analogous to the apportionment of positive property, since debts, standing alone, are not matrimonial property. Property is something of value and a debt is not. I decline to deal with debts in the fashion asked by the husband. To extent that there are joint debts, "the creditors will seek to collect them as best they can". It is not necessary for me to go into what rights of contribution, if any, the parties may have against each other, if called upon to pay a joint debt.

I am satisfied that one of the inherent qualities of "property" is that it may be transferred; bought; sold; exchanged; gifted; inherited; or hypothecated; a university degree is not "property" and therefore is not matrimonial property within the meaning of the Matrimonial Property Act. In the division of matrimonial property it should be given no value.

33 See Pepper v. Pepper (1982), 18 Sask. R. 144 at paras. 41 - 42 (Q.B.):
. . . I am of the view that a contingent interest in an estate does not come within the definition of matrimonial property as contemplated by the Act. The property to be distributed pursuant to the provisions of the Act is that which is owned by a spouse or in which a spouse has an interest at the time the application is made. Unless Mr. Pepper survives his mother he has no interest in the estate of his late father. Moreover, if he should survive his mother but the applicant predeceases him, the question would arise as to who should be entitled to the applicant's share.
For the foregoing reasons, I find that the contingent interest of Mr. Pepper in the estate of his late father is not an interest in matrimonial property that is subject to distribution under the Matrimonial Property Act.

During the five year period between the date of application and the trial, the value of the farmland had increased. Jackson J.A. addressed the issue of valuation stating:

13. In Saskatchewan, the property available for distribution under The Matrimonial Property Act is that which is owned by one or both parties when an application is made under the Act (see the definition of "matrimonial property" in s. 2(h)), but the value of that property can be either fixed as of the date of application or the date of trial, whichever date the trial judge determines to be fit (see the definition of "value" in s. 2(l)).

14. Once the matrimonial property is identified as of the application date, the only possible reason for a dispute as to the date of valuation will be that the value of the property has risen or declined. And this will only be relevant if the court awards one party the asset or assets and orders that the party receiving the assets to pay the other his or her share. If the value stays the same or the property is divided in specie, or, for that matter, if the Court orders the property to be sold, the appropriateness of the valuation date at one point in time or the other will not be an issue.

25. In Tataryn, the trial judge used the date of trial to value the house at $45,000, when its value at the date of application had been $49,500. This Court varied the trial judgment and valued the assets as of the date of application, including the house. Cameron J.A. wrote (at p. 276):

In this case:
(a) the date of application was 16th June 1981;
(b) the date of trial was 31st March 1982.

Mr. Tataryn complains that, while the trial judge chose to value some items of property as at the date of application, he valued others as at the date of adjudication, an inconsistency which worked to Mr. Tataryn's detriment. His counsel submitted that, as a matter of principle, the whole of the property ought to have been valued consistently, as of one date or the other. Generally speaking, I agree this should be done although I note the Act does not require it. In some cases it may be desirable, even necessary, to value one asset at the time of application and another as of the time of trial, but I would add that whenever this is done it should be explained; otherwise it may appear unfair. And there ought to be good reason for it.

Both counsel cite Tataryn as authority for the principle that asset should be valued consistently as at one date or the other. As a general principle, this is correct. But as Cameron J.A. indicates in this quote, it is possible to depart from this general rule if good reason exists to do so. The watchword is fairness. Subsequent case law bears out this interpretation of the Court's ruling in Tataryn.

...[I]n Benson v. Benson Cameron J.A., speaking for the panel on this question, analysed the case law pertaining to the choice of the appropriate valuation date. He wrote (at pp. 26-27):

[33] Now, of course, the Act contemplates the distribution of that property or its value. And the court is empowered to value that property as of the time of application or adjudication, "whichever the court thinks fit". The power in the court to make that choice -- choice, really, for the court is not required to value every item of matrimonial property as of the same time -- is cast in decidedly broad terms. It is not, however, unbounded. It has been taken to constitute a discretionary power, but one which must be exercised rationally, in keeping with the purposes of the Act and the justice of the case: Tataryn v. Tataryn (1984), 30 Sask. R. 282, 38 R.F.L. (2d) 272 (C.A.); Mitchell v. Mitchell (1992), 100 Sask. R. 149, 18 W.A.C. 149, 41 R.F.L. (3d) 220 (C.A.).
Since it is the property owned by the spouses at the time of application which constitutes 
the base for the distribution contemplated by s. 21(1), the courts have tended to choose that 
date for valuation purposes, unless there be something in the circumstances suggesting 
otherwise. From time to time various considerations have informed the choice, including the 
rise or fall of value in the interval between application and adjudication. That has been taken 
to be an appropriate consideration. But value can rise or fall according to divers causes, some 
beyond the control of the spouses, others within their control. This, too, has been taken to be 
an appropriate consideration. Thus a decline in land values attributable to market forces, 
beyond the control of the spouses, has been taken as justification for choosing to value as of 
R. 240 (C.A.). And a rise in the value of business assets, attributable solely to the effort of 
one of the spouses in the interval, has been taken to justify a decision to value as of time of 
application rather than adjudication, as in Gresham v. Gresham (1988), 72 Sask. R.9; 17 
R.F.L. (3d) 209 (C.A.). These were taken to be rational choices, made in keeping with the 
purposes of the Act and the justice of the case.

Selection of the valuation date is not a decision made in isolation from other decisions made in the 
course of dividing matrimonial property. The choice of the valuation date is a rational one based on the 
evidence. As the case law indicates, the valuation date is influenced by such factors as the sufficiency of 
the evidence of value pertaining to one date or the other, the cause of an increase or decrease in value, 
the fairness of one date over the other and the effect of inconsistent dates on the overall fairness of the 
distribution. All of this is dependent upon a thorough understanding of the evidence. Thus, although 
judgments begin with a decision as to the appropriate valuation date, the court hears all evidence 
pertaining to value before selecting the valuation date.

The ratio to be distilled from the foregoing passage is that the default valuation date is the date 
of application unless there are special circumstances to apply the adjudication date value. For 
example, where the value of the property has increased/decreased in the interim as a result of 
market forces beyond the control of the parties, it may be more appropriate to use the 
adjudication date value. Conversely, where the fluctuation in the value of the property is 
attributable to the post-application efforts of one of the parties, it may be more appropriate to 
utilize the application date value. Nevertheless, the decision regarding which valuation date to 
employ is discretionary in nature, and must have a rational correlation to the evidence presented 
at trial.

wherein Foley, J. considered the devastating effect of chronic wasting disease on elk and deer market and valued a 
deer herd effective date of adjudication.


a. Property in General

Interpretation
2(1) In this Act:

“value” means:
(a) the fair market value at the time an application is made pursuant to this Act, or at the time of adjudication, whichever the court thinks fit; or
(b) if a fair market value cannot be determined, any value at the time an application is made pursuant to this Act, or at the time of adjudication, that the court considers reasonable.

After having identified the family property available for distribution and the applicable valuation date, it is important to consider how you will prove the value of the property as a matter of evidence. The definition of “value” provided in the Act was further defined by Lawton J. in *Grenshaw v. Grenshaw*\(^3\) where he stated at paras. 20 to 21:

Section 2(1) defines “value” as the fair market value at the appropriate date. Wise and one of the other evaluators defines “fair market value” as:

... the highest price, expressed in terms of money or monies worth, obtainable in an open and unrestricted market between informed and prudent parties, acting at arms-length, neither party being under any compulsion to transact.

This definition underlines the importance of providing the court with evidence, expert opinion evidence (appraisal reports) in some instances, of the fair market value of the property. While the court frowns on ascribing values with insufficient evidence as to the value or existence of an asset\(^4\), the court is able to determine the value of an asset based upon “reasonable” evidence pursuant to the second branch of the definition under the Act.\(^4\)

In anticipation of trial, it is vital to consider the manner in which you will tender proof of value. In some instances, the value of an asset is easily ascertainable. For example, the value of bank accounts, Registered Retirement Savings Plans (R.R.S.P.’s) and non-registered stock portfolios can be proven simply through tendering statements which approximate the date of application or

\(^3\) (1987), 8 R.F.L. (3d) 102 (Sask. Q.B.).


adjudication. Other property, however, can be difficult and/or costly to appraise. In these situations, it may be prudent to consider:

(i) attempting to reach an agreement with opposing counsel regarding the respective values of certain assets. The Queen’s Bench Rules set out onerous duties of financial disclosure in family law proceedings. If the parties can come to an agreement, they can file an agreed statement of facts prior to trial to obviate the need to call evidence on every asset;

(ii) it may be possible to extract admissions from the opposing party regarding the value of a specific asset at an examination for discovery or pursuant to a notice to disclose pursuant to Rule 616. If the party admits to a value that is reasonable, it can also lead to an agreement on value; and

(iii) if the parties are unable to come to an agreement on the value of certain assets, they must seek the assistance of appraisers, actuaries, chartered accountants etc. in order to procure expert evidence regarding the value of an asset.

b. Business Valuation

Power of the court

26(1) In order to effect a distribution pursuant to this Part, the court may hear an application respecting family property notwithstanding that the spouse who made the application has no legal or equitable interest in the family property.

(2) In order to effect a distribution pursuant to this Part, the court may make any order that it considers fit in the circumstances whether or not it affects title to family property.

(5) Where a spouse has an interest in a corporation and where it would not be reasonable to give the other spouse shares in the corporation, the court may order the spouse who has the interest in the corporation to pay to the other spouse, in addition to any other sums payable pursuant to this Act, a sum no larger than the value of the benefit the spouse has with respect to the assets of the corporation.

There are two basic approaches to assessing the fair market value of a business owned by one or both parties:

(i) the capitalization of earnings method values the business as a “going concern” and attempt to quantify the net present value of the business’ future earnings. Understandably, this method attracts scrutiny based on the number of contingencies which must be addressed in making such a calculation; and

(ii) the fair market value of net assets calculates the amount that could be gleaned by liquidating the assets. After deducting costs of liquidation, income tax consequences, corporate debts, legal fees etc. associated with selling the assets, the net amount is the alleged fair market value of the business.
The valuation of a business frequently raises two separate issues: the income tax consequences attendant on liquidation, and whether a value should be ascribed to the goodwill associated with the business. The issue of tax liability will be discussed in greater detail under the heading associated with equitable considerations, as the Act specifically contemplates such an adjustment under s. 21(3)(j).42

The term “goodwill” has been defined in the following terms:

Property of an intangible nature, commonly defined as the expectation of continued public patronage…..

The custom of patronage of any established trade or business; the benefit or advantage of having established a business and secured its patronage by the public….. The excess of cost of an acquired firm or operating unit over the current or fair market value of net assets of the acquired unit.

Informally used to indicate the value of good customer relations, high employee morale, a well-respected business name, etc. which are expected to result in greater than normal earning power.43

Given the intangible nature of this asset, parties will often disagree on the additional value (if any) that should be ascribed to a business for goodwill. Indeed, it does not appear that either the Court of Appeal or the Court of Queen’s Bench in this jurisdiction have been able to articulate a consistent, principled approach to the issue of assessing the value of goodwill in different contexts. Two divergent examples for discussion/debate may be:

(i) where the goodwill accrues to the individual (deriving from his/her abilities and reputation) and is not transferable, should any value for goodwill be ascribed? The economic value of the goodwill will evaporate when the individual retires, dies or loses his/her interest in the business; and

(ii) where the goodwill accrues as a result of consumer loyalty to the business name or product. The economic value does not derive from the individual and can be transferred upon sale of the business.

The Court of Appeal has held that failure to consider the value of goodwill associated with a business constitutes a reversible error44, however the issue of whether value should be ascribed remains fact sensitive.

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42 See, infra notes 70 - 73.
c. Pension Valuation

The issues related to the valuation and division of pension plans accumulated during a spousal relationship can be intimidating to counsel preparing for trial. The Saskatchewan Court of Appeal held that pension plans were divisible family property in *Tataryn v. Tataryn* 45, where Cameron J.A. stated at para. 45:

> With that I return to the question of whether the pension entitlement in this case is matrimonial property. I have no doubt that it is. Mr. Tataryn has a contractual right to receive, on retirement, a periodic sum for life. His entitlement is vested - in the sense earlier referred to - although not yet matured. Expressed in traditional terms this is incorporeal personal property. It is a chose in action, an existing personal right of property capable of enforcement by action. And, since it was acquired during the marriage, the husband and wife are, by virtue of s. 20, equally entitled to it - subject only to the exceptions, exemptions, and equitable considerations mentioned in s. 21.

The more pressing issues regarding the division of pension entitlements deal with the valuation.

The administration of various pension plans is governed by both provincial and federal legislation, depending on the nature of the undertaking which employs a spouse. In Saskatchewan, *The Pension Benefits Act, 1992* 46 is the general statute which covers all pensions not specifically addressed by their own statute. 47 Likewise, most pension plans administered by federal undertakings 48 are governed by the *Pension Benefits Standards Act, 1985* 49, with the exception of employees of Parliament, the Senate, R.C.M.P. and Canadian Armed Forces. 50

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48 For example, railway employees, chartered bank employees, shiplines, etc.
49 R.S.C. 1985, c. 32 (2nd Supp.).
50 See *The Pension Benefits Division Act*, S.C. 1992, c. 46, Sch. II.
There are two basic forms of pension plan which are available for distribution:

(i) Defined Contribution Plan - A defined contribution plan is an arrangement by which an employer matches the employee’s contributions to the pension fund over the term of employment. The amount of contribution is usually correlated to the employee’s income. These contributions accrue throughout the term of employment and, upon retirement, the pension proceeds are paid out like an annuity. This arrangement is similar in nature to the conversion of an R.R.S.P. to a R.R.I.F. The valuation of a defined contribution plan is relatively straightforward and contains three basic components: the employee’s contributions, the employer’s contributions and the interest accumulated thereon.

(ii) Defined Benefit Plan – The Defined Benefit Plan is more complicated. The value of the plan and the amount available upon retirement is calculated according to a formula. This formula is usually dependent upon two variables: employee income and years of service. Generally speaking, the formula will rely upon the average of the employee’s best four to five years’ income. The pension plan will pay an employee a percentage of this average income upon retirement. The longer the term of service, the higher the percentage. The specific formula applied depends on the pension plan. The value of the plan will often require the assistance of an expert, usually an actuary, who will offer opinion evidence regarding the present value of the pension by relying upon certain assumptions for contingencies. Two experts, depending on these assumptions, can arrive at differing values. In order to properly cross-examine the opposing party’s expert, it is essential to spend some time with your own expert in assessing the weaknesses in the witness’ report.

The topic of pension plan valuation can only be discussed in a summary fashion within the scope of this paper. The important point to recognize is that, in many longstanding relationships, the only significant assets available for distribution are the family home and the respective parties’ pension plans. Where the parties have been contributing to a pension plan for an extended period of time, it would be advisable to retain the services of an actuary to assist you in valuing the asset for the purpose of negotiation and/or preparing for trial.
4. Exemptions

a. Property in General

Property exempt from distribution

23(1) Subject to subsection (4), the fair market value, at the commencement of the spousal relationship, of family property, other than a family home or household goods, is exempt from distribution pursuant to this Part where that property is:

(a) acquired before the commencement of the spousal relationship by a spouse by gift from a third party, unless it can be shown that the gift was conferred with the intention of benefitting both spouses;

(b) acquired before the commencement of the spousal relationship by a spouse by inheritance, unless it can be shown that the inheritance was conferred with the intention of benefitting both spouses; or

(c) owned by a spouse before the commencement of the spousal relationship.

(2) Subject to subsection (4), property acquired as a result of an exchange of property mentioned in subsection (1) is exempt from distribution pursuant to this Part to the extent of the fair market value of the original property mentioned in subsection (1) at the commencement of the spousal relationship.

(3) Subject to subsection (4), family property, other than a family home or household goods, is exempt from distribution pursuant to this Part where that property is:

(a) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses;

(b) money paid or payable pursuant to an insurance policy that is not paid or payable with respect to property, unless the proceeds are compensation for a loss to both spouses;

(c) property acquired after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made with respect to the spouses or, where the spouses are spouses within the meaning of clause (c) of the definition of “spouse” in subsection 2(1), property acquired more than 24 months after cohabitation ceased;

(d) property acquired as a result of an exchange of property mentioned in this subsection; or

(e) appreciation on or income received from and property acquired by a spouse with the appreciation on or income received from property mentioned in this subsection.

(4) Where the court is satisfied that to exempt property from distribution would be unfair and inequitable, the court may make any order that it considers fair and equitable with respect to the family property mentioned in this section.

(5) In making an order pursuant to this section, the court shall have regard to the following:

(a) any of the matters mentioned in clauses 21(3)(a) to (p);

(b) contributions in any form made by the spouses to their relationship, children or property prior to the commencement of their spousal relationship;

(c) a contribution, whether financial or in any other form, made by a spouse directly or indirectly to the acquisition, disposition, preservation, maintenance, improvement, operation, management or use of property mentioned in this section;

(d) the amount of other property available for distribution;

(e) any other relevant fact or circumstance.

(6) All family property is presumed to be shareable unless it is established to the satisfaction of the court that it is property mentioned in this section.
The foregoing provision was considered by the Saskatchewan Court of Appeal in *Deyell v. Deyell*[^51^], where Cameron J.A. stated:

> Given the structure of the section, its application seems to call for a two-staged, step by step, approach. The first stage concerns the conditions of ss. 23(1) and (2) and whether they have been met. Having regard for s. 23(6) the onus in this connection lies with the party claiming the exemption. If the conditions have not been met that is the end of the matter. If met, there arises in the party claiming the exemption a prima facie entitlement thereto, and the inquiry shifts to the next stage.

> The second stage, if reached, has to do with the provisions of ss. 23(4) and (5) and whether the exemption ought to be disallowed in whole or in part. Given the language of s. 23(4), coupled with the nature of the matter, it seems to me the party contending against the exemption bears the burden of satisfying the court that it would be unfair and inequitable to allow it having regard for the considerations mentioned in s. 23(5).

Please note that the family home and household goods[^52^] cannot qualify as exempt property pursuant to this provision. The only effective way to confer exempt status to the family home and contents is by making it the subject of an interspousal contract pursuant to s. 24 of the *Act*. Also note that subsection (6) creates a presumption that effectively imposes an onus on the party alleging that property is exempt. Even where such an onus is discharged, the court retains the discretion to distribute the property pursuant to subsection (4) where it is satisfied that granting exempt status would be otherwise unfair and inequitable.[^53^] The indices of equity include, by reference, those considerations outlined in s. 23(3)(a) - (q) in addition to those considerations listed in s. 23(5).

Section 23 of *The Family Property Act* refers to the fair market value of family property “at the commencement of the spousal relationship” being exempted. The previous legislation simply


[^53^]: See, for example *Vilcu v. Grams* (1999), 172 Sask. R. 201 at para. 12 (C.A.):

> . . . Section 23(1)(c) grants, in the first instance, an exemption to the extent of the value of property acquired before marriage, but s. 23(4) permits the court to make any "order that it considers fair and equitable." It also excludes from the exemption process the matrimonial home. In deciding to invoke equitable considerations under s. 24(4) of *The Matrimonial Property Act*, the trial judge melded these provisions to arrive at a decision with which we cannot take issue.
referred to the fair market value of property in existence at the time of marriage being exempt. Until November 2002, no direction had been given to our courts with respect to the issue of when the spousal relationship commenced for the purposes of s. 23 of The Family Property Act. Some counsel argued that the word “spouses” in s. 2 of The Family Property Act was awkwardly defined. Others, such as ourselves, felt that the issue should be resolved by regarding the commencement of a spousal relationship being at a point two years after the parties started to cohabit. We stated that for several reasons. Firstly, The Family Property Act does not create a legal interest for parties who reside together for less than two years in a cohabiting arrangement. Secondly, had the legislator meant the exemption section to apply to the fair market value of property owned at the commencement of cohabitation, they would have said so.

On November 21, 2002, Madam Justice Ryan-Froslie in D.B. v. J.A.B.\(^\text{54}\) seems to have resolved the issue by regarding the phrase “at the commencement of the spousal relationship” being at the two year point rather than at the commencement of cohabitation. She states at paragraph 41:

A “spousal relationship” is not defined in the Act but “spouse” is defined in s. 2(1) to include either of two persons who “is cohabiting or has cohabited with the other person as spouses continuously for a period of not less than two years”. It is clear from this definition that [D.B.] and [J.A.B.] were not “spouses” within the meaning of the Act when they commenced living together on January 11, 1984. As they did cohabit continuously for two years prior to their marriage on June 27, 1985, they never became “spouses” within the meaning of the Act until their marriage. This is the date their “spousal relationship” commenced.

Additionally, in Ruskin v. Dewar\(^\text{55}\), Mr. Justice McIntyre, in following D.B. v. J.A.B., ruled that for the purposes of s. 23(1)(c) of The Family Property Act, the commencement of the spousal relationship would be two years after the parties began to cohabit as spouses and accordingly, that is the date upon which exemptions are determined.

\(^{54}\) (2002), SKQB 469.

\(^{55}\) (2003), SKQB 514.
As a point of interest, it appears that a person may be a married spouse and as well a cohabiting spouse within the same application. This is important if the parties had resided together in a cohabitation arrangement prior to the marriage and that cohabiting arrangement prior to marriage exceeded two years in duration.

Additionally, the distinction between “the commencement of cohabitation” and “the commencement of spousal relationship” may, practically speaking, be a fine line. It is still open to a court to deny the exemption as being unfair and inequitable in accordance with s. 23(4) of The Family Property Act.

In summary, the exempt property must be in existence at the time proceedings are commenced or, if not, the property must be directly traceable to some other property acquired in exchange. The onus of proving an exchange is on the party asserting it, and reasonably cogent evidence must be presented to meet that onus. The exemption may be denied if the party opposite meets the onus of establishing that it would be unfair and inequitable to allow it.56

b. Property Subject to an Interspousal Contract

Property dealt with in interspousal contract exempt

24(1) Subject to subsection (2), but notwithstanding any other provision of this Act, family property, including a family home and household goods, that is distributed or disposed of by an interspousal contract, or with respect to which an interspousal contract provides for its possession, status or ownership, is exempt from distribution pursuant to this Part.

(2) If at the time the interspousal contract was entered into it was, in the opinion of the court, unconscionable or grossly unfair, the court shall distribute the property or its value in accordance with this Act as though there were no interspousal contract, but the court may take the interspousal contract into consideration and give it whatever weight it considers reasonable.

(3) Where the spouses have entered into an interspousal contract and where an application is made pursuant to this Act respecting family property that is not distributed or disposed of by the interspousal contract, that property shall be distributed in accordance with this Act as though there were no interspousal contract.

Interspousal contracts

38(1) The terms of an interspousal contract mentioned in subsection (4) are, subject to section 24, binding between spouses, whether or not there is valuable consideration for the contract, where the spouses have entered into an interspousal contract:

(a) that deals with the possession, status, ownership, disposition or distribution of family property, including future family property;

(b) that is in writing and signed by each spouse in the presence of a witness; and

(c) in which each spouse has acknowledged, in writing, apart from the other spouse, that he or she:

(i) is aware of the nature and the effect of the contract;

(ii) is aware of the possible future claims to property he or she may have pursuant to this Act; and

(iii) intends to give up those claims to the extent necessary to give effect to the contract.

(2) A spouse shall make the acknowledgment mentioned in subsection (1) before a lawyer other than the lawyer:

(a) acting in the matter for the other spouse; or

(b) before whom the acknowledgment is made by the other spouse.

... 

(4) An interspousal contract may:

... 

(c) be entered into by two persons in contemplation of their commencing to cohabit in a spousal relationship, but is unenforceable until after they commence cohabitation.

As mentioned previously, family property, including a family home, may be exempt from distribution if it is the subject of an interspousal contract. This is particularly relevant where a spouse wishes to preserve the exempt status of a home brought into a relationship. The only manner in which such an interspousal contract may be undermined is where a party can establish the interspousal contract was unconscionable. In situations where the parties have received independent legal advice in advance of executing the interspousal contract, this onus is particularly difficult to discharge. Cameron J.A. canvassed relevant considerations for determining whether an interspousal agreement was voidable under the statute in Deforest v. Deforest, [1982] 4 W.W.R. 701 at 708 (Sask. C.A.):

The validity of an agreement to which s. 41 of The Matrimonial Property Act applies falls to be determined – so far as concerns this case – with reference to the common law doctrine of duress and the equitable notions of constructive fraud. The common law traditionally held that a contract might be avoided if obtained by “duress”: by violence or threat of violence to the person of one of the contracting parties, upon whom the onus fell to prove it. Equity developed the notion of “constructive fraud” which included two related but distinct notions: an agreement was subject to rescission if it was obtained by “undue influence” or constituted an “unconscionable bargain”. Allcard v. Skinner (1887), 36 Ch. D. 145 at 181 (C.A.), referred to “undue influence” as “some unfair and improper conduct, some coercion from outside,
some overreaching, some form of cheating, and generally though not always some personal advantage obtained by” the guilty party which, in some fiduciary relationships, was presumed, while in other cases, was required to be proved as usual. “Unconscionable bargain” was referred to in this court by Woods J.A. in Knapp v. Bell (1968), 67 D.L.R. (2d) 256 at 259 (Sask. C.A.), as follows:

“The plea that an agreement is unconscionable is also to be distinguished from allegations of undue influence and duress. In Morrison v. Coast Finance Ltd. (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.), Davey, J.A., at p. 713 makes clear the distinction when he says:

‘‘A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscious use of power by a stronger party against a weaker. On such claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger.’”


“ The jurisdiction of equity to set aside bargains contracted by persons under influence is well known. But what is referred to here is something distinct from that . . . In the cases now under discussion, the courts intervene to rescind the contract whenever it appears that one of the parties was incapable of adequately protecting his interests and the other has made some immoderate gain at his expense. If the bargain is fair that fact that the parties were not equally vigilant of their interest is immaterial. Likewise if one was not preyed upon by the other, an improvident or evenly grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction.”

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These then – briefly stated – were the particular principles by which the validity and effect of the separation agreement in issue fell to be determined.

While an interspousal contract may be entered into in contemplation of the commencement to cohabit in a spousal relationship, the contract is unenforceable until after the couple commence cohabitation and not until after the two year point in the cohabitation arrangement. We find this somewhat unusual in that the Act does not grant to either cohabiting partner any statutory rights which they can enforce as against the other until the two year point has been reached.

If the cohabiting partners have entered into an agreement prior to the coming into force of The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2), that agreement is deemed to be an interspousal contract even if it did not meet the requirements set out in s. 38(1) and s. 38(2) of the Act provided that each spouse obtained independent legal advice before signing the agreement. Presumably a contract would be deemed to be an interspousal contract even if it did not contain an acknowledgment as is required by s. 38(1)(c) of The Family Property Act.

57 Italics per Cameron J.A.
Many practitioners have prepared cohabitation agreements for parties prior to the commencement of the Act and most have insisted upon independent legal advice despite the fact that it was not required by statute. Cohabitation agreements entered into before the amendments that lacked independent legal advice may still be enforceable in accordance with s. 40 of the Act.

5. Family Home and Household Goods

Interpretation

2(1) In this Act:

... family home means, subject to subsection (2), property:

(a) that is:

(i) owned by or leased to one or both spouses, or in which one or both spouses have an interest, including, without limiting the generality of the foregoing, an interest pursuant to a partnership or trust or an interest as a purchaser pursuant to an agreement for sale; or

(ii) owned by a corporation in which one or both spouses have an interest where, by virtue of that interest, one or both spouses are entitled to occupy the property as a family home; and

(b) that is or has been occupied by one or both spouses as the family home or that is mutually intended by the spouses to be occupied by one or both of them as the family home;

and that is:

(c) a house or part of a house, including the land appurtenant to it consisting of not more than 65 hectares;

(d) part of business premises used as living accommodation;

(e) a trailer or vehicle commonly referred to as a mobile home, including the land appurtenant to it consisting of not more than 65 hectares;

(f) a unit as defined in The Condominium Property Act, 1993, including the owner’s share in the common property; or

(g) a suite;

... household goods means personal property that is ordinarily used, acquired or enjoyed by one or both spouses for transportation, household, educational, recreational, social or aesthetic purposes, but does not include heirlooms, antiques, works of art, clothing, jewellery or other articles of personal use, necessity or ornament or any personal property acquired or used in connection with a trade, business, calling, profession, occupation, hobby or investment;

... Distribution of family home

22(1) Where a family home is the subject of an application for an order pursuant to subsection 21(1), the court, having regard to any tax liability, encumbrance or other debt or liability pertaining to the family home, shall distribute the family home or its value equally between the spouses, except where the court is satisfied that it would be:

(a) unfair and inequitable to do so, having regard only to any extraordinary circumstance; or

(b) unfair and inequitable to the spouse who has custody of the children.

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(2) Where clause (1)(a) or (b) applies, the court may:
(a) refuse to order any distribution;
(b) order that the entire family home or its value be vested in one spouse; or
(c) order any distribution that the court considers fair and equitable.

(3) Where there is more than one family home, the court may designate to which family home this section applies, and any remaining family home is to be distributed in accordance with section 21.

As mentioned in the previous section, it is worth noting that the family home and household goods cannot qualify as exempt property unless it is dealt with pursuant to an interspousal contract. The Act further reinforces the distinct status of the family home by setting out a separate method for distributing the value of the family home and household goods. This division is governed by s. 23 not s. 21. The practical import of this distinction is that the exceptions and equitable considerations set out in s. 21(3) do not apply to the family home and the court may only deviate from equal distribution in “extraordinary circumstances” or where an equal distribution would be unfair or inequitable to the custodial parent.

Notwithstanding the fact that the legislature has set out a separate provision for the division of the family home, it is debatable whether the judiciary has adopted a distinct regime in this regard. More specifically, it is noteworthy that s. 22(1) only allows the court to consider debts and encumbrances specifically related to the family home, however this approach is sometimes blurred. An example of the “bright line” distinction rationale was first set out in Gardiner v. Gardiner:

When the matrimonial home is a subject of an application for distribution the court shall have regard to "any tax liability, encumbrance or other debt or liability pertaining to the matrimonial home" (emphasis added) and then distribute the home or its value equally. Debts and liabilities not pertaining to the matrimonial home may not cut into the value of this one asset to be distributed, or be used to vary the amount to be received by each spouse. Where the equity in the matrimonial home is all but the only asset of value and the spouses have unrelated debts of unequal value, their individual net worths, after receiving one half of the value of their one asset, will be substantially different than if the court were simply to divide equally their cumulative net worth, as it will probably do when dealing with other assets. The result is that while the home is shared equally, debts other than those pertaining to the home are not shared at all. Where the other debts relate to family expenditures, there is a certain unfairness, but that is the effect of s. 22.

The format of the Act, as it relates to the division of the family home, raises an important issue. Many couples attempt to prioritize the payment of their mortgage compared to other debts. This creates the potential for a scenario, similar to that in Gardiner, supra, wherein the family home might be the only asset with any equity. If one of the parties has accumulated significant debts, not related to the family home (i.e., in attempting to run the family business), it may result in a situation where one party may receive half the value of the family home, while the opposing party’s share would be suffocated by unrelated debts which are not divisible under the Act.60 One strategy to address this situation is to allege that this scenario constitutes an “extraordinary circumstance” within the meaning of s. 22(1)(a). This approach was recently affirmed by the Saskatchewan Court of Appeal in Kochylema v. Fulton61 where Wakeling J.A. observed:

This is a situation where the trial judge concluded it would be unfair to give the applicant a half interest in the matrimonial home and give her husband 100% of the debt or liability arising out of the obligation for the payment for the home. He found a fundamental unfairness in the situation. He recognized that only the husband could be sued for the debt because he was the only one who signed the loan documents.

... He recognized this obligation to address the various concerns raised by my colleague in her judgment and decided that fairness and equity were best served by ordering what he referred to as a 'wash'. That is, the house worth $71,000 would go to the husband who would face an obligation to repay more than $71,000 borrowed to purchase the house. I cannot see any reason to find that conclusion involves reversible error.

... The legislation clearly recognizes that extraordinary circumstances will arise and call for the exercising of judicial discretion to adequately address the resulting conditions. Such circumstances were found to exist in this case calling for a decision as to what adjustment was appropriate. The conclusion reached by the trial judge is on the face of it a reasonable one and I see no reason to unnecessarily restrict the discretion authorized by s. 22(1)(a).”

The continuing debate surrounding this issue is evidenced by the strong dissenting opinion of Jackson J.A. which follows the rationale first introduced in Gardiner.62

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61 (1999), 177 Sask. R. 179 at paras. 3 - 7 (C.A.).

With respect to the s. 22(1)(b), an example of the rationale used to deviate from equal
distribution was set out in *Lomax v. Lomax*\textsuperscript{63} where Ryan-Froslie J. stated:

In the case at bar, I am satisfied that it would be unfair and inequitable to the respondent who has
custody of the children of the marriage to order an equal division of the equity in the matrimonial home.
In arriving at this decision I have considered the following factors:

(i) It is clearly in the best interests of the children that they remain in the matrimonial home;

(ii) The respondent is unemployed and has had to liquidate most of the matrimonial assets to
pay matrimonial debts;

(iii) The respondent has made all of the payments with regard to the matrimonial home since
the date of the separation without contribution by the petitioner;

(iv) The petitioner has provided no maintenance for the children of the marriage, leaving the
burden of supporting the children, maintaining the home and paying the matrimonial debts
solely to the respondent;

(v) The equity in the matrimonial home is minimal; and

(vi) The petitioner has net assets in her possession of $800, being the 1975 Ford 3/4 ton truck
while the respondent has no equity in the assets in his possession but rather has $5,200 more in
matrimonial debts than he has assets. This is inequitable and affects the respondent's ability to
provide financially for his children.

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6. Exceptions and Equitable Considerations

Sections 20 and 21 of *The Family Property Act* focus on the underlying principles of the division
of family property in our jurisdiction:

**Purpose**

20 The purpose of this Act, and in particular of this Part, is to recognize that child care, household
management and financial provision are the joint and mutual responsibilities of spouses, and that
inherent in the spousal relationship there is joint contribution, whether financial or otherwise, by the
spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of
the family property, subject to the exceptions, exemptions and equitable considerations mentioned in this
Act.

**Distribution of family property**

21(1) On application by a spouse for the distribution of family property, the court shall, subject to any
exceptions, exemptions and equitable considerations mentioned in this Act, order that the family
property or its value be distributed equally between the spouses.

(3) For the purposes of subsection (2), the court shall have regard to the following:

(a) any written agreement between the spouses or between one or both spouses and a third party;
(b) the length of time that the spouses have cohabited;
(c) the duration of the period during which the spouses have lived separate and apart;
(d) the date when the family property was acquired;
(e) the contribution, whether financial or in some other form, made directly or indirectly by a third party on behalf of a spouse to the acquisition, disposition, operation, management or use of the family property;
(f) any direct or indirect contribution made by one spouse to the career or career potential of the other spouse;
(g) the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the spousal relationship;
(h) the fact that a spouse has made:
   (i) a substantial gift of property to a third party; or
   (ii) a transfer of property to a third party other than a bona fide purchaser for value;
   (i) a previous distribution of family property between the spouses by gift or agreement or pursuant to an order of any court of competent jurisdiction made before or after the coming into force of this Act or The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2);
(j) a tax liability that may be incurred by a spouse as a result of the transfer or sale of family property or any order made by the court;
(k) the fact that a spouse has dissipated family property;
(l) subject to ss. 30(3), any benefit received or receivable by the surviving spouse as a result of the death of his or her spouse;
(m) any maintenance payments payable for the support of a child;
(n) interests of third parties in the family property;
(o) any debts or liabilities of a spouse, including debts paid during the course of the spousal relationship;
(p) the value of family property situated outside Saskatchewan;
(q) any other relevant fact or circumstance.

The exceptions and equitable considerations set forth in paragraph 21(3) are discretionary. There may be a tendency to take each particular equitable consideration and apply same to a client’s particular fact scenario. Recently, Madam Justice Gerwing speaking for the Court in Thompson v. Thompson\(^\text{64}\) stated:

> We also note, as we have done before with respect to complex matrimonial matters, that even were we to consider that there was a basis for interfering with a discretionary finding in one or the other of the areas, we accept that the trial judge would have had in mind an overall scheme of fairness of distribution between the parties. That is, to interfere with discretion in one area can unbalance such a consideration of total equities.

\(^{64}\) 2004 SKCA 169. See also Michalishen v. Michalishen 2002, SKCA 128.
(a) any written agreement between the spouses or between one or both spouses and a third party;

Where an agreement does not satisfy the requirements set out in s. 38 for enforceable interspousal contracts, the court may still consider the agreement within the context of s. 21(3)(a) and s. 40 which states:

Agreements between spouses
40 The court may, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable.

Walker J., in *Gardiner v. Gardiner*65, discussed the interplay between s. 21(3)(a), s. 38 and s. 40, stating:

The wife argues that the intent of s. 38 was satisfied. This disregards the clear wording and meaning of s. 38. If the requirements of s. 38 have not been met, it is not for the court to consider the "intent" of s. 38. The question is whether or not the requirements specified in s. 38 have been met. Here they have not.

If I consider the intent of s. 38, the evidence indicates neither husband nor wife had the benefit of independent legal advice as envisaged by s. 38. Rather, a solicitor, acting on their joint behalfs, prepared an agreement in accordance with their joint instructions without, as stated by the wife, commenting on any of the provisions which they suggested. This does not satisfy s. 38 which is to ensure that both spouses sign an agreement only after being fully aware of their legal rights and entitlements.

Wright, J., of this court, in *Wright v. Wright*, 17 Sask. R. 228, dealt with s. 38 in this way:

Sec. 38(1)(c) requires each spouse to acknowledge, in writing, before his or her solicitor and apart from the other spouse, that: (i) he or she is aware of the nature and the effect of the contract; and (ii) that he or she is aware of the possible future claims to property he may have under this Act and that he intends to give up those claims to the extent necessary to give effect to the contract. No such acknowledgment appears as to either spouse in the separation agreement. Sec. 38 is intended to ensure that each party to an interspousal contract will have full, proper and independent legal advice, apart from his or her spouse, and that his or her legal advisor will certify to that fact in the separation agreement. Covenants in a separation agreement do not meet those tests no matter how explicit or comprehensive. The protection granted spouses to contracts to settle property rights is similar to the protection granted to the wife under *The Homesteads Act*. The court should not permit its jurisdiction to be ousted except in the clearest case. The fact that the parties had independent legal advice and that solicitors from independent firms witnessed the signatures of the respective parties does not assist the respondent.

Maher, J., of this court, agreed with that decision in *Cadieu v. Cadieu*, [1981] 5 W.W.R. 693, at 702. So do I. No such acknowledgment appears here, as to either spouse. The acknowledgment before Mr. Kirk was not before the husband's lawyer but before the lawyer for both. The other was not before a lawyer at all. I find that the husband did not have "full, proper and independent legal advice, apart from (the wife)". This is not the "clearest" case for an ouster of jurisdiction.

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I do not view the agreement as an interspousal contract but as a written agreement falling within the scope of s. 40 and s. 21(2)(a). I will consider it under s. 40, but only with such weight as I consider reasonable. I will consider it under s. 21(2)(a).

In *Huber v. Huber*\(^{66}\), the Husband’s trustee in bankruptcy made an agreement (not an Interspousal Contract) with the Wife with respect to the disposition of the family home. The Wife relied upon this agreement and paid out the arrears of the mortgage as well as the Land Registry costs of transfer and assumed the obligations under a new mortgage. The court ruled that the Wife should be able to rely upon that agreement just as if it had been made with the Husband himself and accordingly, the court, pursuant to s. 40 of *The Family Property Act*, gave effect to the agreement and declared that the family home was to be the sole property of the Wife. She was to be responsible for the debt associated with it.

(b) the length of time that the spouses have cohabited;

There are two basic scenarios where this subsection may be engaged. The first is where the court may order an unequal distribution, where the parties’ spousal relationship has been relatively short and one of the parties has brought considerable assets into the relationship. An example of this rationale was affirmed in *Shockey v. Shockey*.\(^ {67}\)

Alternatively, one may encounter a situation where, although the marital relationship or cohabitation relationship is relatively short, much of the family property was acquired during the period of cohabitation prior to the two year point. Given the exemption for assets acquired prior to the spousal relationship pursuant to s. 23, the court may consider whether such an exemption is inequitable under s. 23(4) - (5) or whether it might be appropriate to grant an unequal distribution of family property pursuant to s. 23(1)(b).\(^ {68}\)

\(^{66}\) 2003 SKQB 329.


(c) the duration of the period during which the spouses have lived separate and apart;

Where a significant amount of family property is acquired after separation, but before an action is commenced pursuant to the Act, the court may grant unequal distribution.\(^{69}\) The distinction between a marital couple and a non-marital couple comes into play with respect to this particular subsection. A non-marital couple must have an application before the courts within a period of two years from the cessation of the cohabitation whereas a marital couple are precluded from the commencement of an application after a divorce has been granted which may be many years following the date of separation.

(d) the date when the family property was acquired;

Where family property is acquired shortly before or after separation, the court may consider this factor in deciding whether to order unequal distribution. This reasoning was clarified by Estey J. in *Robertson v. Robertson*\(^{70}\):

There is, in my view, another fact in this case which makes an equal distribution of the matrimonial property both unfair and inequitable, and that is that some of the land was purchased in 1975, which is subsequent to the separation. The court is entitled by s. 21(2)(d) to take into consideration "the date when the matrimonial property was acquired". Section 2(h) defines "matrimonial property" as "any real or personal property whatsoever, regardless of source, kind or nature, that, at the time an application is made under this Act, is owned, or in which an interest is held, by one or both spouses...". As the Act deals with the distribution or division of matrimonial property, I do not think that the court can or should omit property acquired subsequent to the separation from an order distributing or dividing the matrimonial property. However, such a factor is one that on the facts of this case should be taken into consideration, and does, I believe, give some support to a finding that an equal distribution of the matrimonial property would "be unfair and inequitable".\(^{71}\)


(e) the contribution, whether financial or in some other form, made directly or indirectly by a third party on behalf of a spouse to the acquisition, disposition, operation, management or use of the family property;

The most common example of a scenario where this equitable consideration may apply is where a spouse has received an inheritance or other financial contribution from his/her relatives during the course of the relationship. After reviewing the relevant authorities regarding the issue of third party contributions, Gunn J. distilled the following principles in Wilson v. Wilson:\(^2\):

In order for the court to determine whether or not third party contributions justify an unequal distribution of matrimonial property, ss. 21(2)(e) involves two issues on which the party seeking the benefit of the subsection bears the burden of proof. First, the court must determine whether a third party made a contribution on behalf of the claiming spouse. Second, the Court must determine whether it would be unfair or inequitable to distribute the property equally, having regard to all the circumstances: (See Seaberly v. Seaberly (1985), 44 R.F.L. (2d) 1 (Sask. C.A.) at p. 7).

Property acquired after the marriage, by gift or otherwise, is deemed to be a shareable asset, to be shareable equally unless there is something in all of the circumstances which makes an equal sharing unfair and inequitable. Only where the claimant can show that an equal sharing would be unfair or inequitable, having regard to all of the circumstances, will an unequal or fairer sharing be justified. (Seaberly, supra, at p. 9.)

The fact alone that a third party contribution was conferred on or acquired by one of the spouses to the exclusion of the other does not by itself render it subject to unequal sharing. (Seaberly, supra, at p. 9; Olson v. Olson (1988), 67 Sask. R. 257 (Sask. C.A.).)

Other circumstances to be taken into account by the court in determining whether there ought to be an unequal sharing of the property include:

1. The timing of the third party contribution with respect to the time when the person received the gift or inheritance relative to the span of the marriage: (Olson, supra, at p. 264)
2. How the parties viewed the third party contribution: (Burant v. Burant, [1982] 4 W.W.R. 64 (Sask. Q.B.) at p. 68)
3. Where no contrary intention of the donor is shown there is a presumption of an intention to benefit both parties: (Billio v. Billio (1982), 27 R.F.L. (2d) 150 (Sask. Q.B.) at p. 155)
4. Regardless of the intention of the donor, the court must focus on the fairness and equity as between the spouses rather than a fair result as between spouses and third parties: (Bye v. Bye (1986), 50 R.F.L. (2d) 442 (Sask. Q.B.) at 447; Fraser v. Fraser (1991), 94 Sask. R. 253, 34 R.F.L. (3d) 284 (Sask. Q.B.).)\(^3\)

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(f) any direct or indirect contribution made by one spouse to the career or career potential of the other spouse;

While university degrees and similar credentials are not divisible family property, the court may consider a spouse’s financial contribution to another’s career when considering how to distribute the remaining family property.75

(g) the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the spousal relationship;

In a situation where there is an allegation that a spouse has dissipated family property during the relationship, this provision may be engaged along with s. 21(3)(h), (k) and (o) and s. 25. This provision may also apply where a spouse’s earning capacity has been diminished where they have assumed primary responsibility for child care.77

(h) the fact that a spouse has made:
   (i) a substantial gift of property to a third party; or
   (ii) a transfer of property to a third party other than a bona fide purchaser for value;

There does not appear to be much case authority regarding this provision. In situations involving such transfers of property, it may be appropriate to claim unequal division pursuant to s. 21(3)(h) as well as requesting an order pursuant to s. 28 reversing the transfer.79

74 Supra, note 14.
(i) a previous distribution of family property between the spouses by gift or agreement or pursuant to an order of any court of competent jurisdiction made before or after the coming into force of this Act or *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001* (No. 2);

This provision may be utilized in conjunction with s. 21(3)(a), but the case authority citing this provision has been relatively scarce.\(^\text{80}\)

(j) a tax liability that may be incurred by a spouse as a result of the transfer or sale of family property or any order made by the court;

The leading decision in this jurisdiction regarding the tax implications consequent upon division of matrimonial property is *Carlson v. Carlson*\(^\text{81}\):

The appellant contends that the value of certain assets which he retains as part of his distributive share must be discounted according to the tax impact upon him when he is required to pay capital gains tax or taxes arising from recaptured capital cost allowance. In answer to this contention, the respondent asserts that such potential liability is so speculative or remote that it should not be taken into account.

... In my opinion there is merit to the appellant's argument that the learned trial judge erred in failing to take into account the potential tax liability with respect to assets retained by the appellant as part of his share under the distribution order. Section 21(2)(j) of the Act requires the court to have regard to "a tax liability that may be incurred by a spouse as a result of the transfer or sale of matrimonial property or after the coming into force of this Act".

On the evidence adduced, the value of these assets should have been discounted. However, I am of the opinion that the appellant is not entitled to the full discount of $79,000.00 (rounded off figure) arising from potential tax liability. In this case the distribution order does not force or require the appellant to immediately sell or otherwise dispose of the assets in question. There is no evidence that the appellant intends to sell in the near future and in any event, he may, as a shrewd businessman, arrange his affairs to minimize or defer the tax impact by taking advantage of the relevant provisions of the *Income Tax Act*. In the circumstances of this case, the discount in value cannot be calculated with mathematical certainty because of the various contingencies. However, the court must, as in damage claims for example, assess the situation and arrive at a figure that will achieve "justice" between the parties. In this case the court has determined the value of individual assets taking into consideration accrued capital gains. In the distribution order certain specific assets with such accrued capital gains are retained by the appellant. To effect an appropriate and equal division the value of these specific assets so retained must be discounted with respect to the tax liability which has accrued or in the natural course of events is likely to accrue. After weighing the various contingencies and the

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provisions in our law enabling one to minimize or defer payment of taxes, I have concluded in the circumstances of this case that the value of the assets under consideration should be discounted by $37,000.00 which is just a little less than 50% of the mathematically calculated liability if the assets had been sold at the date of trial.  

While the calculation of potential tax consequences does require some guesswork, counsel would be well advised to proffer sufficient evidence in this regard to ensure the court has an adequate evidentiary foundation to invoke this provision. The decisions regarding tax adjustments have imposed a reduction in value between 0% to 50%. Furthermore, such evidence will preserve the record in the event of an appeal. Jackson J.A. emphasized this aspect in the recent decision of *Vilcu v. Grams*:

> The appellant has presented no evidence with respect to his intention to realize on assets and the tax implications which might flow therefrom. We have only been provided with assumptions based on hypothetical scenarios that the appellant must sell either grain, cattle or land to pay off the judgment. When one examines the matter in its entirety, one is left with the impression the trial judge did take into account the tax implications and recognized there would be no adverse tax consequences resulting from the sale of the farm land... (at 6)


The principles which may be deduced from all this are these. If it would be unfair or inequitable to make an equal distribution having regard for the tax consequences of an order dividing matrimonial property, it is customary for a court to make an unequal distribution of assets under the authority of s. 21(2)(j). But there must be an evidentiary base. If such a base exists, a court should strive to effect

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83 For an example of thorough analysis of tax implications, please see *Boser v. Boser* (1999), 188 Sask. R. 204 (Q.B.).

84 *Supra*, note 33 at paras. 49 - 50.
some form of balancing between the parties (see Carlson and the factors referred to therein). In the absence of particular reason, the evidence need not be that of experts, but ideally counsel should address such matters as the intention or need to dispose of assets, the applicable marginal tax rate and the potential for tax planning to avoid the payment of tax. From the perspective of appellate review, whether a trial judge has erred by not considering or declining to consider potential tax implications under s. 21(2)(j) will ultimately depend on the evidence adduced.

Despite the obiter comments in Vilcu, it may be advisable to introduce expert opinion evidence or an agreed statement of facts on the issue of tax implications in order to avoid an otherwise arbitrary adjustment.

“(k) the fact that a spouse has dissipated family property;”

The term “dissipation” is defined in s. 2 of the Act:

“dissipate” means to jeopardize the financial security of a household by the squandering of property;

Geatros J. further refined this definition in Kozakevich v. Kozakevich\(^85\) by referring to a previous, unreported decision:

I find that when the wife moved the stock to Regina, it was for the purpose of disposal. At the time it seemed to her the proper step to take as a salvage operation. But, in retrospect, as it turned out, it was an unwise move, considering that the bank had not given its consent for that to be done.


"Dissipate" is defined in the concise Oxford Dictionary as wasteful squandering (money).

Such a definition implies careless or foolish acts accompanied by indifference to the consequences. I can find in the husband's action no element of indifference to loss. Certainly, he has made some decisions that appear unwise, even foolish. It should not be labelled wasteful squandering simply because a loss resulted.

That assessment was made in the context of the husband's conduct and decisions made in a farming operation. But the principle to be dissected from Dickson J.’s statement is clear. Poor management and judgment could well be attributed to the wife in the instant case, but I have no hesitancy in finding that she was not indifferent to the consequences. Simply because a loss resulted does not mean, in the particular circumstances, that there was dissipation within the meaning of s. 21(2)(k) of The Matrimonial Property Act.\(^86\)


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Section 21(3)(k) also meshes with s. 25 and s. 28\textsuperscript{87} which state, \textit{inter alia}:

\textbf{Immoral or improper conduct}

\textbf{25} For the purposes of making any determination pursuant to section 21, 22 or 23, no court shall have regard to immoral or improper conduct on the part of a spouse unless that conduct amounts to dissipation or has otherwise been substantially detrimental to the financial standing of one or both spouses.

\textbf{Return of gift of property when insufficient consideration}

\textbf{28}(1) Where an application has been made for a family property order, the court has the powers conferred by subsection (2) where it is satisfied that:

(a) a spouse has, before or after the coming into force of this Act, or \textit{The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)}:

(i) dissipated family property in whole or in part;

(ii) transferred family property to a third person for less than adequate consideration with the intention of defeating a claim that the other spouse may have pursuant to this Act or \textit{The Matrimonial Property Act}; or

(iii) without the consent of the other spouse, made a substantial gift of family property to a third person; and

(b) the dissipation occurred, or the transfer or gift was made, not more than two years before the day on which either spouse commenced the application for the family property order.

(2) For the purposes of subsection (1), the court may do any of the following:

(a) when the court makes a family property order, consider the family property dissipated, transferred or gifted to be part of the share of the spouse who dissipated, transferred or gifted the property;

(b) subject to any terms and conditions that the court thinks fit, order the donee or, subject to subsection (3), the transferee to pay or transfer all or part of the family property to a spouse;

(c) give judgment in favour of a spouse against the donee or, subject to subsection (3), the transferee for a sum not exceeding the amount by which the share of that spouse pursuant to the family property order is reduced as a result of the transfer or gift.

Please note that recourse to s. 28 is restricted to allegations of dissipation which occur within two years of the application for division. If the alleged dissipation occurs outside this time frame, the aggrieved party must rely on s. 21(3)(k) and s. 25.

(l) subject to ss. 30(3), any benefit received or receivable by the surviving spouse as a result of the death of his or her spouse;

In *Kaye v. Pohl*\(^88\), the Petitioner was diagnosed with terminal cancer during the course of the family property action. A judgment for divorce was granted approximately one month before the Petitioner’s death and she asked the Respondent to waive his right of appeal so that the judgment would be final. The Respondent refused, ostensibly because he would be entitled to C.P.P. survivor’s benefits (as opposed to the Petitioner’s children) as a surviving spouse if the Petitioner died before the judgment became final. As it turned out, the Petitioner died before the expiry of the appeal period, and her executor applied for an unequal division. Armstrong J. agreed, stating at paras. 24 - 27:

> The CPP survivor's benefit to the respondent is not, of course, matrimonial property. But ss. 21(2)(l) permits the court to take into account, when determining if there should be other than an equal division of matrimonial property, "any benefit . . . receivable by the surviving spouse as a result of the death of his spouse".

> ... In view of all of the foregoing factors it is not possible to accurately calculate the amount which the respondent will benefit, apparently at the expense of his children, from the petitioner's accumulated CPP credits. Nevertheless, the existence of a significant benefit to the respondent, as a result of the death of the petitioner, must be taken into account when determining the appropriate division of matrimonial property.\(^89\)

(m) any maintenance payments payable for the support of a child;

Judicial consideration of this provision has focused on scenarios where a spouse has accumulated significant child support arrears and has exhibited an unwillingness to pay ongoing child support. McIntyre J. addressed such a circumstance in *Burton v. Burton*\(^90\):

> It is not appropriate to extinguish the arrears. The fact is that the respondent chose not to appeal the interim order and it is not appropriate that I should be asked to sit on appeal of another member of this Court. It is not a situation where the respondent can claim a true inability to pay. The fact is that he has had the use and benefit of almost all the matrimonial property over the period of time that these arrears accumulated.

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\(^88\) (1999), 184 Sask. R. 287 (Q.B.).  
\(^90\) (1998), 165 Sask. R. 14 at paras. 45 - 51 (Q.B.).
The petitioner, in substance, seeks to have the arrears of maintenance charged against the matrimonial property. The respondent seeks to have the arrears payable over time.

... If the arrears were child support, ss. 21(2)(m) would explicitly permit an unequal division. While spousal support is not explicitly listed it can fall within ss. 21(2)(q). Arrears under a support order which required a party to service a joint debt of the parties could also fall within ss. 21(2)(q). An order of the nature sought by the petitioner was made by this Court in Demeria v. Demeria (December 18, 1995), Doc. Saskatoon U.F.C. 742/94 (Sask. Q.B.), and F. (N.P.) v. F. (L.G.) (October 6, 1993), Doc. Saskatoon U.F.C. 792/89 (Sask. Q.B.).

In this instance there is sufficient matrimonial property to be divided so as to make the order requested by the petitioner. The respondent will still be left with substantial matrimonial property. In determining whether to deal with the arrears in the manner suggested by the respondent it is appropriate to assess the likelihood the payments will, in fact, be made. On the one hand the respondent has in the past paid reasonable amounts on account of the support of his wife and children. However, I was left with the distinct impression the respondent made payments in accordance with what he felt was reasonable and on terms controlled by him. I am not left confident that the respondent will voluntarily make the payments and if he remains self-employed enforcement proceedings can be problematic.

In the circumstances it will be appropriate to make an adjustment of the matrimonial property in favour of the petitioner on account of arrears of maintenance. It is necessary to adjust these arrears on account of tax. Support paid under the interim order in question is taxable in the hands of the petitioner. Moneys received under the division of matrimonial property are not taxable. The petitioner's marginal tax rate is 25%. Had she received the $13,576.37 in support she would have had $10,182.27 in after tax dollars. It is appropriate to make an adjustment in the distribution of matrimonial property in favour of the petitioner in this amount.

In Krpan v. Krpan the court engaged this provision where it was apparent at trial that the Respondent was unable to pay interim and ongoing child support as a result of her modest income. It is worth noting, however, that this decision predated the Federal Child Support Guidelines. As a result, it may be debatable whether a court will order lump sum child support in a similar fashion where there is an action for distribution of family property.

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(n) interests of third parties in the family property;

This provision might be engaged in situations where a third party alleges that a specific asset is encumbered by their ownership or security interest in the property. In situations where a third party alleges an unsecured debt or constructive trust, they may initiate their own civil action and consolidate it with the family property action\(^93\), but the spouses themselves rarely allege unequal distribution by relying on this provision. The fact that a spouse may be registered as the joint owner of property speaks more to the issue of valuation than it does to equitable considerations.\(^94\)

(o) any debts or liabilities of a spouse, including debts paid during the course of the spousal relationship;

While family debts cannot be divided in a manner akin to family property\(^95\), they may form the basis for unequal division where one of the spouses is responsible for an inordinate amount of debt accumulated during the relationship. Jackson J.A. discussed the import of paragraph 21(3)(o) in *Russell v. Russell*\(^96\):

> The phrase "matrimonial debt" does not appear in *The Matrimonial Property Act*. The only mention of debts in that Act is as a factor in making an unequal distribution. Subsection 22(1) of the Act directs the court to have regard to debts or liabilities "pertaining to the matrimonial home," but debts which do not pertain to the matrimonial home are only a factor in making an unequal distribution under s. 21. If the Court is satisfied, having regard for a number of factors enumerated in s. 21(2), that it would be unfair and inequitable to make an equal distribution, it may make any order pursuant to s. 21(2)(t) that it considers fair and equitable. The factors which the Court can consider include the following:

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21(2) \text{ Subject to section 22, where, having regard to:}
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\[
(a) \text{ any written agreement between the spouses or between one or both spouses and a third party;}
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\[
(e) \text{ the contribution, whether financial or in some other form, made directly or indirectly by a third party on behalf of a spouse to the acquisition, disposition, operation, management or use of the matrimonial property;}
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\(^95\) See supra, note 13.

(n) interests of third parties in the matrimonial property;

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(o) any debts or liabilities of a spouse, including debts paid during the course of the marriage;

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\ldots
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(q) any other relevant fact or circumstance.

Debts could be taken into account under any of the above clauses, but specifically referred to in s. 21(2)(o). It should be noted that this clause does not mandate that "debts or liabilities" must be divided equally.

Like many other considerations under The Matrimonial Property Act, adjusting a matrimonial property division for debts incurred during the marriage is a matter left solely to the discretion of the trial judge. Obviously, that discretion must be exercised in a fair and just fashion. There are, however, few additional constraints.

A strict construction of the Act and Benson would have required the trial judge to calculate the gross value of the 1992 crop as part of the value of the matrimonial property and then determine whether an equitable adjustment should be made for the debts. As a general rule, however, once debts are accepted as debts incurred by the parties prior to the date of application, Saskatchewan courts deduct debts from the total value of matrimonial property without maintaining that they are doing so as a result of an application of equitable principles. See, for example, the decisions of this Court in Wolff v. Wolff (1985), 44 R.F.L. (2d) 215 (Sask. C.A.); Gaetz v. Gaetz (1996), 24 R.F.L. (4th) 72 (Sask. C.A.); Mitchell v. Mitchell (cited earlier); Olson v. Olson (1988), 67 Sask. R. 257 (Sask. C.A.); Mehling v. Mehling (cited earlier); Wagner v. Wagner (1988), 14 R.F.L. (3d) 415 (Sask. C.A.); Deyell v. Deyell (cited earlier); Meleschak v. Meleschak (1990), 30 R.F.L. (3d) 207 (Sask. C.A.); Rossal v. Rossal (1987), 12 R.F.L. (3d) 15 (Sask. C.A.).

Where such debts are fully documented and involve arm’s length creditors, the argument for unequal division is more palpable than where there is an oral arrangement and the creditor is a close relative of one of the spouses. In such circumstances, the court may be genuinely concerned whether financial support from family members is a legitimate debt within the meaning of this subsection. In Lowenberg v. Lowenberg 97 Barclay J. undertook an extensive review of the relevant Canadian authorities regarding this issue. More specifically, he emphasized that the application of this provision is contingent upon a finding that the debt is legally enforceable.

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Section 3(1) of The Limitation of Actions Act, R.S.S. 1978, c. L-15, as am., provides for repayment of such debts provided that the cause of action arose within the last six years. In particular, the section states:

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3(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

(f) actions for:

(i) the recovery of money, except in respect of a debt charged upon land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other speciality or on a simple contract, express or implied, within six years after the cause of action arose.

70 In Wolff v. Wolff (1985), 37 Sask. R. 19 (Sask. C.A.), Hall J.A., speaking for the court, considered the question of what constitutes a debt within the context of The Matrimonial Property Act. At p. 21, he stated:

In computing the allowable farm debts the learned chambers judge included the sum of $6,000.00 which was described as a "moral obligation" by the respondent to his mother. The respondent maintained that he was morally obliged to pay his mother $1500.00 a year and that he was four years in arrears. Although the learned chambers judge allowed the amount of the arrears, he did not make any provision for future accruals. With all respect, I do not think that this claim of $6,000.00 should have been taken into account in computing the allowable farm debts. We are concerned with legally enforceable debts and not moral ones....

71 The practice of restricting a claimant to only those debts that are legally enforceable has been followed in Wagner v. Wagner (1988), 69 Sask. R. 26 (Sask. C.A.), Kochylema v. Fulton (1993), 114 Sask. R. 268 (Sask. Q.B.), and Wilson v. Wilson (1994), 119 Sask. R. 1 (Sask. Q.B.) which was confirmed by the Court of Appeal ((1995), 131 Sask. R. 231 (Sask. C.A.)).

It is worth noting that a court may also consider whether a creditor is likely to enforce the alleged debt pursuant to s. 21(3)(q). 99

(p) the value of family property situated outside Saskatchewan;

Dickson J. summarized the application of this provision in McCalla v. McCalla 100 by stating:

. . . I have no jurisdiction to order the distribution of foreign real property but I am entitled by s. 21(2)(p) to take its value into consideration if I am satisfied that it is a factor that would make equal distribution of matrimonial property or its value unfair and inequitable. Permitting the husband to retain matrimonial property over which the court has no jurisdiction and the wife no control is, in my opinion, a factor that would make equal distribution of the matrimonial property over which the court does have jurisdiction unfair and inequitable. Therefore, I intend to make an appropriate adjustment when distributing the property situated in Saskatchewan. 101


(q) any other relevant fact or circumstance.

This provision has often been described as a “catch-all” equitable consideration, however it should be emphasized that this provision does not permit the court to revert to an analysis of the respective parties’ contributions during the relationship\(^{102}\) because this would, in effect, circumvent the clear purpose of the Act. The ambit of this provision includes the following considerations:

(a) costs of selling certain assets\(^{103}\);
(b) occupational rent\(^{104}\);
(c) post-separation income and expenses\(^{105}\);
(d) pre-application legal fees\(^{106}\);
(e) spousal support arrears\(^{107}\); and
(f) the (un)likelihood that unsecured creditors will enforce a debt\(^{108}\).


... This kind of claim is founded upon the notion that an equal division would be inequitable because one spouse has had the benefit of occupation while the other has had, of necessity, to pay for alternate accommodation. It is the sort of claim that will succeed if the claiming spouse has been denied possession or forced to vacate the matrimonial home, or if the spouse in possession is seeking to offset, in the distribution of its value, expenditures made to maintain the property since the time of separation.


\(^{106}\) Fischer v. Fischer (1996), 151 Sask. R. 57 (Q.B.)


7. Applications on Death of Spouse

Application by spouse of deceased
30(1) An application for a family property order may be made or continued by a surviving spouse after the death of the other spouse or may be continued by the personal representative of the deceased spouse.

(2) No application by a surviving spouse for a family property order may be commenced more than six months after the date of the issue of a grant of probate or administration for the estate of the deceased spouse.

(3) Where the deceased spouse died intestate, no court, in making a distribution of family property pursuant to an application made or continued by a surviving spouse or continued by the personal representative of a deceased spouse, shall consider the amount payable to a spouse pursuant to The Intestate Succession Act, 1996, and no order made pursuant to this Act affects the rights of the surviving spouse on intestacy.

Where estate is involved
31 Where an application is continued or commenced pursuant to section 30:

(a) this Act applies, with any necessary modification, with respect to the estate of the deceased spouse; and

(b) the property of the deceased spouse, whether or not it has vested in the personal representative, is family property that is subject to this Act.

Property deemed never part of estate
35 Money paid or property transferred to a surviving spouse pursuant to a family property order is deemed never to have been part of the estate of the deceased spouse where a claim is made against the estate:

(a) by a beneficiary under a will;
(b) by a beneficiary pursuant to The Intestate Succession Act, 1996;
(c) by a dependant pursuant to The Dependants Relief Act, 1996;
(d) by a claimant in an action pursuant to The Fatal Accidents Act; or
(e) by any creditor of the deceased spouse or of the estate, except where the court directs otherwise in the family property order.

The Act sets a limitation period of six months after the date of the issue of a grant of probate or administration for the estate of a deceased spouse which corresponds with the limitation period to initiate an application pursuant to The Dependants’ Relief Act.109 It is also worth noting that section 30(1) only permits the personal representative of a deceased spouse to “continue” an action.110 The Saskatchewan Court of Appeal held that the combined effect of s. 30(1) and s. 36 significantly curtailed the ability of the personal representative to actively seek a distribution order in Edward v. Edward Estate111, where Bayda C.J.S. stated:

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109 S.S. 1996, c. D-25.01, s. 4.
110 This limitation has been broadened somewhat in Boychuk v. Boychuk Estate (1993), 116 Sask. R. 54 (C.A.).
The effect of s. 36, particularly when read in conjunction with subsection 30(1), is that the estate of a deceased spouse (except where his personal representative, as in Donkin v. Bugoy, supra, continues an application initiated by him while still alive) may not be created or enlarged through the medium of a matrimonial property order after the death of the deceased spouse. The section is clear: the rights conferred by the Act do not survive his death for the benefit of his estate. What does this mean in practical terms? What approach must a judge use where, after the death of one spouse, the surviving spouse makes an application for a matrimonial property order? The proper approach, in my view, requires that all of the matrimonial assets, that is the assets of both the husband and wife less the respective debts, be taken into account. The judge then determines the surviving spouse's share of those assets as if the deceased spouse had not died (Donkin v. Bugoy, supra.). If that share is less than the value of the assets which the surviving spouse has already received, he or she is entitled to a matrimonial property order for the difference out of the deceased spouse's estate. If that share is the same as or more than the value of the assets the surviving spouse has already received, then the judge must simply dismiss the application. The judge in that case, however, would not make a matrimonial property order in favour of the deceased spouse's estate. Section 36 precludes such an order."

The surviving spouse would be entitled -- by reason of ss. 30(3) -- to his or her share under The Intestate Succession Act irrespective of the disposition of the application for a matrimonial property order.

Where the estate’s assets are not substantial, the surviving spouse may have a concurrent claim for the remaining estate assets pursuant to The Dependants’ Relief Act, 1996.112

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