



MATRIMONIAL PROPERTY LEGISLATION: VALUATION DATES

Background Paper

November 2005

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PART I — Introduction

A. Issue for Discussion

Should Alberta's *Matrimonial Property Act* be amended to permit the valuation of property at a date or dates other than trial? If yes, which date or dates? What other legislative changes would ensure the just and equitable division of matrimonial property by the court and facilitate agreement by the parties?

B. Reasons for Considering this Issue

[1] This memo addresses the issue of the most appropriate date for the valuation of matrimonial property where a marital relationship has broken down while both spouses are alive. Alberta's *Matrimonial Property Act*¹ does not specify a valuation date. In the recent case of *Hodgson v. Hodgson*,² the Court of Appeal interpreted the Act to require valuation as of the date of trial.³ Formerly this date had been applied presumptively, leaving room to use another date in exceptional circumstances.

[2] Some members of the family law bar find the application of the trial date for valuation problematic in practice. One concern is that, because the valuation cannot be final until the date the court rules, the Act as interpreted hinders settlement. Another concern is the cost and delay involved in responding to repeated requests for updated valuation along the way to trial. The problems with valuation as of the trial date existed before the Court of Appeal rendered judgment in *Hodgson*, but the presumptive application of this date left some flexibility to respond to individual circumstances. Making the trial date mandatory further aggravates the problem. Speaking practically, what is seen to be needed is a

¹ *Matrimonial Property Act*, R.S.A. 2000, c. M-9.

² *Hodgson v. Hodgson*, [2005] A.J. No. 22 (CA).

³ *Hodgson*, *ibid.*, at paras. 2, 10.

valuation date that allows the parties to work forward from a past or present date on which the value of property can be known instead of backward from a future date on which the value of property can only be guessed at. The valuation date most commonly proposed is the date of separation.

[3] In this Project, we will:

- (a) consider the advantages and disadvantages of valuing property at a date or dates other than the date of trial;
- (a) in doing so, examine the operation of valuation dates in other Canadian jurisdictions; and
- (c) recommend reform if the analysis suggests that changing the valuation date would better facilitate the achievement of just and equitable matrimonial property sharing in Alberta.

C. Consultation

[4] Invitational Focus Group Sessions will be convened in Calgary and Edmonton in December to explore the problems with the current law and procedures being experienced by family lawyers and the courts, canvass potential solutions, and receive advice on the direction reform should take if it is needed. This Background Paper will provide a foundation for that discussion.

[5] Individual comments are also welcome. You can reach us with your comments on our website, by fax, mail or e-mail to:

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D. Organization of Background Paper

[6] This Paper is divided into four Parts. Part I is introductory. Part II contains a description of the existing law. We begin with a brief account of the approach to sharing taken in Alberta's *Matrimonial Property Act*. We then review the three leading cases on the valuation date under the Alberta *Act*. This is followed by a cursory introduction to matrimonial property regimes in other Canadian jurisdictions, identification of the approaches taken to valuation dates and an account of the valuation dates that are in effect. In Part III, we make a number of observations about the role of valuation dates in achieving a just and equitable division of matrimonial property, and about some of the differences associated with the use of one or another valuation date. In Part IV, we pose options for reform and suggest factors to consider in assessing the advantages and disadvantages of those options.

PART II — Existing Law

A. Alberta

1. Matrimonial property regime

[7] In Alberta, under the *Matrimonial Property Act*, a presumption of equal sharing applies to property of the spouses that was acquired, or increased in value, during the marriage.⁴ The right to a division arises on divorce, nullity, judicial separation, separation, or improper transfer, gifting or dissipation of property by one spouse to the detriment of the other.⁵

[8] Section 7 governs the distribution of property where a right exists. Under section 7(1), the starting point for sharing is “all the property owned by both spouses and by each of them” at the date of trial. Under section 7(2), the market value of ... certain property at the date of marriage, or if acquired later, ... at the date of acquisition is exempt from sharing. The exemptions include: property acquired by gift from a third party, property acquired by inheritance, property acquired before the marriage, an award or settlement for damages in tort in compensation for a loss to that spouse alone, or the proceeds of an insurance policy that is not in respect of property and does not compensate for a loss to both spouses.

[9] Section 7(3) renders certain property subject to division in the court’s discretion. This property includes:

- the difference between the exempt value under section 7(2) and the market value at the time of the trial of that property, property exchanged for it, or property acquired with the proceeds of its sale;
- property acquired with income received during marriage from an exempt property or its successor;

⁴ *Matrimonial Property Act*, *supra* note 1, s. 7(4).

⁵ *Ibid.*, s. 5.

- property acquired after divorce, nullity or judicial separation; or
- gifts from the other spouse.

[10] Section 7(4) requires the equal distribution of all other property acquired during marriage unless it appears to the court that an equal distribution would not be just and equitable.

[11] Section 7 is reproduced here for ease of reference:

7(1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.

(2) If the property is

- (a) property acquired by a spouse by gift from a third party,
- (b) property acquired by a spouse by inheritance,
- (c) property acquired by a spouse before the marriage,
- (d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
- (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,

the market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later, is exempted from a distribution under this section.

(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:

- (a) the difference between the exempted value of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the time of the trial of the original property or property acquired
 - (i) as a result of an exchange for the original property, or
 - (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;
- (b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
- (c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses;
- (d) property acquired by a spouse by gift from the other spouse.

(4) If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it

appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

[12] In exercising its discretion to distribute property under section 7(3) or to award an unequal division of property under section 7(4), the court is required to distribute property in a manner that is just and equitable. In doing so, it must take into consideration the twelve matters set out in section 8 and, in addition, “any fact or circumstance that is relevant.”

8 The matters to be taken into consideration in making a distribution under section 7 are the following:

- (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;
- (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;
- (d) the income, earning capacity, liabilities, obligations, property and other financial resources
 - (i) that each spouse had at the time of marriage, and
 - (ii) that each spouse has at the time of the trial;
- (e) the duration of the marriage;
- (f) whether the property was acquired when the spouses were living separate and apart;
- (g) the terms of an oral or written agreement between the spouses;
- (h) 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 property between the spouses by gift, agreement or matrimonial property order;
- (j) a prior order made by a court;
- (k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;
- (l) that a spouse has dissipated property to the detriment of the other spouse;
- (m) any fact or circumstance that is relevant.

[13] Section 9 gives the court wide powers to make orders giving effect to the division.

2. Valuation date

[14] Alberta's *Matrimonial Property Act* does not specify a valuation date. Case law establishes the date of trial as the valuation date. That law can be traced through three cases: *Mazurenko v. Mazurenko*,⁶ *Kazmierczak v. Kazmierczak*⁷ and *Hodgson v. Hodgson*.⁸

a. Mazurenko v. Mazurenko

[15] In 1981, three years after the *Matrimonial Property Act* came into force, the Court of Appeal rendered judgment in the case of *Mazurenko v. Mazurenko*.⁹ *Mazurenko* remained the leading case on valuation date until 2005. In *Mazurenko*, the husband argued for valuation at the time of separation, not trial. The Court concluded that “[i]n the absence of an express provision to that effect ... the general principle that valuation be made at trial should apply.” The Court expressed its view that, “[w]hile not conclusive on this point, ss. 7(3)(c) and 8(f) militate against the husband’s argument.” Section 7(3)(c) allows the discretionary sharing of property acquired after divorce, nullity or separation. Section 8(f) requires the court to consider property acquired post-separation.

b. Kazmierczka v. Kazmierczka

[16] For many years, cases treated *Mazurenko* as having established a “presumptive rule” that division would take place at the time of trial. In 2001, in the case of *Kazmierczak v. Kazmierczak*, the trial judge engaged in an extensive examination of cases on valuation date.¹⁰ From the cases, he discerned three

⁶ *Mazurenko v. Mazurenko*, [1981] A.J. No. 23 (CA).

⁷ *Kazmierczak v. Kazmierczak*, [2003] A.J. No. 909 (CA) [*Kazmierczak* (CA)], affirming [2001] A.J. No. 955 (QB) [*Kazmierczak* (QB)].

⁸ *Hodgson v. Hodgson*, *supra* note 2.

⁹ *Mazurenko v. Mazurenko*, *supra* note 6.

¹⁰ *Kazmierczak* (QB), *supra* note 7, at paras. 50-61. With respect to the presumptive nature of the use of the trial date, the review discloses that “the overwhelming trend of the cases is to divide at the date of trial, and use the factors under s. 8 to deal with any issues that have arisen during the separation,” although “many of them allow that special circumstances might speak to another date of division”:

(continued...)

reasons for using the date of trial as the date of division. The first reason comes from the language used in the statute. In addition to ss. 7(3)(c) and 8(f):

- ss. 7(3)(a) and 8(d)(ii) talk about the “time of trial”; and
- s. 7(4) speaks of property acquired “during the marriage,” not “during the cohabitation.”

The second reason is that “even after separation the parties are not totally independent.”¹¹ The third reason is the difficulty of evaluating assets owned by the parties many years before the trial date.”¹²

[17] In *Kazmierczak*, the spouses had cohabited for eight years – two years before marriage and six years after marriage. By the date of the trial, they had been separated for 13 years. During the separation, the spouses had led completely separate economic lives. Each of the spouses had conducted a number of transactions and “dealt with their property and assets as if they were the sole owner.” Several homes and a pension were involved. The trial judge commented that “[i]f ever there was a case calling for division as of the date of separation, this would perhaps be the case.”¹³ Nevertheless, he concluded that “a more just and equitable result” could be achieved by dividing the property at the time of trial.¹⁴ He chose to deal with each asset separately, rather than to divide “the net matrimonial property on a percentage basis, as is usually done.”¹⁵

¹⁰ (...continued)

Kazmierczak (QB), *ibid.*, at paras. 53 and 62. The property was “overtly” valued at the date of separation in only one case, *Manister v. Mollberg* (1982), 46 A.R. 11 (QB), in which “the parties had effected a de facto division as of the date of the divorce”: *Kazmierczak* (QB), *ibid.*

¹¹ *Kazmierczak* (QB), *ibid.*, citing *Wilson v. Wilson* (1986), 2 R.F.L. (3d) 86 (Alta. C.A.) at para. 1 and *McGregor v. McGregor* (1996), 183 A.R. 263 [*McGregor*].

¹² *Kazmierczak* (QB), *ibid.*, citing *McGregor*, *ibid.* The judge characterized this reason as one of expediency only, in that it suggests ease of evaluation as the basis on which to choose a valuation date: *ibid.*, at para. 51.

¹³ *Kazmierczak* (QB), *ibid.*, at para. 70.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

[18] In 2003, the Court of Appeal affirmed the trial judge's division.¹⁶ The Court rejected arguments objecting to the trial judge's use of the date of marriage to value exempt property. The evidence and record on this point were unclear.¹⁷ However, the valuation of exempt assets as of the date of trial rather than the date of marriage did not make much difference to the result. Moreover, the trial judge had given due weight to all of the relevant factors. The Court of Appeal did not comment on the presumptive aspect of valuation at the date of trial.

c. Hodgson v. Hodgson

[19] The landscape changed in 2005, with the Court of Appeal's decision in the case of *Hodgson v. Hodgson*.¹⁸ In *Hodgson*, the trial judge used the date of separation to value and divide the matrimonial property. In doing so, he relied on three factors:

- an 11-year delay between the date of separation and the date of trial;
- a significant increase in the value of various assets in the interim (matrimonial home, wife's pension, various gifts and inheritances received by the husband); and
- the separate and independent lives the spouses had led between separation and trial.

The judge relied on the trial judge's review of the case law in *Kazmierczak* to conclude that "notwithstanding the strong presumptive rule set out by the Court of Appeal in *Mazurenko* of division as of the date of trial, it is clear that it is now permissible to use the date of separation where justified by special circumstances."¹⁹

¹⁶ *Kazmierczak* (CA), *supra* note 7, on appeal from *Kazmierczak* (QB), *supra* note 7.

¹⁷ *Kazmierczak* (CA), *ibid.*, at paras. 64-74.

¹⁸ *Hodgson*, *supra* note 2, at 2.

¹⁹ Quoted in *Hodgson*, *ibid.* at para. 5.

[20] The Court of Appeal thought otherwise. It held that the correct approach for a judge to take is to value shareable property as of the date of trial and then exercise discretion having regard to the factors in section 8.²⁰ According to the Court, the elapse of a significant period of time between the date of separation and the date of trial, with an increase in value of the assets in question, does not change the requirement to value the property at the date of trial. As stated by the Court, “valuation and division must take place as of the date of trial.”²¹ This is a rule and not a rebuttable presumption.²²

In summary, the rule set down by Stevenson J.A. in *Mazurenko* is more than a presumptive rule. The court is obliged to divide the matrimonial property as of the date of trial - given the statutory language, and the legislative scheme, of the MPA. This is not a rebuttable presumption but a rule of division.

[21] The Court of Appeal’s conclusion in *Hodgson* can be implied from a number of provisions in the statute, as well as from the overall statutory scheme.

i. Specific statutory provisions

[22] Relevant provisions in the statute include:

- s. 7(1), which gives the court the initial jurisdiction to divide matrimonial property:²³

Section 7(1) ... provides that the court “may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.” The plain meaning of this phrase is that the trial judge is entitled to determine the scope of the divisible assets at the time that the matter comes before him or her - the time of trial. It is worth remembering that property owned at the date of separation may no longer exist. It is the property the spouses possess at the date of adjudication that is relevant to distribution, and it follows that to properly exercise its discretionary powers the court needs to understand its value as at the date of trial.

²⁰ *Hodgson, ibid.*, at para. 33.

²¹ *Ibid.*, at para. 10.

²² *Ibid.*, at para. 32.

²³ *Ibid.*, at para. 12.

- section 7(3)(a), which requires the division of property at the date of trial.²⁴

Section 7(2) of the MPA describes all of the property, owned or acquired by either spouse, that is exempt from distribution. Section 7(3)(a) then provides that the court shall distribute the difference in the exempted value of the property described in s. 7(2), and the market value at the time of trial, in a manner which the court considers just and equitable once the factors set out in section 8 are taken into account. It follows that it is necessary to determine the value of that property as at the date of trial in order to ascertain the amount of property distributable under section 7(3)(a).
- section 7(3)(c), which is inconsistent with division and valuation at the date of separation. This section:²⁵

... establishes that property acquired after a decree nisi of divorce (or some other legal recognition of separation), but before a division of property under the MPA, is property that is subject to division in a manner considered just and equitable.
- various factors listed in section 8, which “lead to the conclusion that the Legislature intended that matrimonial property should be valued and divided at the date of trial.”²⁶ Two examples follow.
 - Section 8(f) states:²⁷

... that when the court is dividing property under section 7 it must consider "whether the property was acquired when the spouses were living separate and apart". This section contemplates the division of property acquired after the parties have separated, using separation as a factor in the determination of what is fair, rather than as a starting point.
 - Section 8(d) requires the court to take into account the property and other financial resources that each spouse had at the time of marriage, and at the time of the trial. This requirement:²⁸

... comes close to being a statement of legislative intent that the date for the valuation and division of matrimonial property should be the date of trial. A court would find it difficult to exercise its discretion as to what is just and

²⁴ *Ibid.*, at para. 13.

²⁵ *Ibid.*, at para. 14.

²⁶ *Ibid.*, at para. 15.

²⁷ *Ibid.*

²⁸ *Ibid.*, at para. 16.

equitable if it did not understand what the parties owned at the time of trial. This, too, supports the time of trial as the valuation date.

ii. Overall statutory scheme

[23] Taken together, sections 7 and 8 “describe a four-step process of exclusion and qualification”²⁹ which, “when viewed as a whole, is aimed at achieving a just and equitable division of property owned by the parties at the date of trial.”³⁰

- the first step is “to determine all property owned at date of trial,”³¹ which is “the most inclusive point, as far as available property is concerned”;³²
- the second step is “to discern the property that is exempt from distribution under section 7(2), or that can be traced to section 7(2) property” and then “to exclude from the distribution the value of that property, as at date of acquisition, or date of marriage.”³³
- the third step is to “determine what property falls under section 7(3).”³⁴ This property:
 - ... includes the increase in the value of exempt property, from the date of acquisition or marriage, to the date of trial. That property is then distributed between the parties in a manner that is just and equitable. No statutory presumption of equality exists with respect to this property, and the trial judge's discretion is exercised by taking the section 8 factors into consideration. Over the years, jurisprudence has developed to assist judges in the exercise of that discretion. For instance, where a gift, inheritance, or other section 7(2) property is acquired after separation, Mazurenko provides that any increase in the value of that property is also exempt. In addition, Mazurenko suggests that where exempt property, or a portion of otherwise exempt property, is brought into the marriage it may attract the presumption of equality.

²⁹ *Ibid.*, at para. 18.

³⁰ *Ibid.*, at para. 22.

³¹ *Ibid.*, at para. 19.

³² *Ibid.*, at para. 18.

³³ *Ibid.*

³⁴ *Ibid.*, at para. 20.

- the fourth step is “to divide the balance of the remaining assets equally, unless it would be unjust and inequitable to do so considering the factors set out in section 8.”

iii. Exceptional cases

[24] The Court of Appeal referred to three cases where it was alleged the court had used the date of separation to effect the valuation and distribution of certain items of matrimonial property. In its view, the cases which were said to deviate from the rule in *Mazurenko* “still support the principle that the court should deal with any inequities that might arise, when valuing and dividing the property held by the spouses as at the date of trial, by applying the factors set out in section 8.”³⁵

d. Party agreement

[25] The preceding paragraphs describe the situation in cases that come to court for resolution. The Act does not affect the freedom of the parties to agree to a division based on valuation at a date of their own choosing:³⁶

Of course, parties are still free to agree to divide property using whatever date of division they wish provided they enter into a formal agreement to that effect in accordance with the conditions set out in sections 37 and 38. In the absence of such an agreement, however, the matrimonial property must be dealt with by the trial judge on the basis of the statutory requirements, which include using the date of trial for purposes of making a distribution.

B. Other Canadian Jurisdictions

1. Matrimonial property regimes

a. Similarities

[26] Every province or territory in Canada makes statutory provision for the distribution of matrimonial property when a marital relationship comes to an end. As in Alberta, the regimes provide for deferred sharing, in which:³⁷

³⁵ *Ibid.*, at para. 28.

³⁶ *Ibid.*, at para. 29.

³⁷ In Quebec, the spouses may choose one from among three matrimonial regimes – partnership of acquests (deferred sharing), community property or separate property. The choice may be made in a marriage contract entered into prior to solemnization of their marriage (*Civil Code of Quebec, C.C.Q.* 1991, art. 431) or by changing the marriage contract during marriage (*ibid.*, art. 438). The default regime for spouses who do not specify a matrimonial regime in a marriage contract before solemnization is partnership of acquests (*ibid.*, art. 432).

- the right to a division of property arises on the occurrence of one or another event related to relationship breakdown;³⁸
- before that event occurs, the spouses own their property separately; and
- in general, the occurrence of that event gives a spouse the right to claim an equal division of property accumulated by each spouse since marriage.

b. Differences

[27] This having been said, a surprising degree of difference exists in the details of Canada's matrimonial property regimes. The statutes vary in their identification of:

- the events that give rise to the right to a division (*e.g.*, separation, divorce, nullity);
- the property that is subject to sharing less deductions and exemptions (*e.g.*, all property acquired during marriage, "family assets" as defined on the basis of use, matrimonial home and household effects whenever acquired); and
- the usual manner of sharing (*e.g.*, compensation payment to equalize the net result, distribution of assets themselves).³⁹

Usually, matrimonial property will be divided equally. However, circumstances vary greatly from case to case, and judicial discretion to divide the property unequally, or to divide property that ordinarily is not subject to equal sharing or is

³⁸ In Saskatchewan, the *Family Property Act*, S.S. 1997, c. F-6.3 (chapter number and title changed by S.S. 2001, c. 51), does not appear to place conditions on the right to apply. Under the predecessor *Matrimonial Property Act*, which also left open the time of application, the court required that "there must be some dispute or *lis* between the parties:" Donna Wilson and Valerie G. Watson (November 2003), in *Matrimonial Property Law in Canada*, looseleaf service (Thomson-Carswell), at S-13, citing *Thompson v. Thompson*, January 14, 1983, Doc. No. Saskatoon Q.B. 1910, Sask. Q.B., Gerein J. Spouses could not use the Act to vest assets in one spouse in order to protect them from execution and seizure by creditors of the other spouse: *ibid.*, citing *Mahon v. Mahon* (1982), 30 R.F.L. (2d) 130, 21 Sask. R. 10 (Q.B.). The *Family Property Act* does require persons whose claim is based on cohabitation for at least two years to apply for the division of property within two years of separation.

³⁹ In British Columbia, under s. 56(1) and (2) of the *Family Relations Act*, R.S.B.C. 1996, c. 128, the events giving rise to a right to the distribution of family assets "trigger" an entitlement in each spouse to an interest in each family asset as a tenant in common.

exempt from sharing, plays a significant role in achieving fairness between the parties in each statutory scheme. Most statutes set out a list of matters for the court to consider in varying the usual sharing. In the Yukon, the list includes as a factor “the date of valuation of family assets.”⁴⁰ In addition, courts have wide powers to make the orders that are necessary to realize the division that has been determined.

[28] Different standards are used to activate the exercise of judicial discretion. In Alberta, the standard is a division that is just and equitable.⁴¹ Before deviating from an equal sharing of family assets, Manitoba imposes a much stricter standard. It requires the court to be “satisfied that equalization would be grossly unfair or unconscionable.”⁴² The court may vary the distribution of commercial assets where equalization would be “clearly inequitable,” having regard to the listed factors.⁴³ In Newfoundland and Labrador, the equal division of matrimonial assets must be “grossly unjust or unconscionable;”⁴⁴ in Nova Scotia, “unfair or unconscionable”;⁴⁵ in Saskatchewan, “unfair and inequitable.”⁴⁶ In Ontario, Prince Edward Island, the Northwest Territories and Nunavut, an equal distribution must be “unconscionable;”⁴⁷ in New Brunswick⁴⁸ and the Yukon,⁴⁹ “inequitable;” in

⁴⁰ *Family Property and Support Act*, R.S.Y. 2002, c. 83, s. 13.

⁴¹ *Matrimonial Property Act*, *supra* note 1, ss. 7(3) and (4).

⁴² *The Family Property Act*, R.S.M. 1987, c. M45 [Title changed from *The Marital Property Act*, S.M. 2002, c. 48, s. 16(2)], s. 14(1).

⁴³ *Ibid.*, s. 14(2).

⁴⁴ *Family Law Act*, R.S.N. 1990, c. F, s. 22.

⁴⁵ *Matrimonial Property Act*, R.S.N.S. 1989, c. 275., s. 13.

⁴⁶ *Family Property Act*, *supra* note 38, s. 21(2).

⁴⁷ *Family Law Act*, R.S.O. 1990, c. F, s. 5(6); *Family Law Act*, S.P.E.I. 1995, c. 12 (R.S.P.E.I. 1988, c. F-2.1), s. 6(5); *Family Law Act*, S.N.W.T. 1997, c. 18, s. 36(6); and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 (in force November 1, 1998), s. 36(6).

⁴⁸ *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 7.

⁴⁹ *Family Property and Support Act*, *supra* note 40, s. 13.

British Columbia, “unfair.”⁵⁰ In Ontario, where the standard is “unconscionable,” unequal division is a rare occurrence.⁵¹

[29] Because the valuation date is merely one element in a larger scheme designed to achieve just and equitable results in individual cases, meaningful comparison requires an appreciation of the interaction between the valuation date or dates and other elements in each jurisdiction’s regime.

2. Valuation dates

[30] The differences in the details of matrimonial property regimes in Canada include the use of a wide range of valuation dates (*e.g.*, date of separation, application, divorce or nullity, trial, adjudication, division). Eight of the thirteen Canadian jurisdictions specify the valuation date by statute.

- The provisions in Ontario, Prince Edward Island, the Northwest Territories, Nunavut and the Yukon are similar.⁵² These jurisdictions specify the earliest of the date the spouses separate, a divorce or declaration of nullity is granted or an application to prevent the improvident depletion of assets is commenced.
- Manitoba specifies valuation as the spouses may agree and, in the absence of agreement, the date cohabitation ceased or, where cohabitation continues, the date of application.⁵³
- Saskatchewan gives the court a choice between the “time of application” or “time of adjudication.”⁵⁴ The usual date is the date of application because the

⁵⁰ *Family Relations Act*, *supra* note 39, s. 65(1).

⁵¹ In discussing unequal division in Ontario, Simon R. Fodden, *Family Law*, Toronto, Ont: Irwin Law (1999), comments that “the high threshold has worked to prevent deviation from equalization in all but the exceptional case”: c. 11, heading B 6) a).

⁵² Ontario *Family Law Act*, *supra* note 47, s. 4(1); Prince Edward Island *Family Law Act*, *supra* note 47, s. 4(1)(d); *Family Law Act*, *supra* note 16, s. 33; *Family Law Act (Nunavut)*, *supra* note 16, s. 33; and *Family Property and Support Act*, *supra* note 16, ss. 15(3) and 6(2).

⁵³ *The Family Property Act*, *supra* note 42, s. 16.

⁵⁴ *Family Property Act*, *supra* note 38, s. 2(2).

property owned on that date constitutes the base for distribution.⁵⁵ All property need not be valued on the same date;⁵⁶ however, the use of two dates is exceptional. Where two dates are used, the dates chosen must apply consistently to the assets of both spouses.⁵⁷

- Quebec values property in a partnership of acquests retroactively to the date of the application where the property regime is dissolved by divorce, nullity, judicial separation, or separation of property.⁵⁸

[31] In the remaining five jurisdictions, the statutes do not specify the valuation date. In these jurisdictions, the valuation date is established in case law.

- As has been seen, Alberta case law mandates valuation at the date of trial.
- British Columbia case law also establishes the date of trial, but exceptions are possible in rare cases presenting exceptional circumstances.⁵⁹
- In New Brunswick, judges exercise wide discretion with respect to the valuation date, and they may select valuations dates on an asset by asset basis. In general, judges value marital property at the date of trial and non-marital property at the date of separation.⁶⁰

⁵⁵ See e.g., *Formwald v. Formwald*, February 18, 1982, Doc. No. Estevan Q.B. 41, Sask. Q.B., Rutherford J. and *Ewing v. Ewing*. (1986), 51 Sask. R. 51 (*sub nom. Ewing v. Ewing (No. 1)*) (Sask. Q.B.). See also Wilson and Watson, *supra* note 38, at approx. S-23.

⁵⁶ *Mitchell v. Mitchell*, 1992 CarswellSask 58, 41 R.F.L. (3d) 220, 100 Sask.R. 149, 18 W.A.C. 149 (C.A.).

⁵⁷ *Ibid.*

⁵⁸ *Civil Code of Quebec*, *supra* note 37, art. 465. In cases of dissolution by “a conventional change of regime during the marriage” or “the absence of one of the spouses in the cases provided for by law,” the dissolution [presumably, including the valuation] takes effect immediately. Property alienated prior to dissolution is valued at the date of alienation: *ibid.*, art. 476.

⁵⁹ Kirstie J. MacLise and Hugh G. Stark (May 1999), in *Matrimonial Property Law in Canada*, looseleaf service (Thomson-Carswell).

⁶⁰ Margaret McCallum (March 2004), in *Matrimonial Property Law in Canada*, looseleaf service (Thomson-Carswell), at NB-42.

- Nova Scotia case law also gives judges substantial discretion to determine the date of division for each asset: there is “no requirement ... to assign a single valuation date for all matrimonial assets.”⁶¹ The test for assigning a valuation date is “whether the value achieved on the division day is one which would have been achieved if the division could have been made on the true separation date.”⁶²
- In Newfoundland and Labrador, case law establishes that valuation of the matrimonial home and property owned jointly by the spouses should be “on or as close as practicable to the date of implementation of division.”⁶³ Other assets are usually valued at the date of separation, but additional considerations may warrant other valuation dates.⁶⁴

⁶¹ *Simmons v. Simmons*, [2001] N.S.J. No. 276; 2001 NSSF 35 (NSSC, Fam Div)., at para. 11, cited with approval in *Morash v. Morash*, [2003] N.S.J. No. 40, at para. 22 (CA).

⁶² *Simmons*, *ibid.* at para. 28.

⁶³ David C. Day (April 1994), in *Matrimonial Property Law in Canada*, looseleaf service (Thomson-Carswell), at N-142.

⁶⁴ *Ibid.*.

PART III — Discussion Points

A. Importance of Valuation Date

1. Purposes

[32] The valuation date serves a number of purposes:

- In most jurisdictions, the valuation date provides the cut-off date for deciding what property interests are subject to sharing. This is not invariably the case. In Saskatchewan, for example, where the statute offers a choice of two valuation dates (application or adjudication), the property subject to sharing is identified as of the time of application.⁶⁵
- Valuation on the valuation date provides a base for calculating an equal distribution of the assets that are subject to equal sharing.
- Valuation on the valuation date also provides a base from which to assess factors which may support variations in the proportions of sharing, whether of assets that are ordinarily shareable equally or assets that are subject to discretionary sharing.⁶⁶

[33] Much can happen to property during the time that elapses from the date of separation to the date of court application, to the date of trial, to the date of written judgment, to the date of actual division. Property can be acquired or disposed of. The value of property can appreciate or depreciate, whether in consequence of market forces or decisions taken by the owning spouse. The interest of the non-owning spouse will be affected by these changes. The fact that circumstances fluctuate adds importance to the choice of valuation date.

2. Need for evidence of value

[34] In order to negotiate a fair division of property, the parties need to know its value. In order to divide property fairly between the parties, courts need evidence

⁶⁵ *Family Property Act*, *supra* note 38, s. 2(1); see also Wilson and Watson, *supra* note 38, at S-19.

⁶⁶ Even if the valuation date is set at separation, the discretionary factors in all jurisdictions allow the court to consider changes during the post-separation period.

of its value. In jurisdictions that give the court discretion to select a valuation date, the available evidence may determine the date selected. For example, in the Saskatchewan case of *Lamb v. Lamb*, the judge had no alternative but to value the family home as of the date of adjudication because the only evidence tendered with respect to it was an appraisal dated near the trial.⁶⁷ All other property in the case was valued at the date of application.⁶⁸

3. Imprecision of valuation

[35] Valuation is an imprecise art: “the whole exercise requires many acts of judgment and means that both expertise and equity are desirable.”⁶⁹ Some assets are particularly difficult to value (*e.g.*, unmatured stock options, pensions). Valuation standards vary. Alberta’s *Matrimonial Property Act* refers to “market value.”⁷⁰ “Fair market value” may be appropriate for property having a commercial value. The Manitoba statute defines fair market value as “the amount that the asset might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer.”⁷¹ Not all property fits within this concept of a hypothetical sale in the notional market.⁷² The broader term “fair value” has been proposed to more appropriately describe the result of resorting to a notional market in a matrimonial property matter in which “an overarching concern for fairness and equity is meant to obtain.”⁷³ The choice between “replacement value” or “sale value” is the subject of discussion in the maritime provinces.⁷⁴

⁶⁷ *Lamb v. Lamb*, 1998 CarswellSask 258, 166 Sask. R. 170 (Q.B.), cited in Wilson and Watson, *supra* note 38, at S-25.

⁶⁸ *Ibid.*

⁶⁹ Fodden, *supra* note 51, at ch. 11, heading B. 3) b).

⁷⁰ *Matrimonial Property Act*, *supra* note 1, ss. 7(2) and 7(3)(a).

⁷¹ *The Family Property Act*, *supra* note 42, s. 15(2).

⁷² Fodden, *supra* note 51, at ch. 11, heading B. 3) b)..

⁷³ *Ibid.*, citing J. MacDonald and A. Wilton, MacDonald and Weiler, *Family Law Act of Ontario*, Vol. 2, rev. ed. (Toronto: Carswell, 1994) looseleaf service, at v-10 and v-36-7.

⁷⁴ See, *e.g.*, McCallum, *supra* note 60, at NB-41; Day, *supra* note 63, at N-142.

[36] Recognizing the imprecision of valuation, a Nova Scotia judge suggests that parties should be satisfied with appraisals that are reasonably close in time to the valuation date:⁷⁵

There must be a recognition that valuation is an imprecise science in the case of many types of assets. The parties should be encouraged not to spend lawyer time and valuator time for appraisals as of a precise date when an appraisal in reasonable proximity of the valuation date is likely to be relatively reliable and is available.

4. Valuation is expensive

[37] It is generally accepted that valuation is expensive. There may be a question about who is qualified to value assets:⁷⁶

For real property, must the person be a real property appraiser? For certain types of personal property, should the person be an auctioneer? For purposes of valuing a pension, who is qualified to offer expert opinion evidence?

Where the court is being asked to exercise its discretion to divide property based on differences in value at two points in time, two valuations will be needed. An example would be valuation for the purpose of calculating the difference between the value of property that was exempt at the time of the marriage or acquisition and the value of that property at the time of trial under section 7(3) of Alberta's *Matrimonial Property Act*. This two-stage approach to valuation "may be very costly to parties, particularly where the parties own complex assets."⁷⁷

5. Equal division in kind avoids need for valuation

[38] One commentator observes that the spouses can avoid the problems and expense of valuing assets by agreeing to divide them equally in kind. This method of division is particularly effective for assets that would be expensive to replace but have little sale value:⁷⁸

If the spouses can agree on an in specie division of their property, they can avoid the problems and expense of valuing assets that may be expensive to replace but would fetch very little if sold. If actual assets are allotted to each spouse in equal shares, rather than one spouse keeping the assets and paying the other for his or her share, it will not matter if the method of

⁷⁵ *Simmons*, *supra* note 61, at para. 17.

⁷⁶ *Day*, *supra* note 63, at N-142.

⁷⁷ *MacLise and Stark*, *supra* note 59, at BC-90.

⁷⁸ *McCallum*, *supra* note 60, at NB-41.

valuation is replacement value or sale value, so long as the same method is applied consistently to all assets.

However, in Alberta, when the court is asked to distribute matrimonial property, it seems that all property must be included in the distribution process mandated by statute. The general rule is that, in the absence of an agreement that satisfies the conditions set out in sections 37 and 38, “the matrimonial property must be dealt with by the trial judge on the basis of the statutory requirements.”⁷⁹ The first step under the statutory process is “to determine *all* property owned at the date of trial” [italics added].⁸⁰ In *Hodgson v. Hodgson*, the Court of Appeal appreciated that a difference exists between valuation and division. It acknowledged that “[t]here may be rare occasions where a judge might be able to deal with property without actually evaluating the property.”⁸¹ Nevertheless, the Court stated, “a judge must always go through the analysis required” by the *Matrimonial Property Act*.⁸²

B. Importance of Judicial Discretion

[39] The ability of the court to respond appropriately to the circumstances in individual cases is key to the success of matrimonial property legislation throughout Canada. The statutes in every Canadian jurisdiction confer discretion on the court to divide matrimonial property unequally in circumstances where an equal distribution would not achieve a fair result, and to distribute property that is not included in the property that is ordinarily distributed equally.

[40] The usual two approaches to judicial discretion are to confer authority on the court:

- to divide unequally property that would otherwise be shared equally; and
- to divide equally or unequally property that is excepted from equal sharing.

⁷⁹ *Hodgson*, *supra* note 2, at para. 29.

⁸⁰ *Ibid.*, at para. 18

⁸¹ *Ibid.*, at para. 29.

⁸² Courts in New Brunswick also require valuation in any event: McCallum, *supra* note 60, at NB-41.

In exercising their discretion, judges consider the factors set out in lists like that found in section 8 of Alberta's *Matrimonial Property Act*. In addition to the items on the list, these provisions usually give the court discretion to consider any other relevant factor.

[41] A third approach is to confer discretion on the court:

- to choose the valuation date for all of the property, or certain categories of property, or on an asset by asset basis.

As McCallum observes, where judges are empowered to select a valuation date, they “may take account of changing property values by adjusting the valuation date, making an unequal division of marital property, or by dividing non-marital property.”⁸³

[42] The third approach is taken in New Brunswick, Nova Scotia and Newfoundland, where the choice of valuation dates is essentially unfettered, and in Saskatchewan, where the court has a choice between two legislated valuation dates. It is taken in a more limited fashion in jurisdictions such as British Columbia that allow valuation at a discretionary date in exceptional circumstances. Using this approach, equal sharing may take place on a date that relates to a time when the interests of the spouses in the property were in fact equal. The choice of valuation date can serve as a means of achieving fairness without upsetting the equal division.

[43] Some examples of this approach follow. In Saskatchewan, RRSPs which “by their very nature” are assets that increase (or decrease) in value through market forces were valued at the date of adjudication so that the increase (or decrease) would be shared.⁸⁴ In another case, assets that had been depleted by the husband's business venture were valued at the date of separation, prior to the depletion; the husband's RRSPs which had increased in value through market forces were valued

⁸³ McCallum, *supra* note 60, at NB-42, citing *Fraser v. Fraser*, 1983 CarswellNB 39, [1983] N.B.J. No. 14, 35 R.F.L. (2d) 45, 47 N.B.R. (2d) 364, 124 A.P.R. 364 (C.A.).

⁸⁴ *Josdal v. Josdal*, 1997 CarswellSask 385, 157 Sask. R. 135 (Q.B.), cited in Wilson and Watson, *supra* note 38 at S-24.

at the date of application.⁸⁵ In British Columbia, the date of separation was used to value a depreciable asset which had been subject to extensive use by one spouse after separation.⁸⁶ Where one spouse had unilaterally cleaned out accounts prior to the event that entitled the other spouse to hold property as a tenant in common, the court chose a valuation date immediately prior to the withdrawals.⁸⁷ In New Brunswick, the decline in value of a couple's investment portfolio, which was not due to mismanagement by the husband, was valued at a date that divided the loss equally.⁸⁸

[44] With or without judicial discretion, courts will strain for ways to reach fair results in individual cases. Ontario provides an example. In that province, the valuation date must be the date of separation. The statute, as interpreted in the case law, basically does not allow the court to take account of increases or decreases in the value of property between the date of separation and the date of trial. The restriction applies even where the fluctuation is simply the result of market forces and even though, had the division actually taken place at separation, the non-owning spouse would have been able to invest their share to take advantage of a rising market. Not surprisingly, courts have found different means to achieve fairness in this situation. In the case of *Rawluk v. Rawluk*,⁸⁹ a majority of the Supreme Court of Canada upheld the (rather awkward) device of imposing a constructive trust giving the non-owning spouse an equitable right to participate in the increase in value of an asset that was due to market factors rather than the efforts of the owning spouse. Another device is to award the non-owning spouse

⁸⁵ *Nesbitt v. Nesbitt*, [1997] 1 W.W.R. 690, 31 R.F.L. (4th) 297 (Sask. Q.B.).

⁸⁶ *Lyall v. Lyall*, [1985] B.C.D. Civ. 1641-01 (S.C.), cited in MacLise and Stark, *supra* note 59, at BC-92.

⁸⁷ *Patrick v. Patrick* (1991), 35 R.F.L. (3d) 382, 62 B.C.L.R. (2d) 188 (S.C.); see also *McKenzie v. McKenzie*, May 28, 1991, Victoria Registry No. 22218, B.C.S.C.

⁸⁸ *Dykeman v. Dykeman*, 2002 CarswellNB 485, [2002] N.B.J. No. 440, 2002 NBQB 395, 256, cited in McCallum, *supra* note 60, at NB-42.

⁸⁹ *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, 23 R.F.L. (3d) 337. The need to resort to a constructive trust is debatable. A minority of members of the Court were of the opinion that sharing could have been achieved by finding an equal division to be unconscionable.

pre-judgment interest on an asset used by the owning spouse during a period following the valuation date.⁹⁰

[45] Judicial discretion also plays a role in the court's choice of orders to give effect to the matrimonial property division it has determined. The following statement from the judgment in the British Columbia case of *Blackett v. Blackett* is illustrative:⁹¹

Having addressed the question of amount, the judge must also address the question of terms of payment. A compensation order ought not to force the payor to borrow to the point of crippling himself with debt. The court should bear in mind that, if the respondent is forced to borrow and if interest rates should rise substantially, the appellant will be well-off but he may be in the poor house.

C. Time Period Between Separation and Division

[46] It is widely accepted that, subject to permissible deductions and exemptions, the matrimonial property owned by the spouses at the time of separation should be shared equally. In some jurisdictions, equal sharing is restricted to property owned on separation (*e.g.*, Ontario, with rare exception). In other jurisdictions, equal sharing applies to all property owned at a later date (*e.g.*, the date of application in Saskatchewan or the date of trial in Alberta) and the court has discretion to make an unequal division on the basis of intervening change.

[47] The valuation date is not of great importance for assets that have a relatively stable value. However, its importance magnifies where property changes hands, or the market economy is changing rapidly. As is apparent from the discussion of the role of judicial discretion, dealing fairly with changes in either the ownership or value of property during the interval between separation and division presents challenges for the courts. The challenges are especially great in cases of long delay. They exist whether the time period is dealt with by working forward from valuation at separation or backward from valuation at a later date.

⁹⁰ See, *e.g.*, *Zenner v. Zenner*, (1991), 37 R.F.L. (3d) 313, 96 Nfld. & P.E.I.R. 337, 305 A.P.R. 337 (P.E.I.C.A.). This may help. However, in Ontario, the rate will be set according to the bank rate, which may not compensate for the lost increase in value: Fodden, *supra* note 51, at ch. 11, heading b 3) a), citing Courts of Justice Act, R.S.O. 1990, c. C.43, s. 128; *Starkman v. Starkman* (1990), 75 O.R. (2d) 19 (C.A.); and S. Grant, Pre-judgment Interest: To Award or Not to Award" (1991) 6 Money and Family Law 41.

⁹¹ (1989), 22 R.F.L. (3d) 3347, 40 B.C.L.R. (2d) 99, 63 D.L.R. (4th) 18 (C.A.), Southin J.A.

D. Choice of Valuation Date

[48] A range of dates is available for valuing marital property. These include the dates of separation (or marriage breakdown), application, trial (or adjudication), divorce or nullity, hearing on remand or division post-trial. We list some advantages and disadvantages of using the date of trial or, alternatively, the date of separation in Part IV. Some advantages and disadvantages relating to the use of other dates are listed in Appendix A.

E. Valuation Date: Mandatory or Flexible

1. Mandatory date for all property

[49] Several jurisdictions, Alberta being one, have adopted a single valuation date to be applied to all property in all cases. The primary advantage of a single valuation date for all property is that fixing the date precludes argument about when valuation should take place and what property should be valued. One disadvantage is that the trial court lacks discretion to alter the valuation date in view of asset value fluctuations, whatever the reasons for those fluctuations. Another disadvantage is that courts may resort to extraordinary measures in order to achieve fairness (*e.g.*, where an early valuation date is mandatory, but arguably inequitable, a court may impose a constructive trust or award the non-owning spouse interest on his or her share of matrimonial property).

2. Specific valuation dates for specific assets or classes of asset

[50] In some jurisdictions, courts have singled out particular types of assets and adopted “rules” on what date should be used for valuing those assets. These rules are not applied inflexibly. They serve as guidelines for the usual case. In Nova Scotia, in the judgment in *Simmons v. Simmons*,⁹² the court carefully analyzed the case law governing choice of valuation date. The Nova Scotia Court of Appeal subsequently referred approvingly to the “comprehensive discussion of ‘valuation date’” in this judgment.⁹³ *Simmons* proposes “rules” in examples relating to: investments or RRSP accounts; bank accounts; depreciating or appreciating assets; post-separation consumption; assets valued by appraisal; assets normally subject to separation date valuation; assets unaffected by delay between separation and

⁹² *Simmons v. Simmons*, *supra* note 61.

⁹³ *Morash v. Morash*, [2003] N.S.J. No. 40, at para. 22 (CA), at para. 21, referring in particular to *Simmons*, *ibid*, at paras. 9 to 35.

division (pensions, accrued income tax refunds and long service awards, income tax refunds, frequent flyer points); and assets normally valued as of division. The discussion is reproduced in Appendix B.

3. Flexible date

[51] Statutes in some jurisdictions leave the courts free to exercise their discretion in selecting a valuation date. Such a choice could be open-ended as it is in Nova Scotia, New Brunswick, Newfoundland and, to a lesser extent in British Columbia, or it could be fixed by statute as it is in Saskatchewan. Advantages of giving the court a choice are:

- judicial discretion to vary the valuation date “is a positive thing so that a fair and equitable result can be obtained on a case by case basis”;⁹⁴
- it enables “equal” division to take place at an appropriate time; and
- in a variation of this approach, limited the choice by statute
 - narrows issues parties must resolve in order to reach agreement, and
 - limits scope for uncertainty about the date the court will choose.

Disadvantages are:

- choice adds a further element of uncertainty to the process of negotiating party agreement because parties are left to speculate about what date or dates the court will choose;
- it adds to the issues that may be argued in court; and
- the valuation date is subject to varying, possibly conflicting, judicial interpretations.⁹⁵

⁹⁴ *Simmons, supra* note 61, at para. 9.

⁹⁵ As has been the experience in Newfoundland: *Day, supra* note 63, at N-145.

4. Different dates within a single case

[52] Courts in New Brunswick, Nova Scotia, Newfoundland and Saskatchewan allow the valuation of assets within a single case at different dates. For example, in Saskatchewan, in the case of *Mitchell v. Mitchell*, the Saskatchewan Court of Appeal stated:⁹⁶

This court has stated on more than one occasion that the court can use the date of adjudication and the date of application in the same application to value the matrimonial property. The date of adjudication can be used for the valuation of some of the assets such as the land, and the date of the application can be used for the valuation of the remaining assets, providing that the change in dates for the purposes of evaluation is applied consistently to the assets of both parties.

The primary advantage of this approach is:

- the ability of the court to choose the appropriate date for equal sharing of each asset.

A disadvantage is:

- the difficulty, when negotiating settlement, in predicting what dates the court will choose.

⁹⁶ 1992 CarswellSask 58, 41 R.F.L. (3d) 220, 100 Sask.R. 149, 18 W.A.C. 149 (C.A.), cited in Wilson and Watson, *supra* note 38, at S-22. See also *Benson v. Benson*, 1994 CarswellSask 41, 3 R.F.L. (4th) 291, 120 Sask. R. 17, 68 W.A.C. 17 (C.A.).

PART IV — Reform of Valuation Date in Alberta

[53] The concern raised by family lawyers in Alberta is that valuation at the date of trial involves valuation of uncertain property on an uncertain future date. It sets up a continually moving target. Repeated requests for valuation updates are costly to the parties, frustrate settlement and delay trial. The issues, then, are whether a valuation date other than the date of trial would better promote the resolution of disputes by party agreement, reduce costs and delay and further the ability of the court to achieve just and equitable distributions.

A. Division While Spouses Are Alive

[54] The choices for reform are to stay with the existing law or to enact a statutory provision.

[55] If change is to be enacted, the content of that change must be determined. The possibilities for enactment in a statutory provision are wide-ranging. What should a statute provide? Should the statute specify a valuation date or give the court discretion to choose for itself? Should the statute specify one date only, or a choice of dates? Should the court have discretion, in exceptional circumstances, to use a date other than the date or dates specified by statute? Should the legislation set out different valuation dates for different categories of asset? Should this be permitted in the court's discretion? Should the parties have a say in choosing the valuation date or dates? Should it be possible to omit from the requirement for valuation an asset which the parties agree to divide equally?

[56] Two options for statutory enactment are proposed. The first option is to enact the date of separation as the valuation date. The second option is to enact the date of trial but giving the court discretion to choose another date in exceptional circumstances. This option would, in effect, restore the law as it was understood under *Mazurenko*.

1. No change: keep date of trial

[57] The date of trial is, of course, the existing valuation date in Alberta. Courts in British Columbia value property at the date of trial, but they have discretion to choose another date in exceptional circumstances. In Saskatchewan, where the

statute provides a choice between the date of application and the date of adjudication, the courts have interpreted the date of adjudication to mean the date of trial.⁹⁷

[58] Advantages of using the date of trial include:

- the court deals with property that exists at the time of trial;
- the court has an accurate picture of the parties' financial situations close to the time of distribution, and is therefore able to respond to the full circumstances;
- the court may take into account the reasons for and effect of post-separation gains and losses;
- this date facilitates settlement because it keeps the parties at the bargaining table;
- for property ordinarily shared equally, the onus of proving the case for an unequal division will be on the spouse wishing to share less of their property (likely the spouse in the stronger financial position);
- the law and practice is known – the practice using this law has been going on for more than a quarter of a century with apparently satisfactory results; and

⁹⁷ Wilson and Watson, *supra* note 38, at S-27:

It has been suggested that there is an ambiguity in the term "date of adjudication." The ambiguity arises when the court reserves its judgment, and renders it at a later date. In such a situation, is the date of adjudication the date of trial, when the evidence was tendered, or is it the date that judgment was actually rendered by the court? In virtually every case, however, the court has treated the date of adjudication as meaning the date of trial, and thus no particular allowances are made for the fact that judgment was given at some later point in time. It is submitted that any attempt to value assets as of the date that judgment is rendered by the court, if this date is different from the trial date, would be purely speculative, and could not possibly be based upon the evidence before the court.

- there is no data to indicate that the use elsewhere of other valuation dates produces fairer results.

Some disadvantages are:

- prior to trial, the parties must negotiate backward from an unknown future date and unknown future property and values;
- valuation at date of trial is unrealistic because appraisals must be done before trial;
- valuation at two points in time is required to allow the court to take into account changes in property ownership and values between the date of separation and the date of trial;
- litigants are put to the expense and delay caused by repeated requests for valuation updates; and
- actual division may not take place until later (*e.g.*, if judgment is reserved, or property is sold and proceeds divided).

2. Enact date of separation

[59] As stated in the introduction to this Paper, Alberta lawyers often discuss the date of separation as an alternative to the date of trial. The date of separation is the date used most widely in Canada.

[60] Some advantages of valuing property at the date of separation are:

- this date “is primarily relevant as the date that the matrimonial assets are identified”;⁹⁸
- it provides the parties with a convenient starting point from which to negotiate an agreement without commencing a proceeding in court;

⁹⁸ *Simmons, supra* note 61, at para. 14.

- if gains and losses post-separation are ignored, it “obviates a potential inequity in situations where a marital asset has increased in value through the efforts of one spouse”;⁹⁹
- it recognizes the reality that time has passed before cases come to trial, the parties have moved on with their lives and, as a result, their property has changed;
- experience indicates that in many cases the date of separation is a better determinant of a just and equitable distribution; and
- valuation at the date of separation would facilitate the granting of interim orders for distribution.

Disadvantages include:

- the date of separation may be difficult to pinpoint with accuracy (separation is a process that takes place over time, and parties may continue to share property and economic decisions, even where they live apart);¹⁰⁰
- “date-of-separation values do not give an accurate picture of the parties’ financial situations at the time of distribution;”¹⁰¹
- although entitled to a share of matrimonial property at separation, the non-owning spouse is deprived of the use of assets prior to division;
- applied strictly, valuation at separation ignores post-separation property changes;

⁹⁹ Online: DivorceSource.com.

¹⁰⁰ The trial judge in *Kazmierczky* (QB), *supra* note 7, at para. 52, did not find this reason very compelling because the spouses’ ongoing economic and familial relationships would continue to be factors whether the property is divided promptly or not.

¹⁰¹ The trial judge in *Kazmierczky*, *ibid.*, did not find this reason very compelling for the same reason.

- inequitable results may follow if asset values increase or decrease through market forces between separation and trial (distribution) because the non-owning spouse does not have the ability to participate in the market by investing their share during this time period;
- if changes post-separation are considered, later valuations will be required to allow the court to consider the effect of the change in value between separation and trial;
- the onus of proving the case for discretionary division will be on spouse who wishes a greater share (likely the spouse in the weaker financial position);
- initially, at least, a new valuation date will bring uncertainty to practice.

[61] The date of separation could be combined with a discretion in court to choose a different date if the circumstances warrant. The treatment of the period between separation and trial would have to be considered. For example, should the court have discretion under section 7(3)(c) to distribute “property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses”? How would the section 8 factors apply? Would they need modification? Other details may need attention.

3. Enact date of trial with court discretion to choose another date

[62] Practitioners tell us that use of the date of trial would be workable if the court were given discretion to choose another date for valuation. They say that, at a minimum, the discretion that was thought to exist under *Mazurenko* should be restored.

[63] However, in *Kazmiercsky*, the Court of Appeal was of the view that valuation at a date other than trial has rarely occurred in a court case. The Court referred to just three cases. In its opinion, all of the cases said to deviate from the rule in *Mazurenko* “still support the principle that the court should deal with any

inequities that might arise, when valuing and dividing the property held by the spouses as at the date of trial, by applying the factors set out in section 8.”¹⁰²

B. Division on Death of a Spouse

[64] Appendix C reproduces the discussion on valuation date in ALRI Final Report No. 83 on *Division of Matrimonial Property on Death* (May 2000). Recommendation No. 12 (at p. 103) is that: “The jurisprudence governing choice of valuation date is adequate.” The paragraph preceding this paragraph states:

The existing Alberta law is preferable [to the day before, date of, or date after death]; as a general rule, the valuation date should be the date of trial. The court *should continue to have a limited discretion to use the date of separation as the valuation date* where it would not be just and equitable to divide property acquired after separation equally.” [italics added]

That is to say, the recommendation to stay with the existing law was premised on the understanding that the court would continue to have a limited discretion to use the date of separation as a valuation date.

[65] Is a response required:

- (a) for cases where the marriage broke down before the death occurred; or
- (b) for cases where the death triggers the right of the surviving spouse to make a claim under the *Matrimonial Property Act*?

C. Factors to Consider

[66] In thinking about the direction reform should take, matters to consider include:

- the effect of the valuation date on the ability to reach a just and equitable result;
- the importance of taking a comprehensive view of the assets to be shared;
- whether it should be possible to proceed on an asset by asset basis;
- the effect of the valuation date on the parties’ motivation to settle;

¹⁰² *Hodgson, supra* note 2, at para. 28.

- the extent to which the valuation date promotes early resolution of the dispute (whether by party agreement or the court);
- the way in which a typical case unfolds and the time involved
 - allowing time for emotions to settle,
 - dealing with support and custody,
 - employing mediation or collaborative processes in an effort to resolve issues amiably,
 - seeking disclosure and obtaining appraisals when disagreement becomes apparent;
- the appropriate treatment of events between separation and trial
 - gains or losses attributable to market forces,
 - changes in property owned,
 - wasting of assets,
 - accumulating assets while failing to meet support obligations;
- the impact of the valuation date on cost and delay
 - the cost to litigants of repeated valuations (appraiser, lawyer's time),
 - the delay in resolving the dispute (by settlement or trial) caused by repeated valuations,
 - potential to minimize the number of assets that become moving targets,
 - prevention of harm to the non-owning spouse from delay in distributing property; and
- the impact of the valuation date on
 - procedural efficiency,
 - the use of court resources,
 - provision for interim distribution,
 - the content of sections 7 and 8, and
 - current practice.

APPENDIX A

Valuation on Dates Other Than Date of Trial and Date of Separation: Some Advantages and Disadvantages

1. Date of application

[67] The date of application is one of the choices for valuation in Saskatchewan. It is used in Manitoba in situations where the parties continue to cohabit. This date is also used occasionally in provinces that allow the court an open-ended choice of valuation date. Advantages of the date of application are:

- the interest of the parties clearly crystallizes on the day the respondent receives notice that a claim is being made;¹⁰³
- crystallization of the claim discourages the owning spouse from purposely decreasing an asset's value before trial in order to disadvantage the non-owning spouse;¹⁰⁴
- applied strictly, this date keeps the non-owning spouse from sharing increases in the value of property attributable to the owner's efforts after application is commenced;¹⁰⁵ and
- it accommodates settlement negotiation from the commencement of the court proceeding forward.

¹⁰³ See *Metz v. Metz* (1991), 34 R.F.L. (3d) 255, 96 Sask. R. 95 (Q.B.), additional reasons at (1991), 36 R.F.L. (3d) 419 (Sask. Q.B.).

¹⁰⁴ Online: DivorceSource.com.

¹⁰⁵ Online: DivorceSource.com.

Disadvantages include:

- applied strictly, the date of application can yield inequitable results if asset values increase or decrease through market forces by the time of trial or division; and
- if changes in value or ownership post-application are considered, a second valuation will be required to allow the court to consider the effect of changes when the matter comes to trial.

2. Date of divorce or nullity decree

[68] In Ontario, Prince Edward Island, the Northwest Territories, Nunavut and the Yukon, the date of divorce or nullity may be the earliest date giving rise to entitlement to a division of matrimonial property. By way of advantage:

- this date defines a clear point in time;
- the reason for sharing is finished because the marriage relationship that created the obligation to share is over; and
- “... using this date helps assure that the marital estate includes property acquired during the marriage. In a province that uses this approach, the court may not rely on stale financial data.”¹⁰⁶

Disadvantages include:

- in negotiating agreement prior to divorce or nullity decree, the parties must work backward, speculatively, from an unknown future dissolution date and an unknown future property value; and
- property changes may occur in the period intervening between divorce or nullity decree and the court hearing on matrimonial property.

¹⁰⁶ Online: DivorceSource.com.

3. Date of hearing on remand

[69] An issue of post-trial change in value may arise “where there is a long delay in the release of reasons for judgment, there is a dispute about the terms of the order flowing from the reasons, the reasons leave an issue to be decided or in the event of an appeal.”¹⁰⁷ The date of trial usually holds firm because this is the date at which the evidence is available. However, matrimonial property is sometimes valued on the date of a hearing on remand or an appeal.

4. Date of division

[70] Courts have also noted the distinction between date of trial and date of division. A lengthy time may elapse following court order before actual division and changes in value may occur during this time period. The main advantage of using the date of division is accuracy of the values used. However, like valuation at the date of trial, valuation at the date of division does not provide a foundation of known values from which to negotiate agreement.

¹⁰⁷ MacLise and Stark, *supra* note 59, at BC-92, quoting Huddart J. in *Halpin v. Halpin* (1996), 26 R.F.L. (4th) 30, 27 B.C.L.R. (3d) 305, [1997] 2 W.W.R. 749 (C.A.).

APPENDIX B

Asset Specific Valuation Dates: Excerpts from *Simmons v. Simmons*

[2001] N.S.J. No. 276; 2001 NSSF 35 (NSSC, Fam Div).

Analysis cited with approval by the Nova Scotia Court of Appeal
in *Morash v. Morash*, [2003] N.S.J. No. 40, at para. 22.

- ***Investments of RRSP accounts:***

¶ 18 If one of the parties holds investments or RRSP accounts at separation date, that spouse may account to the other by way of an inter-spousal rollover in an amount sufficient to equalize their positions or the owner spouse may retain that position and settle with a cash transfer. I would refer to the date of that rollover or the cash transfer as the "division date". The division date may be prior to trial or after the trial. Had it been possible to effect the rollover or cash transfer on the very day of separation, and ignoring any difference in investment performance that the one spouse might have achieved as compared to the other, they would in theory have separately achieved whatever combined gain or loss was actually achieved by the owner spouse as of the division date. The non-owning spouse cannot complain that he or she could have made better use of the asset if it had been divided sooner or that the investment lost value in the market. The parties must accept the particular makeup of their asset mix and the investment decisions of the owner spouse (both of which are normally the function of agreement or acquiescence of the spouses) until such time as they finalize the separation of that asset.

¶ 19 It would be unfair to allow the owner to fail to share that growth with the non-owner spouse because, had the investment been divided on separation date, there would have been shared growth. Similarly, if the investments decreased in value as compared to separation date, it would be unfair for the non-owner spouse not to share in that loss. The post-separation delay in settling this type of asset would have therefore affected the spouses equally by using the division date value. If there were post-separation contributions made to that investment account, it along with its increase or decrease in value should belong to the party contributing to it under the principle of section 4(1)(g) of the Act.

- ***Bank accounts:***

¶ 20 Bank accounts present a slightly different character. After a period, in the case of some couples, of continued joint use of a bank account, the couple eventually separates their use of an account. When the bank account is an untouched savings account, its treatment would be the same as the

investment accounts referred to above. However, the operating bank account will normally be treated differently. Often, at or near separation date, the couple will separate their incomes and responsibility for expenses and therefore the separation date is the valuation date. In those cases the use of that date to value such accounts is usually fair because the post-separation changes in value occur from their then separate income and expense activity. For other couples, a transitional joint usage of the account continues for many months. Where the transitional use of an account demands that it be valued as of the eventual date on which those finances are assigned, the use of valuation dates will need adjustment. If there are expense accounts accruing but not paid as of valuation date that would normally be paid from such an account, those expense accounts can either be shared by the parties as matrimonial debts as of valuation date or can be netted against such bank account balance at that date.

- ***Depreciating or appreciating assets:***

¶ 21 In the case of O'Hara v. O'Hara (1991), 104 N.S.R. (2d) 426, Saunders, J. (as he then was) made a distinction between depreciating assets and appreciating assets suggesting that the former should be valued at separation date and the latter at trial date.

¶ 22 This rationale is best illustrated by considering the position with respect to the division of the value of a motor vehicle. If one spouse maintains possession of the vehicle throughout the separation, that spouse has had the utility from that depreciation. It would be most unfair for the non-user spouse to receive his or her share after its value by the other's usage has depreciated substantially. Had it been possible to divide the asset at separation, the non-owning spouse would have had an accounting for its then value. If trial date was used for this type of asset, the post-separation delay would have affected the spouses unequally; the user-spouse would have had the benefit of the depreciation plus fifty percent of the then current value while the non-user spouse would have only the latter. Separation date value should be used for these types of assets because it results in the spouses being equally affected by the delay to trial date. The delay in the accounting would otherwise operate to the detriment of the non-user. Spouses should not be encouraged by court decisions to rush their divorce in order to avoid that result.

- ***Post-separation consumption:***

¶ 23 I do not interpret Justice Saunders in O'Hara, supra as saying that all assets which prove to depreciate in value must be valued at separation date. Instead, I interpret the decision as standing for the proposition that when assets which existed at separation date are consumed or partly consumed prior to trial, the spouse who enjoyed that consumption must account to the spouse who lost out on it. Valuing that type of asset at separation date achieves that goal and allows both spouses to be treated at trial date as if they had received an accounting on the separation date. To hold otherwise is to deny a non-user spouse his or her share of the value of an asset that was consumed or partly consumed prior to trial by the other.

- ***Assets valued by appraisal***

¶ 24 For those types of assets which will be valued by appraisal, it is not practical to expect the couple to have conducted an appraisal on the exact valuation date. This will usually come as part of the negotiations several months after separation. Given the lack of material change in value over a few months and the lack of precision associated with appraisals, a value obtained within a reasonable time frame of a particular date such as the separation date should be treated as representing separation date value.

- ***Assets normally subject to separation date valuation:***

¶ 25 Subject to exceptions mentioned above, the types of assets typically owned by separating couples which would normally be subject to separation date valuations would include motor vehicles, furniture and household contents, bank accounts, recreational vehicles, boats and any other type of asset whose values tend to be consumed by usage.

- ***Assets unaffected by delay between separation and division:***

¶ 26 There are certain types of assets whose value, from the point of view of the non-owning spouse, are not affected by the delay between separation date and division date. For that reason, these assets should be valued at separation date. The following are examples.

¶ 27 Pensions can be divided at source by way of credit splitting so that the non-owning spouse will receive value (usually payable at some future date) equal to the pension that had been earned as of the separation date. Any increase in value of the pension after the separation date is a function of post-separation contributions or years of employment service of the member spouse. Such growth is analogous to post-separation acquisitions which under section 4(1)(g) of the Act are excluded, prima facie, from division. Both spouses must wait for their entitlement. Growth in separation date value should be accounted for in the credit splitting process. Growth arising from post-separation contributions or employment service should not be shared. It follows therefore that pensions should be divided as of separation date and this has been widely acknowledged by the court. See for example, the decision of Justice Davison in *Sangster v. Sangster*, (1991), 100 N.S.R. (2d) 248 and the decision of Justice Goodfellow in *Taylor v. Taylor*, (1992), 38 R.F.L. (3d) 313.

¶ 28 The logic for this valuation date, in my view, is that separation date value meets the test of providing a value which achieves, on the division day, that which would have been achieved if the division could have been made on the separation date. This is so because the pension division can actually be made "as of" the separation date and therefore the non-owning spouse is not affected by the post-separation delay of settlement.

¶ 29 Accrued income tax refunds and long service awards are to be divided as of separation date. This is so because the entitlement to share in the asset

can be measured by reference to the period of cohabitation. Any value in these types of assets that accrues after separation date will occur because of the post-separation employment service and tax contributions respectively of that spouse. Being post-separation assets, they would not be shared under the theory of section 4(1) (g) of the Act. There is no post-separation impact on value since long service awards can only be available to both spouses on the day when they are received which as of trial date is often in the future. The non-member spouse cannot be said to be harmed by waiting for his or her money since there was no entitlement for either spouse to receive that money until the severance date. When it is received during separation, the accounting delay is usually immaterial, but income growth can be added if it is material and warranted.

¶ 30 Regarding income tax refunds, although there may be some lost interest income to the non-owner spouse in the delay period, it can usually be safely ignored based on the lack of materiality involved.

¶ 31 Frequent flier points are another example of assets capable of being related by acquisition to the period of cohabitation. Therefore its post-separation accruals can be fairly ignored. Separation date provides the appropriate division date.

- ***Assets normally valued as of division:***

¶ 32 Examples of assets which would normally be valued as of division date are real estate, bonds, stocks, mutual funds, RRSP accounts, cash value of life insurance, business assets (in those cases where business assets have a relevance) and any other assets which do not meet the above tests for division at separation date.

APPENDIX C

Death of a Spouse: Excerpts from ALRI Report No. 83 on *Division of Matrimonial Property on Death*

pp. 42-44

CHAPTER 3. OVERVIEWS OF THE *MATRIMONIAL PROPERTY ACT*

D. Matrimonial property

4. Valuation date

[95] Although the MPA does not spell out when the court should identify and value the assets and liabilities of each spouse, jurisprudence has established that the valuation date is the date of trial¹²⁹ and that this rule applies where one of the spouses dies.¹³⁰ The court does, however, have a limited discretion under section 8(f) to use the date of separation as the valuation date where it would not be just and equitable to divide property acquired after separation equally.¹³¹ This really amounts to ordering unequal division under section 7(4) of the Act.

[96] The choice of valuation date will significantly affect the entitlement of the surviving spouse. If the valuation date is the date of trial, the court will identify all of the assets and debts of each spouse existing as of that date. Any assets that pass on the moment of death to a third party will not be owned by either spouse as of the valuation date and will not be available for distribution unless the property can be recaptured under section 10 of the MPA. Moreover, the debts of the estate of the deceased spouse will be increased by the debts that accrue as a result of the death. This will include income tax that is triggered on death, funeral expenses and the cost of administering the estate (i.e., executor fees, legal fees and accounting fees).¹³²

¹²⁹ *Mazurenko v. Mazurenko*, *supra* note 7; *Ahlgrim v. Ahlgrim* (1983), 45 A.R. 9 (Q .B.); *Herchuk v. Herchuk* (1984), 38 R.F.L. (2d) 240; *Burger v. Burger* (1985), 48 R.F.L. (2d) 158 (Q.B.); *Zubiss v. Moulson Estate*, *supra* note 71; *McWilliams v. McWilliams* (1989), 23 R.F.L. (3d) 26 5 (Alta. Q.B.); *Baker v. Baker Estate*, *supra* note 80; *Bracewell v. Bracewell*, *supra* note 87; *McAllister v. McAllister* (1997), 20 1 A.R. 287 (Q.B .); *Cox v. Cox*, *supra* note 123.

¹³⁰ *Zubiss v. Moulson Estate*, *ibid.* and *Baker v. Baker Estate*, *ibid.*

¹³¹ For example, see *Baker v. Baker Estate*, *ibid.* and *Kary v. Kary* (1996), 194 A.R. . 194 (Q.B.).

¹³² *Zubiss v. Moulson Estate*, *supra* note 71, is a case where the valuation date was the date of trial. At page 1 82 of the judgment, the judge determined the increase in value of the husband's assets between date of marriage and date of trial. He subtracts the net value of the estate at trial from value of estate at marriage. The net value of the estate at trial was the value of the estate after payment of income tax of \$224,472, being taxes owed by the deceased personally and by limited companies on the winding-up. The case does not indicate whether funeral expenses or cost of administering the estate were considered in determining the value of the estate at time of trial. Logically, this should

(continued...)

[97] If the valuation date is the date of separation, only those assets and liabilities existing as of the date of separation will be considered. Where the deceased owned will substitutes, the assets of the deceased spouse would include assets that at the moment of death passed to a third party. Nevertheless these assets are not available for the satisfaction of any matrimonial property order granted in favour of the surviving spouse.¹³³ Valuing assets as of this date may also raise difficult valuation questions in situations where the imminence of death affects the value of an asset.¹³⁴ In addition, the debts of the deceased spouse will not include funeral expenses or costs of administering the estate.¹³⁵ Query whether income tax triggered by death would be deducted.¹³⁶

[98] As noted earlier, the cost of bringing or defending the matrimonial property action is considered the personal responsibility of each spouse and is not taken into account in the matrimonial property division.¹³⁷ Therefore, no matter what the valuation date, the costs of defending the action should not influence the surviving spouse's entitlement under the MPA. Such costs are more appropriately dealt with by an award of costs.¹³⁸

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¹³² (...continued)
have happened.

¹³³ This is a problem under the Ontario *Family Law Act* because in a division of matrimonial property upon the death of a spouse, the valuation date is the date before the death of the spouses. See OLRC, *Report on Family Property Law* (1993) at 105-107 ("Ontario Report").

¹³⁴ *Ibid.*

¹³⁵ *Baker v. Baker Estate*, *supra* note 80 is a case in which the couple separated three months before the husband died. The court chose the date of separation as the valuation date to ensure the estate did not benefit from the savings accumulated by the wife after separation by reason of her frugality and hard work at a time when she had no benefit of the assets acquired over the course of the marriage. In this case, no assets passed on death to a third party. When valuing the debts of the deceased spouse, the court included only those that were in existence at death. It excluded funeral debts and the costs of administering the estate. See (1992), 136 A.R. 94 at 110-111 and footnotes 5, 7 and 8 to the original decision.

¹³⁶ This issue was not addressed in *Baker v. Baker Estate*, *ibid.* Income tax payable by reason of RRSPs was taken into account in the valuation of the RRSPs. In Ontario, the valuation date is the day before death. In *Bobyk v. Bobyk Estate* (1993), 47 R.F.L. (3d) 310 (Ont. H.C.J., Gen. Div.), the court held that tax liability relating to RRSPs that was triggered by death should be treated as a debt in existence on the valuation date. It also treated as a debt the income tax that was payable by reason of recapture of depreciation on death.

¹³⁷ *Baker v. Baker Estate*, *supra* note 80 at 111.

¹³⁸ McLeod & Mamo, *supra* note 66 at A-29.

CHAPTER 4. DIVISION OF MATRIMONIAL PROPERTY FOLLOWING THE DEATH OF A SPOUSE

C. Is there any conduct that would disqualify a surviving spouse from making a claim under the *Matrimonial Property Act*?

2. Separation before death

[192] Presently, once the spouses have lived separate and apart for one year, they are entitled to bring a matrimonial property action, and the action must be commenced within two years of separation. After this period, an action based on separation is barred. Notwithstanding this fact, the cause of action revives if one of the spouses files a divorce petition, and the spouse must bring the matrimonial property action within two years of the granting of the divorce judgment.²⁴³ Consequently, the two-year limitation period that runs from the date of separation is of little effect during the joint lives of the spouses. Several cases involve a lengthy period of separation. In one case, the period of separation was 19 years.²⁴⁴

[193] Assume that the spouses were separated for more than two years before the death of one of the spouses and that neither spouse commenced a matrimonial property action nor divorce proceedings. In these circumstances, should death revive the cause of action under the MPA? Or should death create a cause of action only for the benefit of a surviving spouse who was living with the deceased at the time of death? The question is not easily answered. On the one hand, the purpose in imposing short limitation periods is to encourage spouses to finalize their affairs within a reasonable time after separation.²⁴⁵ On the other hand, ensuring that the cause of action is revived upon death means that the contribution of the surviving spouse to the marriage will always be recognized.

[194] In our opinion, the best solution is to revive the cause of action upon the death of the deceased spouse. Such a solution will ensure that the law recognizes the contribution made by the surviving spouse, and still give the court the flexibility to consider how the property should be divided given the peculiar facts of the case. Much will depend upon whether there was a relationship after separation, whether property was acquired after separation and how such property was acquired. This option will also protect the surviving spouse who, while separated from his or her spouse, has chosen not to commence a matrimonial property action or divorce proceedings because of the failing health of the other spouse.²⁴⁶ The revival of the

²⁴³ Section 6(1)(a) and *Weicker v. Weicker*, *supra* note 75.

²⁴⁴ *Weicker v. Weicker*, *supra* note 93.

²⁴⁵ Four of the commentators argued that separation for more than two years should also be a bar to an action on death. In their opinion, a spouse should be required to bring an application within a reasonable time of separation or divorce.

²⁴⁶ Consider the case where the spouses separate and at a later time it is discovered that one of the
(continued...)

cause of action upon death will work much like the revival of the cause of action where divorce proceedings are commenced during the joint lives of the spouses. The existing law does not cause insurmountable problems and should not do so under this proposal.

pp. 102-103

CHAPTER 4. DIVISION OF MATRIMONIAL PROPERTY FOLLOWING THE DEATH OF A SPOUSE

H. What will be the valuation date?

[237] Choice of valuation date is extremely important in bringing about a fair result in division of matrimonial property upon death. Four possible choices exist: (1) day before the date of death, (2) date of death, (3) day after date of death, and (4) date of trial, with discretion to vary valuation date when it is appropriate to do so. Among the commentators, the majority preferred the fourth choice, which is the existing law, while a small minority preferred the date of death.

[238] The Ontario experience shows that making the valuation date the day before the date of death creates serious problems that should be avoided.³¹⁰ The date of death is also unworkable as a valuation date. If the spouse dies at noon on a given date, does the court value the property owned in the morning, including the spouse's interest in assets held in joint tenancy, or does it value only the property owned in the afternoon, which would not include property that passed by right of survivorship. To avoid such legal niceties, the day after the date of death could be chosen as the valuation date. But this then gives rise to problems when the value of assets increases or decreases between that date and the date of trial. It also fails to recognize that the financial arrangements of a couple will be interdependent until the point of matrimonial property division. The existing Alberta law is preferable; as a general rule, the valuation date should be the date of trial. The court should continue to have a limited discretion to use the date of separation as the valuation date where it would not be just and equitable to divide property acquired after separation equally.

RECOMMENDATION No. 12

The jurisprudence governing choice of valuation date is adequate.

²⁴⁶ (...continued)

spouses has a terminal illness. In this situation, the one spouse may choose not to commence an action under the MPA for fear that it would cause stress to the other spouse in a time of serious illness. That spouse would have no cause of action under the existing MPA upon the death of the spouse if the parties had been separated for more than two years and an action had not been commenced under the MPA or *Divorce Act* before death.

³¹⁰ Ontario Report, *supra* note 133 at 106-7.

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