AN EXAMINATION OF SECTION 4 OF THE (ONTARIO) FAMILY LAW REFORM ACT, 1978

*Carol Tennenhouse**

I. INTRODUCTION

The Family Law Reform Act, 1978[1] came into force on March 31st, 1978. As its long title, An Act to Reform the Law Respecting Property Rights and Support Obligations Between Married Persons and in Other Family Relationships, suggests, the provisions of this Act will undoubtedly affect numerous aspects of family law in Ontario.

This article deals specifically with section 4 of the Act, the division of family and non-family assets. More particularly, the following four main issues are examined: situations giving rise to the operation of section 4, the definition of family assets, the section 4 division of assets, and the effect of death on the operation of section 4. As the case law in each of these areas is at present only in the very early stages of development, the major portion of this analysis has been devoted to considerations arising from potential constructions which may be placed upon this section of the Act. A critical analysis of the relevant case law, however, has been included in the footnotes for research and reference purposes.[2]

II. SITUATIONS GIVING RISE TO THE OPERATION OF SECTION 4

Subject to subsection 4(4), section 4 of the FLRA provides that, upon application, each spouse be entitled to an equal division of the family assets where:

A. a decree *nisi* of divorce is pronounced;
B. a marriage is declared a nullity; or
C. the spouses are separated and there is no reasonable prospect of the resumption of cohabitation.[3]

Each of these situations will be examined in turn.

---

*Student-at-Law, Ottawa.

[1] S.O. 1978, c. 2. [Hereinafter referred to as the FLRA.]

[2] Including decisions which were reported or available as of March 1, 1979.

[3] S. 4(1).

A. *Where a Decree Nisi of Divorce is Pronounced*

It is evident from the wording of sections 4(1) and 4(2) of the FLRA that an application pursuant to section 4(2) may be brought by either spouse from the time the decree *nisi* is pronounced until just prior to the granting of a decree absolute; the section speaks in terms of a "spouse" and not a "former spouse".[4] This distinction may become particularly relevant when consideration is being given to shortening the time after which a decree *nisi* may be made absolute pursuant to section 13(2) of the Divorce Act.[5]

This first condition should also be considered in light of section 13(3) of the Divorce Act, which contemplates *inter alia* a rescission of the decree *nisi*. In accordance with section 6 of the FLRA, after the granting of a decree *nisi*, a court may order the complete division of family assets including, for example, the partition or sale of property. After the completion of such a sale, however, any person may still show cause why the decree should not be made absolute and in accordance with section 13(3) of the Divorce Act, a court may order its rescission. No provision has been included in Part 1 of the FLRA to enable a court to review and vary a section 6 order where there has been a material change in the circumstances of the parties. In light of section 21 of this Act (which provides for such a variation where an order for support has been made), the maxim *expressum facit cessare tacitum* would seem to be most applicable. It would appear, therefore, that should such a situation arise, it would result in the retention by each spouse of his or her share of the family assets even though the decree *nisi* upon which this entitlement had originally been occasioned has since been rescinded. Although initially this result may seem to be somewhat incongruous, it is quite compatible with the overall scheme of the Act; a division of family assets, it must be remembered, may also be made between spouses who are separated but who have not even contemplated seeking a divorce. In addition, arguments in favour of certainty, finality, and the protection of the bona fide interests of third parties should be considered.

Where, in a divorce situation, corollary relief is being sought, "[i]nter-spousal property rights should logically be resolved before the making of an order for maintenance under section 11(1) of the Divorce Act",[6] the means of both parties being a most relevant consideration. A section 4 application should therefore be made prior to or, at the latest, contemporaneously with an application for maintenance under section 11 of the Divorce Act. In these cases, courts will likely follow the approach

---

[4] Compare the wording of s. 4(1) with that of ss. 7 and 8. In Armitage v. Armitage (Ont. H.C. Chambers, December 12, 1978, no. 19483/77), for example, it was held *inter alia* that as the parties were already "former spouses", s. 4 of the FLRA was not applicable. *See also Re* Gibbins and Gibbins, 22 O.R. (2d) 116 (H.C. 1978).

[5] R.S.C. 1970, c. D-8. *See also* Barzo v. Barzo, 7 R.F.L. (2d) 123 (Ont. H.C. 1978).

[6] J. PAYNE, DIGEST OF CASES AND MATERIALS ON THE DIVORCE ACT, Supplement V, 158 (1976).

adopted by Chief Justice Morrison of the Nova Scotia Supreme Court in *Laschowiecz v. Laschowiecz*[7] when he stated: "Since I have no authority under the Divorce Act to order property settlements, the matter of the petitioner's entitlement to maintenance must be held in abeyance pending a determination or agreement with regard to properties jointly held." Since Rule 778 of the Ontario Rules of Practice has now been revoked, it would appear that in a proper case, joinder of these two actions will now be permitted.

In general, although, as was noted above, a spouse may wait until just prior to the granting of a decree absolute to make a section 4(2) application, it is highly unlikely, even in the absence of corollary relief, that he or she would ever wish to do so. Such a delay may be fraught with danger. If, for example, a decree absolute were granted after the application had been filed but before a section 6 order had been made, it is questionable whether a court would be statutorily empowered to make such an order since section 6, like section 4, refers only to "spouses" and not "former spouses".[8] It is submitted that in the vast majority of cases this problem need never arise. Those seeking a divorce usually have separated long before the actual divorce proceedings are instituted and, as such have already become entitled to a division of family assets, pursuant to the third condition specified in section 4 (*i.e.*, where the spouses are separated and there is no reasonable prospect of the resumption of cohabitation).[9] In light of the potential problems which may otherwise result, spouses in this situation should be encouraged to submit a section 4(2) application as soon as they become entitled to do so.

A final point which might be noted regarding this first condition concerns the applicability of this section to a foreign decree *nisi*. The section refers only to a decree *nisi* being pronounced, and this would seem to apply to both foreign and Canadian decrees.[10] In this regard, the provisions of section 13 of the FLRA concerning conflict of laws should not be overlooked.

---

[7] Unreported, July 9, 1971, No. 1201-02373. *See also* Silverstein v. Silverstein, 20 O.R. (2d) 185, at 189, 1 R.F.L. (2d) 239, at 243, 87 D.L.R. (3d) 116, at 119 (H.C. 1978): "Before determining the amount of maintenance to be paid under s. 11 of the Divorce Act it is necessary to resolve the property issues so that there is a determination of the condition, means or other circumstances of the parties."

[8] The emphasis which a court may choose to place upon this distinction is questionable. In Sonntag v. Sonntag, 5 R.F.L. (2d) 372 (Ont. H.C. 1978), after the granting of a decree *nisi*, the husband applied for a decree absolute and the wife applied for a division of family assets pursuant to s. 4. The husband's application was adjourned *sine die* to be heard after the disposition of the wife's application. The court held that: "The decree absolute may not affect the adjudication of rights in an application under the Family Law Reform Act, but a more cautious approach is to adjourn the absolute application." *Quaere* whether this suggests that as long as the application is made before the granting of a decree absolute, a s. 6 order may be made after the decree absolute has been granted.

See also Bashutzky v. Bashutzky, 22 O.R. (2d) 644 (H.C. 1978).

[9] This suggestion was made by Professor Payne.

[10] *See also* s. 6(2) of the Divorce Act, and J. CASTEL, 2 CANADIAN CONFLICT OF LAWS 117 (1977).

B. *Where a Marriage is Declared a Nullity*

Although initially this condition may appear to be relatively straightforward, as Professor Driedger has stated, "a provision when read alone may appear to be clear and unambiguous, but when read in its full context it turns out that it is not."[11] Since a declaration of nullity may be granted in the case of either a void or voidable marriage, each of these situations will be examined in turn.

1. *The Voidable Marriage*

Section 1(f)(ii) of the FLRA provides that the word spouse means *inter alia* either of a man and woman who are "married to each other by a marriage that is voidable and has not been voided by a judgment of nullity". As was noted above, section 4 provides that where "a marriage is declared a nullity" each *spouse* is entitled to have the family assets divided and that the court may, "upon the application of a person who *is* [emphasis added] the spouse of another" determine any matter respecting this division. In *Internal Revenue Commissioners v. Hinchy*, Lord Reid stated, "[O]ne assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of other clauses, and attributes to Parliament a comprehension of the whole Act."[12] Yet, when these two sections are read together, the result is somewhat surprising, for the entitlement to have a division of family assets made arises "where the marriage is declared a nullity", at which time, in accordance with the section 1(f)(ii) definition of spouse, one is no longer a spouse and therefore ceases to be so entitled. By construing the Act so as to give every provision meaning, it becomes evident that section 4 as presently drafted does not apply in the case of a voidable marriage which is declared to be a nullity.[13]

2. *The Void Marriage*

Section 1(f)(iii) of the Act defines the word spouse to include "either of a man and woman who . . . have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year". In contrast with the definition provided in section 1(f)(ii), this subparagraph makes no reference to a judgment of nullity. Provided that the spouses have cohabited within the required period of time, even if the marriage is declared a nullity, the parties will still fulfill the requirements of section 1(f)(iii) and will be entitled to have a division of family assets made.

Before leaving this section, however, one further problem should be explored. Section 1(f)(iii) refers to a "form of marriage", whereas section 4 refers to a "marriage". The significance, if any, of this distinction bears examination. The term "form of marriage" is hardly a stranger to Ontario matrimonial statutes. Section 34(1) of the former Marriage Act, for

---

[11] E. DRIEDGER, THE CONSTRUCTION OF STATUTES 69 (1974).

[12] [1960] A.C. 748, at 766, [1960] 1 All E.R. 505, at 511 (H.L.).

[13] *See infra* note 23.

example, provided that "[w]here a form of marriage is gone through between persons either of whom is under the age of eighteen years . . . such a form of marriage shall be void . . .".[14] In reference to the phrase "form of marriage", Lamont J. stated "indeed [that] is all that the performing of the ceremony can be where no valid marriage takes place."[15] In general, where words in a statute have been judicially construed and the legislature has repeated them without alteration in a subsequent statute, the legislature is taken to have intended them to be used in the sense in which they were so construed.[16] In accordance with this principle of statutory interpretation, the term "form of marriage" as used in section 1(f)(iii) may therefore be interpreted as meaning a marriage void *ab initio*. Furthermore, as the legislature has chosen to use this term to refer to a void marriage, the word "marriage" as used in section 4 cannot by proper statutory construction be given the same meaning.[17] On a strict reading of the Act, therefore, spouses to a marriage which is void *ab initio* are not entitled to a section 4 division of family assets.

Alternatively, one may argue that the word "marriage" in section 4 was intended to refer to both void and voidable marriages. The former section 1 of the Matrimonial Causes Act[18] provided that "[i]n any action for divorce or to declare the nullity of any marriage, the court may order that the husband shall secure to the wife . . . such gross sum of money. . . ." Having declared the marriage in question to be void, the Supreme Court of Canada in *Powell v. Cockburn*[19] was presented with a claim by the "wife" for corollary relief pursuant to section 1 of the Act. The "husband" contended that this section and, more specifically, the words "marriage", "husband" and "wife" were not applicable in the case of a marriage void *ab initio*. Mr. Justice Dickson rejected this position, stating:

> I cannot agree with these contentions, for they are contrary to both the language and the spirit of the Act. The section speaks of "any" action to declare a marriage a nullity, with no restriction to voidable marriages. The use of the words "husband" and "wife" is reasonable, for the parties to a non-existent marriage appear *de facto* to be a husband and wife despite their *de jure* status. Nor can I see reason to accord different financial relief in voidable, as opposed to void, marriages. Although a party to a voidable marriage is a husband or wife in law until the marriage is declared to be a nullity, after such a declaration he or she ceases to have that marital status retroactively and assumes the same status as the participant in a void marriage.[20]

---

[14] R.S.O. 1927, c. 181. It might also be noted that s. 254(1) of the Criminal Code provides that: "Everyone commits bigamy who . . . (i) being married, goes through a form of marriage with another person." The Divorce Act, s. 3(c) also provides that a petition for divorce may be presented where the respondent "has gone through a form of marriage with another person."

[15] Kerr v. Kerr, [1934] S.C.R. 72, at 83, [1934] 2 D.L.R. 369, at 376 (1933).

[16] *Supra* note 11, at 102.

[17] *Id.* at 74.

[18] R.S.O. 1970, c. 265.

[19] [1978] 2 S.C.R. 218, 22 R.F.L. 155, 68 D.L.R. (3d) 700 (1976).

[20] *Id.* at 235-36, 22 R.F.L. at 170, 68 D.L.R. (3d) at 714-15.

Although the Matrimonial Causes Act did not refer to the term "form of marriage" in a different section (and therefore the two situations are not on "all fours"), it may be argued that the legislature intended that the interpretation placed upon the word "marriage" by Mr. Justice Dickson should also be applied to the word "marriage" as used in section 4 of the FLRA.

Professor Driedger has stated that if a judge, in construing a statute, finds that its words are capable of two constructions, he must select the one that is best in harmony with the words, intention and object of the statute.[21] Employing a somewhat unique drafting technique, the legislature has specifically stated its intention in enacting section 4 of the FLRA by providing that:

> The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal division of the family assets, subject to the equitable considerations set out in subsections 4 and 6.[22]

This section, it should be noted, is addressed to all spouses (as defined in Part I of the FLRA), and therefore clearly includes spouses to a void marriage. In view of the approach taken by Mr. Justice Dickson in the Supreme Court, it is submitted that it is this second construction which is in fact (if not semantically) more in harmony with the intent of the statute and that, pursuant to this approach, spouses to a void marriage should be entitled to a division of the family assets where the marriage is declared a nullity.[23]

C. *Where the Spouses are Separated and There is No Reasonable Prospect of the Resumption of Cohabitation*

Although the applicability of this section to a spouse as defined in section 1(f)(i) or (ii) can hardly be doubted, the position of a spouse in a void marriage as defined in section 1(f)(iii) is not quite as certain. To

---

[21] *Supra* note 11, at 37.

[22] S. 4(5).

[23] At present, it would appear that in Ontario, all judgments in nullity actions are absolute in the first instance. *See, e.g.*, Rose v. Rose, 1 O.R. (2d) 193, 3 R.F.L. 146, 8 D.L.R. (3d) 45 (C.A. 1970). If an Act were to be introduced which provided that both a "decree *nisi*" and a "decree absolute" could be proclaimed in annulling a voidable marriage, this problem might be averted. In such a situation, a court might be prepared to treat the "decree *nisi*" as a declaration of nullity entitling a spouse to have a division of the family assets made, and the "decree absolute" as the judgment of nullity referred to in s. 3(f)(ii). This "solution", however, is speculative at best.

It should also be noted that in the case of a marriage void *ab initio*, the declaration of nullity is "purely declaratory", and therefore technically unnecessary. *See, e.g.*, Christensen v. Rowbottom, 52 W.W.R. 637, 52 D.L.R. (2d) 477 (B.S.S.C. 1965). It would appear, however, that in order to fall within the ambit of s. 4(1), such a declaration would have to be obtained.

satisfy the requirements of this subparagraph, spouses to such a marriage must either be "cohabiting or have cohabited within the preceding year." What then of spouses who ceased to cohabit more than two years ago? On a strict reading of these two sections, it would appear that such spouses are not entitled to have a division of the family assets made.

In such a situation, however, a court may choose to resort to section 2(5) of the Act and extend the time prescribed in section 1(f)(iii). It should be noted that in so doing, a court must first satisfy itself that, *inter alia*, no substantial prejudice or hardship would result to any person "affected by reason of the delay". This requirement bears further examination. Prior to the introduction of the FLRA, in a "traditional" marriage where the husband was the sole breadwinner and the wife remained at home, title to the majority of the family assets was often held by the husband and remained in his name both during and after the marriage. If section 4 were to become applicable in such a situation as a result of an extension of the time specified in section 1(f)(iii), it might well be argued that the interests of the husband would be substantially prejudiced because his wife would then, subject to section 4(4), be entitled to an equal share of these assets. Although the conditions stipulated in section 2(5) have been included in other recent Ontario statutes,[24] they have yet to receive judicial consideration. The word "prejudiced", however, has been judicially construed as meaning, *inter alia*, "unjustly made to suffer".[25] As the Act speaks in terms of *substantial* prejudice or *hardship*, it is indeed doubtful that a court would be prepared to find the husband's objections to be sufficiently persuasive.

In considering this third section 4 situation, it should also be noted that there is no stipulation in the Act concerning the minimum amount of time during which a couple must be separated before section 4 will apply, nor is the word "separated" defined anywhere in the Act. It is assumed that a court will look to the interpretation which has been placed upon the phrase "living separate and apart" in section 4(1)(e) of the Divorce Act for guidance. In light of the absence of the words "and apart" in the FLRA, however, a court may choose to draw some rather fine distinctions here. One might also wonder whether a court will attach any significance to the difference between the term "residing together" which is used in section 3(b) of the FLRA and the term "cohabiting" which appears in sections 1 and 4 of the same Act.

III. The Definition of Family Assets

Part 1 of the FLRA clearly distinguishes between at least two types of property: family assets and assets other than family assets. Although on

---

[24] *See, e.g.*, Judicial Review Procedure Act, S.O. 1971, c. 48, s. 5.

[25] Rendall, McKay, Mitchie Ltd. v. Warren & Dyett, 8 W.W.R. 113, 21 D.L.R. 801 (Alta. S.C. 1915).

first reading it would appear that the definition of family assets provided in section 3(b) is clear and unequivocal, on closer examination several potentially significant ambiguities may be discerned.[26] Because this distinction in classification is crucial to the operation of section 4, the following issues will be examined in greater detail:

A. When does property become part of the family assets?
B. What is the nature of ownership required?
C. What is meant by the phrase "ordinarily used or enjoyed"?
D. What is the status of income-earning investments?

A. *When Does Property Become Part of the Family Assets*?

The definition of family assets includes "property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children . . . while the spouses are residing together. . . ." Although it is clear that the ownership and stipulated use or enjoyment of the property must take place while the spouses are residing together, it is not clear whether this ownership and use must continue until the time of separation, decree *nisi* or declaration of nullity, *or* whether property may be classified as a family asset provided that it was so owned and used at *any* time during the marriage prior to separation;[27] *i.e.*, "once a family asset, always a family asset". The choice between these two approaches must not be made lightly, for the potential consequences which may arise are significant. Suppose, for example, that husband H in Year One was a salaried employee and purchased a car which he used exclusively for the purpose of transporting his family. In Year Three, H opened his own business and from then on used the car exclusively for business purposes. In Year Four, H and his wife separate. Had H and his wife separated in Year One, clearly the car would have been considered to be part of the family assets. In Year Four, however, can it still be so considered?

---

[26] Although the matrimonial home is included in the definition of family assets, as Part III of the FLRA is devoted to this issue exclusively, it was felt to be beyond the scope of this article to include a discussion of issues concerning the matrimonial home in particular.

[27] It may be argued, for example, that the designation "family asset" will attach to any property which satisfies the requirements of s. 3(6) at any time during the marriage, and that once so classified this property will remain part of the family assets regardless of its subsequent use. From the cases decided to date, it would appear that in general the courts have chosen to reject this "once a family asset, always a family asset" approach. In Taylor v. Taylor, 6 R.F.L. (2d) 341, at 349 (Ont. U. Fam. Ct. 1978) the court stated:

> The applicant sought to have the court trace assets acquired prior to separation from what might otherwise have been family assets at the time of separation. That, however, is contrary to the intent of s. 4 of the Act, which preserves the private property regimes of each spouse until the separation occurs. It is only at that time that the court must look at each of the then assets of the spouses to determine whether they fall within the definition of "family assets" within the meaning of s. 3 of the Act.

Similarly, in categorizing the sailboat in Bregman v. Bregman, 21 O.R. (2d) 722, at 732, 7 R.F.L. (2d) 201, at 211, 91 D.L.R. (3d) 470, at 480 (H.C. 1978), Henry J. held that when the boat was acquired "the character of this asset changed".

Because the precise wording of section 3(b), read in its grammatical and ordinary sense, is of little assistance in answering these questions, resort must be had to other sections of the Act. Section 6 provides for the division of non-family assets where a spouse has, *inter alia*, unreasonably impoverished the family assets. If one interprets this section as having been intended to apply in the case of a spouse who has unreasonably converted property that had been a family asset into property that will no longer meet the section 3 test, it would seem that in the course of a marriage, property that at one time would have been considered to be a family asset can, in fact, lose this designation. This then would tend to support the first approach referred to above. If this approach is adopted, the next question which must be asked is: what point in time will a court choose to be the "cut-off point" in designating property? Again, the wording of the Act provides only minimal assistance. Does the "cut-off point" occur when the entitlement to a division of family assets arises under section 4(1), or does it occur only when an application is made pursuant to section 4(2)?[28] A husband, for example, may decide to remove all of the funds contained in a section 3(b)(i) bank account and open a new account for his own use, following the couple's separation but before an application has been made. Unfortunately, the Act provides no guidance regarding these questions, and, in light of the liquidity of some family assets, this is indeed a serious shortcoming which will undoubtedly receive considerable judicial attention.[29]

Returning to the initial question, suppose that a court chooses instead to adopt the "once a family asset, always a family asset" approach, interpreting section 4(6) as applying to a spouse who, prior to separation, has given family assets away intentionally, avoiding the operation of the Act, and unreasonably impoverishing those assets. An entirely new set of problems must then be resolved. In the hypothetical posed above, suppose that in Year Three H traded in the family car for a new car which he used exclusively for business purposes. What would be the status of the new car? To assist trust beneficiaries in cases where A's property has found its way into B's hands in an identifiable form, both the common law courts

---

[28] It should be recalled that "[a] division of family assets does not follow as a matter of course on the breakup of the marriage. The spouse who seeks a division thereof must make that claim." Irrsack v. Irrsack, 22 O.R. (2d) 245, at 248, 93 D.L.R. (3d) 139, at 142 (H.C. 1978).

[29] In Bregman v. Bregman, a Picasso gouache was removed from the matrimonial home by the husband in August, 1975. In December, 1975, Mrs. Bregman moved to a separate bedroom and the spouses ceased to cohabit. In December, 1976, Mrs. Bregman commenced divorce proceedings. The court held that with the marriage breakdown imminent, the husband was not entitled to remove the Picasso, which had been found to be a family asset. *Supra* note 27, at 733, 7 R.F.L. (2d) at 212, 91 D.L.R. (3d) at 481.

See also Boydell v. Boydell, 2 R.F.L. (2d) 121, at 123 (Ont. U. Fam. Ct. 1978), where this issue was raised but not decided; Re Ellis and Matsushita, (Ont. Div'l. Ct., November 28, 1978); Rinas v. Rinas (Ont. H.C. February 5, 1979); Rusin v. Rusin (Ont. H.C. August 21, 1978, no. 01891/74); Typro v. Typro (Ont. H.C. March 2, 1979).

and courts of equity have recognized the right of A to follow or trace the property and to reclaim it from B.[30] It may well be that if the courts adopt the "once a family asset, always a family asset" approach, they may also choose to adopt this trust principle in a somewhat modified form, tracing and reclaiming family assets (or their equivalent value) for the purpose of making a section 4 division. Theoretically, until the entitlement arises to have a division of family assets made, the Act clearly preserves the separate property regime of each spouse. It may be argued, however, that tracing family assets *after* separation does not violate this principle, and that in fact it is indirectly provided for in section 4(6)(a) of the Act.[31] Still, it must be remembered that the doctrine of tracing is a most complex one, having evolved slowly, and sometimes painfully, in the courts of equity and common law. Any attempt to adapt it to this situation will require the greatest of care and caution.

B. *What is the Nature of Ownership Required?*

In accordance with section 3(b), to be considered a family asset, the property in question must be owned by either one spouse or both spouses. The term "property" is defined in section 3(c) as meaning "real or personal property or any interest therein." This definition, therefore, includes both legal and equitable interests in property. Furthermore, it is evident that such property need not be wholly owned by either spouse as long as one spouse has at least a minority interest in it. If, for example, two brothers, B_1 and B_2, were to invest in a snowmobile which was used for recreational purposes by their respective families and B_1 later obtained a decree *nisi*, in accordance with section 3(b) one half of the snowmobile would be included in B_1's family assets. Although the Act does not provide expressly for the protection of the interests of third parties (*i.e.* those of B_2 and his family) in this type of situation,[32] it is assumed that in making any orders pursuant to sections 6(b) or (c), for example, a court would take the interests of these parties into consideration.

C. *What is Meant By the Phrase "ordinarily used or enjoyed"?*

In accordance with section 3(b), a family asset must be "ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household,

---

[30] In general, the common law treats property as being identifiable as long as it has not been mixed with other property. In equity, as long as (1) the property is traceable, (2) there is an equity to trace, and (3) tracing does not produce an inequitable result, a claimant will be entitled either to the asset into which his property has been traced or else to a charge upon it. See SNELL'S PRINCIPLES OF EQUITY 286 (27th ed. R.E. Megarry & P.V. Baker 1973).

[31] The tracing of assets was categorically rejected by the court in Taylor v. Taylor, *supra* note 27.

[32] It is unfortunate that a provision similar to s. 2(10) of the Act was not included for this purpose.

educational, recreational, social or aesthetic purposes. . . ." In this section, the meaning of the phrase "ordinarily used or enjoyed" will be closely examined.

1. *Use or Enjoyment*

Professor Driedger has stated that after an Act has been read as a whole, the words of the individual provisions are to be read in their grammatical or ordinary sense.[33] The verb "use" has been defined as meaning to "employ for some purpose", or "put into service",[34] while the verb "enjoy" has a variety of dictionary meanings including to "take pleasure in", "have the benefit of", and "have and use with satisfaction".[35] It is clear that both grammatically and statutorily these two verbs may be employed in either an active or passive sense. In property law, for example, a continuous easement has been defined as one which is "enjoyed passively",[36] (such as a right to light) as opposed to one which requires personal activity for its enjoyment. Similarly, when the words of the Ontario Municipal Act, "using any land for drainage purposes"[37] were construed, the court held that "using" included, *inter alia*, the very passive act of merely holding land.[38] Section 3(b) of the FLRA, it should be recalled, requires only that the property in question be used or enjoyed by the spouses or one or more of their children. As has been demonstrated, this choice of verbs embraces a potentially wide variety of meanings, and it may well be argued that if the mere possession of an object brings pleasure to its owner, it is literally being used or enjoyed by him.[39] It now remains to consider what, if any, restrictions have been placed upon this otherwise very wide construction of this section.[40]

2. *"Ordinarily"*

As was noted above, section 3(b) stipulates that the property in question must be "ordinarily used or enjoyed. . . ." The word "ordinarily" has been defined as meaning "usually", "to the usual extent", or

---

[33] *Supra* note 11, at 81.

[34] THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1573-74 (1969).

[35] *Id.* at 474.

[36] *Cf.* McDonald v. Lake Simcoe Ice Co., 29 O.R. 247 (H.C. 1898), *rev'd* 26 O.A.R. 411 (1898), *rev'd* 31 S.C.R. 130 (1901), where it is stated that the right of enjoyment in a riparian proprietorship on a navigable river is simply the right *to have* the stream flow in its natural state.

[37] R.S.O. 1887, c. 184, s. 479(15).

[38] *Re* Davis and Toronto, 21 O.R. 243 (Q.B.D. 1891).

[39] It is for this reason that a picture hanging in the matrimonial home or oriental rugs which are displayed there can be considered to be family assets. *See* Bregman v. Bregman, *supra* note 27.

[40] It should also be noted here that in *Bregman* it was held that, "the onus is on the person who is claiming division of the family assets to establish to the satisfaction of the court what property is embraced in the family assets". *Id.* at 729, 7 R.F.L. (2d) at 208, 91 D.L.R. (3d) at 477.

"reasonably".[41] This broad dictionary definition, however, has, on occasion, been considerably restricted by Canadian courts. The Supreme Court of Canada, for example, has held that the term "ordinarily resident" as used in the Income Tax Act[42] does not refer to a mere preponderance of time. Rather, it means "residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence."[43] If this somewhat more restrictive approach were to be applied to the phrase "ordinarily used or enjoyed", a court would likely find that property used only once for one of the required section 3(b) purposes and used for other purposes the rest of the time would not qualify as a family asset. Conversely, property customarily used for a "family asset" purpose and only occasionally used for other purposes, would likely be considered to be part of the family assets.[44] The issue is then reduced to a question of fact.

As was noted above, however, the word "ordinarily" may also mean "to the usual extent". Although this aspect of the word has not as yet received judicial notice, it should not be overlooked. Suppose, for example, that having bought a sailboat a husband and wife use it once, only to discover that neither of them really enjoys sailing. Rather than selling it, they simply drydock the boat for two years after which time they seek a divorce. Certainly, the boat has not been ordinarily used or enjoyed in the sense of being used to the extent to which sailboats are normally used. Yet, as was noted above, in the *Thomson* case Mr. Justice Rand stated that ordinary residence meant "residence in the course of the customary mode of life *of the person concerned*."[45] It would seem, then, that a court may choose to interpret the word "ordinarily" in a subjective rather than objective sense, thus making the manner or extent to which others would customarily use the object in question an irrelevant consideration.

Finally, it should be noted that section 3(b) provides that the property must be ordinarily used or enjoyed by either both spouses or one or more of their children. It does not provide, however, that both spouses must use or enjoy the property together, at the same time, or for the same purpose. A husband taking a course in classical music, for example, may purchase an expensive tape deck which he uses solely for his music classes and which, on completion of his course, he never uses again. His wife may then

---

[41] *Supra* note 34, at 1013.

[42] R.S.C. 1952, c. 148, s. 250(3). This term has also been used in the following Acts where it has received judicial attention: The Divorce Act, R.S.C. 1970, c. D-8, s. 5(1)(b); The Indian Act, R.S.C. 1970, c. I-6, s. 4(3); The Election Act, R.S.O. 1937, c. 8, s. 18(1); The Motor Vehicles Act, R.S.N.S. 1954, c. 184, s. 1; Reciprocal Enforcement of Judgments Act, R.S.A. 1942, c. 140, s. 5.

[43] Thomson v. M.N.R., [1946] S.C.R. 209, at 224, [1946] 1 D.L.R. 689, at 701 (*per* Rand J.); quoted in Taylor v. Taylor, *supra* note 27, at 353.

[44] It should be noted here that "the statute requires an actual ordinary user to convert an asset into a family asset. The mere intention to ordinarily use the property for recreational purposes is insufficient. . . ." Taylor v. Taylor, *supra* note 27, at 354.

[45] *Supra* note 43 (emphasis added).

decide to use the tape deck to record and enjoy her favorite music while the husband is away at the office during the day. Although the spouses have never used or enjoyed the machine together (*i.e.*, at the same time or for the same purpose), its use has still fulfilled the requirements of section 3(b), and it will qualify as being part of the family assets.[46]

D. *What is the Status of Income-Earning Investments?*

Although the term "family assets" as defined in the Act includes money in an account where the account is ordinarily used for "family purposes", no distinction has been made in section 3(b)(i) between the initial "investment" or deposit, and the revenue that this generates in the form of interest, the subparagraph presumably applying to both chequing and savings accounts. Similarly, no specific reference has been made in section 3(b) to the status of revenue-generating investments such as stocks and bonds. If, for example, the dividends or interest generated from these investments is ordinarily used for the purposes specified in section 3(b), will the stocks or bonds themselves be considered to be part of the family assets?[47] It may well be that the answer lies in a distinction based on degree rather than subject-matter; liquidity being the unit of measurement. Can a spouse, for example, prevent the label of "family asset" from attaching to his savings by consistently using ninety-day term deposits or sixty-day debentures rather than a savings account? Because subparagraphs (i) to (iv) of section 3(b) are illustrative only, it is highly unlikely that a court would be prepared to overlook such practices; but, because these investment vehicles may also be used for longer periods of time, one must indeed wonder where the courts will choose to "draw the line".

In any case, it is clear that investments in deferred plans, such as Registered Home Ownership Savings Plans which have not yet been

---

[46] Of course if the deck were purchased by the husband and never used by either of the spouses but only by one of their children, it would still be considered to be a family asset. *See* s. 3(b).

[47] In addition, what if the capital asset is used as security for the purchase of a family asset, say a car? Can it now be said to have been used at least indirectly for "transportation"? On a close reading of the section, it may be that a distinction should be drawn between the use made and enjoyment derived from merely possessing the capital asset itself, and the use made and enjoyment derived from the revenue that the asset generates. In general, with regard to money held in s.3(b)(i) bank accounts, the case of Boydell v. Boydell, *supra* note 29, might be briefly referred to, where it was held that nothing in s. 4 required an accounting for an equal division of a bank account to be made as of the date of separation. Here the wife took more than half of the amount remaining in family asset bank accounts and used it to support herself and her child. Gravely J. held that she should not be required to pay back part of this amount to her husband on a principle of equal sharing. As counsel agreed that the bonds held by the spouses were family assets, the case was not considered further. *But see* Cicero v. Cicero (Ont. U. Fam. Ct. June 15, 1978), where it was held that where a husband had spent the entire proceeds of a joint bank account which had been used for household purposes and was at the time of separation a family asset, the wife was entitled to be credited with a half interest in the value of the account as it stood at the time of separation.

realized, will definitely not qualify as family assets.[48] Although the money in question may have been invested for the purpose of eventually buying a home, neither the money in the plan nor any benefits accruing from it has ever been used "while the spouses are residing together . . . for household purposes". It therefore cannot qualify as a family asset.

IV. THE SECTION 4 DIVISION OF ASSETS

Section 4(1) provides that, "subject to subsection 4 . . . each spouse is entitled to have the family assets divided in equal shares." To appreciate the legislature's intent in enacting this provision, this section must also be read in light of section 4(5):

> The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal division of the family assets, subject to the equitable considerations set out in subsections 4 and 6.

Thus, upon application, each spouse is entitled to an equal division of the family assets unless one of the equitable considerations specified in subsections 4 or 6 is found to be relevant.[49] In view of their effect, it is felt that it is essential to consider these two subsections in greater detail.

A. *The Subsection 4 Conditions*

Before proceeding to examine the individual paragraphs of this subsection more closely, two general observations should be made. First, the circumstances specified in this subsection are exhaustive: any condition not specified in paragraphs (a) to (f) inclusive, must not be considered by a court in relation to subsection 4.[50] Secondly, section 4(5)

---

[48] This principle was referred to in Taylor v. Taylor, *supra* note 27, at 354, where it was held that a condominium in Florida which was intended to be used for recreational purposes, but was in fact never so used prior to the separation of the spouses, could not be considered to be a family asset.

[49] The steps which are to be followed by a court in making a s. 4 division have been described as follows: "Firstly, on the evidence determine what are the family assets and non-family assets to be affected by these pertinent provisions. Secondly, make the appropriate division of family assets with due consideration to the provisions of s. 4, s-ss. (4) and (5). Thirdly, consider the application of s. 4(6) in light of the adequacy or equitability of the disposition of the family assets in all the prevailing circumstances." Brown v. Brown, 20 O.R. (2d) 20, at 23, 1 R.F.L. (2d) 343, at 347, 86 D.L.R. (3d) 566, at 569 (H.C. 1978).

It is also clear that "there is a fairly heavy obligation cast upon a person who suggests that the division [of family assets] should be otherwise than equal, to show not only that the case falls within one or more of the statutory criteria, but that having regard to those criteria an equal division would be unequitable." Mercer v. Mercer, 5 R.F.L. (2d) 224, at 231 (Ont. H.C. 1978).

[50] This principle was clearly recognized in Silverstein v. Silverstein, *supra* note 7, at 200, 1 R.F.L. (2d) at 256, 87 D.L.R. (3d) at 130:

conclusively presumes that joint contribution has been made by the spouses in the course of their marriage. Whether or not this presumption in fact reflects the true nature of the marriage in question is not a relevant consideration.

1. *Section 4(4)(a)*

The reference in this paragraph to any agreement other than a domestic contract clearly extends to an inter-spousal agreement which does not satisfy the requirements of section 54 of the FLRA and which cannot be considered to be a domestic contract. In addition, it is submitted that this paragraph may be interpreted so as to include any agreement made between one spouse and a third party, or between two third parties. The broad wording of this paragraph should not be overlooked.[51]

2. *Section 4(4)(f)*

As in the case of section 4(4)(e), this paragraph refers to "property" in general, and therefore pertains to both family and non-family assets. Although this section will undoubtedly be found to be applicable in many very diverse situations,[52] one circumstance which gives rise to some

---

> [A] Court may only depart from the *prima facie* right of a spouse to equal division of family assets, if it is satisfied that because one or more of the criteria set out in cls. (*a*) to (*f*) are established there would be inequity in an equal division. I am convinced that the Legislature did not intend the Court to be entitled to exercise any broad jurisdiction to divide family assets in accordance with what an individual Judge may think is fair and equitable in a particular case. The property law in this Province is of vital importance to married persons, and in my view that law not only should be but is in fact now clear and precise. The rule of law now is that there is equal sharing of family assets. . . . [A] Court should be loath to depart from that basic rule . . . .

This approach was supported in Taylor v. Taylor, *supra* note 27, and in Bregman v. Bregman, *supra* note 27.

[51] Ss. 4(4)(b), (c), (d), and (e) appear to be relatively straightforward and have therefore not been considered in detail. Note, however, that with regard to s. 4(4)(e), the question of whether or not a gift includes a gift from one's spouse was raised in *Silverstein*, *supra* note 7, at 203, 1 R.F.L. (2d) at 260, 87 D.L.R. (3d) at 133. It was there held that such a gift was not included:

> [T]he Legislature in using the word "gift" obviously intended that it was a gift from someone other than the other spouse. If "gift" in that section is to be considered as including a gift from the other spouse, then the Legislature would have perpetuated the artificial exercise of attempting many years later to determine the intention of a happily-married couple who were not contemplating a subsequent marriage breakdown when they bought their family home. I am convinced that the Legislature intended to end that artificial exercise not perpetuate it. Accordingly, it is my interpretation of that clause that the word "gift" means a gift from someone other than the other spouse.

See also Calvert v. Calvert, (Ont. H.C. April 9, 1979, no. 07475/77). With respect to gifts in general *see* Dittmer v. Dittmer, (Ont. Cty. Ct. December 13, 1978, no. 221/78).

[52] In *Bregman*, *supra* note 27, at 736, 7 R.F.L. (2d) at 215, 91 D.L.R. (3d) at 484, Henry J. offered, as an example, the situation which might result if in the course of a marriage a husband transferred all or a substantial portion of his non-family assets to his

question concerns the case of a spouse who has abdicated his or her family responsibilities in order to acquire non-family assets. The issue here relates to the nature of the presumption made in section 4(5) and the extent to which a court may look behind this presumption in applying section 4(1).

Consider, for example, the case of a husband who has consistently spent seven days a week working "day and night" at the office in order to acquire substantial non-family assets. Although he has provided for his wife and children in a material way, he has failed to fulfill any of his other family responsibilities. As section 4(4)(f) provides that a court may consider "any circumstance" relating to the acquisition of property, it may well be argued that this language is sufficiently broad to include the conduct of this "workaholic" and, in the proper case, to deny him an equal division of the family assets.[53]

In construing this section, however, other relevant sections of the Act must also be considered. Of particular importance in this regard is section 4(6), which provides that in making a division of the non-family assets, a court must, *inter alia*, consider the following two factors:

(i) the considerations set out in clauses *a* to *f* of subsection 4 and
(ii) the effect of the assumption by one spouse of any of the responsibilities set out in subsection 5 on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not a family asset.

If one chooses to consider the situation contemplated in section 4(6)(b)(ii) as also falling within the ambit of section 4(4)(f) (and therefore section 4(6)(b)(i)), section 4(6)(b)(ii) can only be viewed as being redundant and therefore unnecessary.[54] Viscount Simon has stated, "[T]hough a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed".[55] It is submitted that by specifically referring to two conditions in section 4(6)(b), the legislature clearly intended each to be considered as being exclusive of the other. Returning to our initial hypothetical, as the "workaholic" situation (wherein the abdicating spouse acquires greater non-family assets) falls precisely within the ambit of section 4(6)(b)(ii), it should not be perceived as being a relevant consideration under section 4(4)(f). In general, the fact that a spouse may

---

wife. After an equal division of the family assets on separation, the husband would be left only with his one-half share of the family assets. Henry J. felt that an inequity might result here and that s. 4(4)(f) would be applicable. Similarly, if one spouse had borrowed money to purchase the family sailboat and continued to maintain the debt, a court might find that it would be inequitable to divide this asset equally.

[53] *See also* Mercer v. Mercer, *supra* note 49, at 231.

[54] As will be demonstrated, the difference in terminology between s. 4(4)(f), which refers to property, and s. 4(6)(b)(ii), which refers to property that is not a family asset, does not affect this analysis.

[55] Hill v. William Hill (Park Lane), Ltd., [1949] A.C. 530, at 546, [1949] 2 All E.R. 452, at 461 (H.L.).

have abdicated his or her family responsibilities in order to acquire non-family assets is, in accordance with this analysis, not a factor which a court may consider in dividing family assets.

B. *The Subsection 6 Conditions*

As was discussed above, the declared purpose of section 4 is to recognize by an equal division of family assets the joint contribution made by spouses in the course of a marriage. Subsection 6 provides that a court *must* make a division of the *non*-family assets where a spouse has unreasonably impoverished the family assets, or where the result of a division of the family assets would be inequitable having regard to certain specified considerations. Each of these situations will now be examined in turn.

1. *Section 4(6)(a)*

It is evident that for this provision to be applicable in a given situation, not only must there be non-family assets in existence, but, at least at some point in time, there must also have been family assets which a spouse has "unreasonably impoverished". The issue of when an asset becomes a family asset is therefore particularly relevant, for the impoverishment of such an asset can presumably take place *only* after the asset has been so categorized. In any case, the phrase "unreasonably impoverished" is not defined in the Act and will undoubtedly attract extensive judicial attention. Suppose, for example, that the family yacht was sold and that the money so acquired was used to invest in a prudent business venture which has since proven to be most successful. Can it be said that the family assets have thus been "unreasonably" impoverished? What if the business venture, which was a reasonable investment at the time it was made, has since, due to the general economic environment, failed miserably? Would the fact that this transaction occurred fifteen years before a couple's separation (as opposed to two months before such a separation) make any difference? What if the yacht was simply given away to a "needy friend" who happened to be the brother of the husband? Is intent a relevant consideration here? Unfortunately, the Act provides little guidance in answering these questions.

2. *Section 4(6)(b)*

The interpretation to be placed upon this provision is equally unclear. The section provides that "[t]he court shall make a division of any property that is not a family asset where . . . the result of a division of the family assets would be inequitable in all the circumstances. . . ." Is this section to be construed as meaning that where the result of *any* division of the family assets *would* be inequitable having regard to the relevant circumstances, no division should be made and only the non-family assets should be divided *or*, does it mean that in addition to a division of the

family assets, whether it be in equal shares or otherwise, a division of the non-family assets should also be made? Because the language of the section is subject to either interpretation, resort must be had to the other sections of the Act. Whereas section 4(5) refers to both sections 4(4) and 4(6), section 4(1) provides only that the entitlement to an equal share of the family assets arises "subject to section 4(4)", not subject to sections 4(4) and 4(6). It is therefore submitted that in the proper case a spouse may be entitled to a division of both the family and non-family assets, the portions of each being determined only after close judicial consideration of the relevant provisions.[56]

In considering section 4(6)(b)(ii), it should be noted that the section refers only to the *effect of the assumption by one spouse of any of the subsection 5 responsibilities* on the ability of the other to acquire non-family assets. It does not, prima facie, require that one spouse assume more of the family responsibilities than the other or, conversely, that one spouse abdicate these responsibilities to the other. As was noted in the introduction to this part, however, section 4(5) conclusively presumes that joint contribution has been made by both spouses in the course of a marriage, and *because* of this presumption, each spouse is entitled to an *equal* division of the family assets. Where *both* spouses have in fact assumed these responsibilities, therefore, a court cannot in light of this presumption find such a division to be inequitable *pursuant to section 4(6)(b)(ii)*, for this would be contrary to its stated intent. It is therefore submitted that, in spite of the very broad wording of section 4(6)(b)(ii), this subparagraph *must* be read in light of the Act as a whole and therefore will only become applicable where there has in fact been a sufficiently significant abdication of responsibilities to rebut the otherwise conclusive presumption contained in section 4(5).[57] Where such an abdication can be

[56] It would seem that in Weir v. Weir, 6 R.F.L. (2d) 189, at 194 (Ont. H.C. 1978), a third alternative was postulated. Southey J. interpreted the effect of s. 4 as allowing a court to recognize a contribution by the wife to the husband's accumulation of non-family assets either by making a division of the property that is not a family asset or by making a division of family assets in unequal shares. It would appear that in *Silverstein*, *supra* note 7, the court would, in the proper circumstances, have been prepared to make both an unequal division of family assets and a division of non-family assets.

[57] It is clear that the case law has not in general adopted this approach. *See, e.g., Bregman, supra* note 27; *Brown, supra* note 49; and *Silverstein, supra* note 7.

In *Bregman*, almost a reverse conduct onus was placed upon the non-earning spouse, for the court found that the wife had in the course of the marriage "[devoted] herself to the management of the house, [and] the care and upbringing of the children". *Supra* note 27, at 729, 7 R.F.L. (2d) at 208, 91 D.L.R. (3d) at 477. It also found, however, that the husband had not only provided adequate financial support but had "acted as a good father to the children, spent time with them in the evenings and on week-ends and assisted in their daily care as a normal father does." *Id.* at 739, 7 R.F.L. (2d) at 218, 91 D.L.R. (3d) at 487. The court then stated:

> [Section 4(6)] imports a new concept into family law that recognizes the importance of the traditional role of a wife and mother in the financial success that her husband achieves. The intention of the Legislature is to recognize that contribution in the distribution of the *total* assets. That contribution is, to a greater or lesser degree, *except in the case of a wife who has abdicated her responsibility* as defined in s. 4(5), invariably present. In very many cases,

demonstrated, it should be noted, it is not necessary to establish a causal relationship between the assumption of responsibility and the acquisition of a particular property, but only between the assumption of responsibility and the acquisition of non-family assets.

V. SECTION 4 AND DEATH

The final issue to be discussed regarding section 4 concerns the effect of this provision following the death of a spouse. Section 4(3) provides that "[t]he rights under subsection 1 are personal as between the spouses but any application commenced under subsection 2 before the death of a spouse may be continued by or against the estate of the deceased spouse." It may prove useful to examine the implications of this section for testate and intestate succession.

> because the assets will be modest, division of the family assets will take account of the wife's contribution adequately. But where the accumulation of the assets by the husband is significantly in excess of the family assets, some further distribution of non-family assets may be necessary to recognize adequately the wife's contribution to their acquisition by the performance of her domestic role . . . (Emphasis added). *Id.*

It is submitted that this interpretation violates the intent of this section, specifically s. 4(5). The existence of "significant" (as opposed to "non-significant") non-family assets is nowhere referred to in s. 4 and is not a consideration which the legislature has chosen to place within the ambit of the courts. Furthermore, in light of the presumption made in s. 4(5), merely assuming an equal share of the responsibilities therein specified must not be viewed in the same light as the *abdication* by one spouse of his or her responsibilities.

In *Brown*, in addition to ordering an equal division of the family assets, the court awarded the wife $60,000 pursuant to s. 4(6)(b) of the Act in recognition of her contribution to her husband's previous business and her "major contribution to the salutary economic condition of the family throughout the marriage" (*supra* note 49, at 24, 1 R.F.L. (2d) at 348, 86 D.L.R. (3d) at 570). At no point, however, did the court find that there had been *any* abdication by Mr. Brown of his s. 4(5) responsibilities. Rather, the converse appears to be true (*id.*). This approach, it is submitted, is not in keeping with the strict wording of the Act and it is indeed unfortunate that the court did not here consider the applicability of s. 8.

In *Silverstein*, both ss. 4(6)(b) and 8 were applied. With regard to the former section, the court found that Mrs. Silverstein had assumed "the major share of the responsibilities of child care and household management" and that had she not done so, her husband "would not have had as much time as he did to devote to business and the earning of money with which to purchase that asset", (*supra* note 7, at 196, 1 R.F.L. (2d) at 251, 87 D.L.R. (3d) at 127). The court therefore awarded Mrs. Silverstein a portion of the non-family assets. Mr. Justice Galligan then stressed the fact that in accordance with s. 4(4), a court should only make an unequal division of the family assets "in clear cases where inequity would result, having regard to one or more of the statutory criteria set out in cls. (*a*) to (*f*)." (*supra* note 7, at 200, 1 R.F.L. (2d) at 256, 87 D.L.R. (3d) at 131). He examined the contribution which each spouse had made to the marriage and stated that, "Mr. Silverstein was the breadwinner and worked hard and long to provide the material comforts for his family and himself." (*supra* note 7, at 200, 1 R.F.L. (2d) at 257, 87 D.L.R. (3d) at 131). He therefore found that an equal division of the family assets would not be inequitable under the circumstances. It is submitted that having found that there had been no abdication by Mr. Silverstein of his s. 4(5) responsibilities, the fact that Mrs. Silverstein had assumed her responsibilities cannot *in light of the s. 4(5) presumption* and the wording of the Act entitle her to a portion of the non-family assets pursuant to s. 4(6)(b). *See also* O'Reilly v. O'Reilly, (Ont. H.C. February 22, 1979, no. 08171).

A. *Testate Succession*

Section 17 of The Succession Law Reform Act, 1977[58] provides that subject to subsection 2, a will is not revoked by the presumption of an intention to revoke by reason of a change of circumstance. Subsection 2, however, provides that such a presumption will be made (except when a contrary intention appears by the will) where *inter alia* the testator's marriage is terminated by a judgment absolute of divorce. As a section 4 entitlement arises prior to the granting of a decree absolute, it would appear that even if a testator dies following the division of the family assets (and on occasion the non-family assets), as long as his death is prior to the issuance of a judgment absolute, his will will not be revoked by a mere presumption to revoke based on this change in circumstance. If a spouse in this situation neglects to alter his will following a section 4 division, on his death the surviving spouse will receive all that is thereby devised to her while retaining whatever she has received pursuant to the section 4 division.

B. *Intestate Succession*

Where a person dies intestate in respect of property and is survived by a spouse and issue, in general the spouse is entitled to at least the first $75,000 net value of property held by the estate.[59] As was discussed earlier, a section 4 division of assets must occur prior to the termination of the marriage. It would therefore appear that if a spouse dies intestate following a section 4 division but prior to the termination of the marriage, the surviving spouse will be entitled both to the first $75,000 net value of property which was owned by the deceased at the time of his death (*i.e.*, *exclusive* of the assets which may have been owned by the deceased prior to the section 4 division but which are now owned by the spouse) *and* to those assets which were received by the surviving spouse as a result of the section 4 division.

Because both the FLRA and the Succession Law Reform Act came into force on the same date, it must be assumed that in drafting these statutes the legislature was aware of their potential interrelationship. By not excluding the application of either Act in these circumstances, it can only be assumed that the legislature intended these results to occur.

VI. A Concluding Note

In the preceding pages, an attempt has been made to examine various aspects of section 4 of the FLRA. Although only some of the issues which may potentially be raised pursuant to this section have been discussed, it is clear that this section will not be a stranger to Ontario's courts.[60]

---

[58] S.O. 1977, c. 40.

[59] Ss. 45-47.

[60] As stated in the Introduction, only s. 4 of the Act has been examined in detail. It should be recalled that other provisions of the Act, including s. 8 and Parts II, III and IV, may be relevant considerations in any given situation.