THE HOMEMAKER AND NON-FAMILY ASSETS: A CONSIDERATION OF THE ONTARIO FAMILY LAW REFORM ACT, SUBPARA. 4(6)(*b*)(ii)

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1. INTRODUCTION

Two medical practitioners, *A* and *B*, who are both qualified in a lucrative specialty, meet at a convention and are subsequently married. By mutual consent, *A* becomes a full time homemaker and, in due course, child care giver. *B* continues to work and provides ample financial support for the household. However, as *B*'s income is far greater than that needed to support the household, the bulk of it is invested in real estate. After twenty years, the marriage breaks down. The family assets are then valued at $250,000 and the non-family assets, the real estate investments, at $5,000,000. Does *A* have a claim to a share of the $5,000,000?

A may make an application under the Family Law Reform Act, paragraph 4(6)(*b*),[1] which empowers the court to divide non-family assets wherever the result of a division of family assets would be inequitable having regard to the considerations listed in paragraphs 4(4)(*a*) to (*f*).[2] More important, from the perspective of someone in *A*'s position, is subparagraph 4(6)(*b*)(ii) which governs the situation where the assump-

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[1] R.S.O. 1980, c. 152 [hereafter cited as the F.L.R.A.]. Para. 4(6)(*b*) provides as follows:

> The court shall make a division of any property that is not a family asset where
> . . .
> (*b*) the result of a division of the family assets would be inequitable in all the circumstances, having regard to,
> (i) the considerations set out in clauses 4(*a*) to (*f*), 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.

The possibility of a claim under s. 8 will not be considered partly because the recent Supreme Court of Canada decision in Leatherdale v. Leatherdale, *infra* note 3, provides clear authority for not regarding the discharge of sub. 4(5) responsibilities as a contribution within the meaning of s. 8, and partly because s. 8 deals with the determination of ownership of non-family assets. This article is concerned with the potential division of non-family assets that are unequivocally owned by the titled spouse.

[2] These factors include the following: agreements other than domestic contracts; the duration of the period of cohabitation during marriage; the duration of the period of living separate and apart; the date when the property was acquired; the extent to which the property was acquired by inheritance or gift; and any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering inequitable an equal division of family assets.

tion by one spouse of the joint marital responsibilities identified in subsection 4(5) (child care, household management and financial provision) has an effect "on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not a family asset".[3]

The problem posed in the above hypothetical, and in all marriages based on a traditional division of responsibilities between spouses, is whether homemaking, not amounting to more than a fair share of the joint contribution to the total responsibilities under subsection 4(5), entitles a spouse to a division of non-family assets under paragraph 4(6)(*b*). Certain decisions[4] rendered by the Ontario Court of Appeal possibly suggest not.[5] Moreover, the Supreme Court of Canada's recent decision in *Leatherdale v. Leatherdale*[6] arguably vindicates this view with the result that the homemaker whose spouse performs a fair share of the joint marital responsibilities might no longer be able, *qua* homemaker, to claim any entitlement to a share of non-family assets. It will be argued, however, that such an interpretation of *Leatherdale* is not justified and indeed runs counter to the decided cases in both the High Court of Justice and Court of Appeal of Ontario.

Before examining that case law and the Supreme Court decision in *Leatherdale*, the background of Ontario matrimonial property law as it relates to the division of assets on marriage breakdown will be briefly considered.

II. Background to the Legislation

The separate property regime prevailed in Ontario prior to the enactment of the F.L.R.A. In later years it was felt that this system did not equitably reflect the contribution to the marital relationship made by the spouse who assumed the traditional homemaking role. Critics recognized that this spouse performed essential duties and contributed fully to the marital partnership. However, due to the nature of this role, the spouse was precluded from acquiring assets, family or otherwise. On the other hand, the earning spouse, likewise contributing no more than a fair share to the relationship, was frequently able to achieve a financial surplus which could be used to acquire assets. Upon marriage breakdown, therefore, the earning spouse often would have title to

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[3] It should be noted that entitlement need not be found in both subparagraphs 4(6)(*b*)(i) and (ii). The court need only direct its consideration to both provisions without having to ground a claim in both. *See* Colville-Reeves v. Colville-Reeves, 37 O.R. (2d) 568, 27 R.F.L. (2d) 337 (C.A. 1982).

[4] Leatherdale v. Leatherdale, 31 O.R. (2d) 141, 118 D.L.R. (3d) 72 (1980); Young v. Young, 32 O.R. (2d) 19, 120 D.L.R. (3d) 662 (1981).

[5] One academic commentator, feeling that the Court of Appeal decisions in *Leatherdale* and *Young* effected a change in the interpretation of the law stated that "now. . . simply performing household duties will not provide a basis for a s. 4(6) claim": *see* McLeod, *Ontario*, in MATRIMONIAL PROPERTY LAW IN CANADA O-22 (A. Bissett-Johnson & W. Holland eds. 1982).

[6] 45 N.R. 40, 30 R.F.L. (2d) 225 (S.C.C. 1982).

assets, sometimes substantial, and the homemaking spouse would not.

This inequity in the separate property regime attracted criticism from various sources, including the Royal Commission on the Status of Women in Canada which included the following in its 1970 Report:

> [W]e recommend that those provinces and territories which have not already done so, amend their law in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon the dissolution of the marriage, each will have a right to an equal share in the assets accumulated during marriage otherwise than by gift or inheritance received by either spouse from outside sources.[7]

The position of the non-titled spouse was highlighted in *Murdoch v. Murdoch*[8] where the duties and labours of a wife were not seen to confer any right to a share in assets accumulated by the husband. This decision accelerated the movement toward matrimonial property law reform in all common law provinces.[9] In 1974 the Ontario Law Reform Commission proposed the continuance of the separate property regime during the lifetime of the marriage and its replacement by a community regime upon marriage breakdown.[10] All assets acquired by both spouses as a result of their joint or individual efforts during the course of the marriage would be divided equally.[11] Such a reform was required, according to the Report, in part because "the courts rejected jurisdiction to award a beneficial interest for the performance of 'normal' matrimonial duties. . .".[12] The Commission recommended that marriage be clearly identified as a form of partnership with the parties sharing equally in its fruits.[13] The Law Reform Commission of Canada also recommended the adoption of the deferred community property regime.[14] A study paper for the Commission noted that "[n]o Canadian case has given any wife a share of the home, its contents, or a share in any other property merely because of her role as a homemaker".[15] The Commission noted the role played by cultural conditioning in establishing a traditional division of marital responsibilities which in turn worked "to ensure that more property is bought with the funds of husbands than wives".[16]

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[7] REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA, at 410 (1970).

[8] [1975] 1 S.C.R. 423, 13 R.F.L. 185, 41 D.L.R. (3d) 367 (1973).

[9] The Ontario response was to pass the Family Law Reform Act, 1975, S.O. 1975, c. 41 as an interim measure dealing specifically with the Murdoch v. Murdoch type of situation and to initiate detailed consideration of more wide ranging reform.

[10] ONTARIO LAW REFORM COMMISSION, REPORT ON FAMILY LAW, PART IV FAMILY PROPERTY LAW (1974).

[11] Thus excluding property brought into the marriage by each spouse and property received by each spouse during the marriage by gift or inheritance.

[12] ONTARIO LAW REFORM COMMISSION, *supra* note 10, at 45.

[13] *Id.* at 49-52.

[14] LAW REFORM COMMISSION OF CANADA, REPORT ON FAMILY LAW 41-42 (1976).

[15] Wuester & Payne, *Family Property Law: Proposals for Reform*, in LAW REFORM COMMISSION OF CANADA, STUDIES ON FAMILY PROPERTY LAW 265 (1975).

[16] LAW REFORM COMMISSION OF CANADA, WORKING PAPER 8: FAMILY PROPERTY 6 (1975).

It was in light of these kinds of criticisms that the Legislature of Ontario examined matrimonial property law reform. Its proposals, however, did not include a community property regime which had been advocated by the Royal Commission on the Status of Women in Canada, the Ontario Law Reform Commission and the Law Reform Commission of Canada. The Attorney General argued that such regimes created too little flexibility and involved automatic disruption of commercial and financial assets on marriage breakdown, even when the end result would be of little benefit to the non-titled spouse.[17] He also claimed that in jurisdictions where community property was in effect there was a great tendency for couples to contract out of its application.[18] However, the government's proposals did undergo significant changes during debate. The original version listed the criteria now contained in subsection 4(4) by which a court could order an unequal division of family assets or the transfer of property owned by one spouse to another. However, no explicit reference was made to the assumption of family responsibilities as a ground for such division. In fact, these[19] were included only as the rationale for an equal division of the *family* assets. Nor did the Bill make any reference to the concept of marriage as a partnership. The original version died on the Order Paper. When reintroduced, the recognition of marriage as a form of partnership was identified as one of the purposes of the enactment.[20] However, its definition of family responsibilities and the grounds for dividing family and non-family assets remained essentially unchanged and the effect of the assumption of marital responsibilities was not identified as a factor.[21] However, following prolonged discussion of Opposition amendments to extend the rights of homemaking spouses in relation to non-family assets, the government cepted some Liberal proposals, the precursors to what are now subsections 4(5) and 4(6). The mover emphasized that the amendments would constitute a substantive recognition of the principle, already stated in the Preamble, of marriage as a partnership. The adoption of these proposals would oblige a court to consider a division of non-family assets where equity demanded it, without making such a division mandatory.[22] The Attorney General indicated that he shared the mover's view on the purported intent of the Act. He supported the amendments, stating that they strengthened the concept of marital partnership and joint responsibility.[23]

As this background indicates, the principal concern was adequate recognition of the property rights of a homemaking spouse who, through non-remunerative responsibilities made a full contribution to the marital

[17] LEG. ONT. DEB., 31st Leg., 2d sess. No. 16, at 601 (1978).

[18] *Id.* at 601-602.

[19] Family responsibilities were identified as the "mutual contribution by the spouses, whether financial or otherwise, to the family welfare": Bill 6, 30th Leg. Ont., 4th sess., 1977, cl. 4(5).

[20] Bill 59, 31st Leg. Ont., 1st sess., 1977.

[21] Bill 59, 31st Leg. Ont., 1st sess., 1977, cl. 4(3).

[22] LEG. ONT. DEB., 31st Leg., 2d sess. No. 19, at 711-12 (1978).

[23] *Id.* at 712.

partnership. The shortcomings of the separate property regime were resolved by a compromise between a full community regime and a regime based solely on judicial discretion. The present Act creates a *prima facie* community of property for family assets. Subsection 4(4) authorizes a court to vary an equal division where such a *division* would be inequitable. This would seem to require that one spouse be more deserving than the other, for example, because the assets were acquired during a marriage of extremely short duration or because one spouse failed to perform the required fair share of the responsibilities of the marital partnership.

In addition to these provisions, a specific power to divide non-family assets is given by subsection 4(6). Unlike subsection 4(4), subsection 4(6) does not require that the *division* be inequitable; rather that the *result* of the division be inequitable in light of the criteria listed in subparagraphs (i) and (ii). Subsection 4(6) may then be interpreted as providing for the division of non-family assets in two situations: where the deserving spouse may be insufficiently compensated by an unequal division of the family assets and the result, being inequitable, justifies a division of the non-family assets; and secondly, where both spouses are equally deserving and the court can find no reason to upset the *prima facie* entitlement of each to half the family assets. However, where the earning spouse, for example, has been able to acquire assets and the homemaking spouse has not, due to their respective marital responsibilities, that would be sufficient reason, in certain circumstances, to divide the non-family assets.

Bearing in mind this brief background to subsection 4(6), and in particular subparagraph 4(6)(*b*)(ii), theway in which the provision has been interpreted by the courts may now be considered.

III. The Jurisprudence

1. *Trial Judgments*

Subparagraph 4(6)(*b*)(ii) was first given detailed consideration in *Silverstein v. Silverstein*.[24] Mr. Justice Galligan noted that the wife assumed the major share of two of the three responsibilities identified in subsection 4(5), namely child care and household management:

> That assumption enabled Mr. Silverstein to devote more of his time to working in his business than would have been possible had he been required to assume his full share of the time and effort which goes into child care and household management. Therefore his ability to earn money to acquire assets was substantially increased.[25]

However, as His Lordship noted, the husband performed more than his full share of the financial responsibility as he "assumed the total responsibility for the making of financial provisions for the family".[26] However,

[24] 20 O.R. (2d) 185, 87 D.L.R. (3d) 116 (H.C. 1978).
[25] *Id.* at 195-96, 87 D.L.R. (3d) at 126.
[26] *Id.* at 196, 87 D.L.R. (3d) at 127.

he then concluded that Mrs. Silverstein should be awarded a share of the non-family assets under 4(6)(*b*)(ii) because a mere division of the family assets would not have recognized sufficiently the contribution of her homemaking role to his acquisition of assets.[27] This division was ordered even though no equitable reason was found to justify an unequal division of family assets.

In *Bregman v. Bregman*[28] subparagraph 4(6)(*b*)(ii) was examined more closely. Mr. Justice Henry stated:

> In my opinion, it [4(6)(*b*)(ii)] 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, 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. . . .[29]

Applying this reasoning to the hypothetical posed in the introduction to this article, *A* would clearly have a claim against the non-family assets of *B*. It should be emphasized that Mr. Justice Henry's judgment was not dependent on a finding that the earning spouse had failed to perform a fair share of subsection 4(5) responsibilities. Certainly no such finding was made on the facts. Mr. Bregman was found to have been the sole financial provider, a generous husband who engaged servants to assist Mrs. Bregman in her domestic responsibilities and, in relation to which, he himself made "an appropriate contribution as a good husband and father".[30] In addition His Lordship noted that a positive contribution to the acquisition of non-family assets would be made by all non-earning spouses who did not actually abdicate their subsection 4(5) responsibilities. *Bregman*, like *Silverstein*, therefore represents an application of the second situation identified above in which subparagraph 4(6)(*b*)(ii) may be invoked. In contrast, the decisions in *Weir v. Weir*[31] and *O'Reilly v. O'Reilly*[32] represent the first situation. In both cases, unlike in *Bregman* or *Silverstein*, one spouse had shouldered a greater burden of the mutual responsibilities under subsection 4(5) and therefore was seen to be more deserving. However, although these facts were held to bring the spouse within the scope of subparagraph 4(6)(*b*)(ii), no orders for the division of non-family assets were made, because these assets were not substantial and the inequity could be redressed by an unequal division of family

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[27] *Id.*

[28] 21 O.R. (2d) 722, 91 D.L.R. (3d) 470 (H.C. 1978), *aff'd* 25 O.R. (2d) 254, 104 D.L.R. (3d) 703 (C.A. 1979).

[29] *Id.* at 739, 91 D.L.R. (3d) at 487 [emphasis added].

[30] *Id.* at 738, 91 D.L.R. (3d) at 486.

[31] 23 O.R. (2d) 765, 96 D.L.R. (3d) 725 (H.C. 1978).

[32] 23 O.R. (2d) 776, 96 D.L.R. (3d) 742 (H.C. 1979).

assets. These decisions, though differing from those rendered in *Bregman* and *Silverstein*, are by no means inconsistent with them. The cases demonstrate the two ways in which subparagraph 4(6)(*b*)(ii) may be invoked.

However, an incompatible interpretation of subparagraph 4(6)(*b*)(ii) does appear to have been made by Mr. Justice Walsh in *Tylman v. Tylman*:

> [T]he Act, [F.L.R.A.], by s. 4(5), conclusively presumes that a joint contribution has been made by both spouses during the course of their marriage, and because of this presumption each is entitled to an equal division of their family assets by s. 4(1). It is only when there has been a sufficiently significant abdication of the responsibilities set out in [s.] 4(5) to rebut this otherwise conclusive presumption, that an inequity occurs requiring redress under s. 4(6)(*b*)(ii).[33]

Whereas Mr. Justice Henry argued that a claim might be validly made under subparagraph 4(6)(*b*)(ii) in every case where the *non-earning spouse had not abdicated* subsection 4(5) responsibilities (assuming other criteria were satisfied, such as the existence of substantial non-family assets), Mr. Justice Walsh maintained that such a claim could only be entertained when the *earning spouse had abdicated* responsibilities under subsection 4(5). It appears that Henry J. accepted that it is the *existence* of the marital partnership that requires the application of subparagraph 4(6)(*b*)(ii) in circumstances where one spouse would otherwise acquire a far greater share of the total assets. Mr. Justice Walsh, on the other hand, would invoke subparagraph 4(6)(*b*)(ii) only in circumstances where the partnership had *failed*, thereby using this provision not to reward a spouse for performing a fair (albeit non-asset producing) share of mutual responsibilities, but rather to punish the spouse who failed to perform a fair share. Therefore, in the hypothetical given in the introduction, *B*'s non-family assets would be subject to consideration under subparagraph 4(6)(*b*)(ii) only as a consequence of negative conduct by *B*, not positive conduct by *A*. To accept the contrary, Walsh J. argued, would be to accept:

> the false assumption that an equal division of family assets is always inequitable to the wife whenever the husband has substantial non-family assets. The Family Law Reform Act, 1978 does not, as I perceive it, introduce into this Province a system of community property between the spouses, which the acceptance of this false assumption would require.[34]

Presumably Walsh J. would see that false assumption at work in the *Bregman* decision. However, the reasoning in that case is not based on such a false assumption. Henry J. did not suggest that whenever one spouse has more non-family assets than the other, an equal division of family assets will result in inequity. Rather his decision shows that whenever the acquisition of substantial non-family assets by one spouse is facilitated by the way in which the spouses have divided their mutual responsibilities as defined in subsection 4(5), it may be inequitable in the result to divide only the family assets.

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[33] 30 O.R. (2d) 721, at 725, 117 D.L.R. (3d) 730, at 734 (H.C. 1980).
[34] *Id.*

2. *The Court of Appeal*

In *Leatherdale v. Leatherdale*[35] Mr. Justice Lacourcière, for the Court, noted that in the *Weir* and *O'Reilly* cases, inequity had been redressed by an unequal division of family assets whereas in *Silverstein* and *Bregman* it was redressed by the equal division of family assets and by a further division of non-family assets. His Lordship emphasized that such a divergence showed the flexibility of the provisions in allowing the Judges to deal with inequity, "not according to a broad discretionary approach to equity, but following the statutory criteria and the express recognition of the spouses' joint responsibilities in the marital relationship".[36] He did not suggest that the inequity must involve the failure of one spouse to discharge a fair share of mutual responsibilities. Indeed, he found that both parties had made a substantial contribution to their subsection 4(5) responsibilities but that this did not preclude the Court's consideration of Mrs. Leatherdale's claim under subparagraph 4(6)(*b*)(ii). However, on the facts, which indicated that the value of Mrs. Leatherdale's assets exceeded those of her husband, the Court did not consider that either the equal division or the result of such a division of family assets would be inequitable.

That the decision of the Court of Appeal in *Leatherdale* is consistent with the decision of the High Court of Justice in *Bregman* finds support in the subsequent case of *Whaley v. Whaley*.[37] The Court there made reference to *Leatherdale*, yet still felt able to follow *Bregman*. It found no reason to upset the *prima facie* equal division of family assets, yet found the result of that division inequitable due to the substantially greater non-family assets which had been acquired by the husband, in part by reason of the wife's assumption of all domestic responsibilities (even though the couple had no children).

In *Young v. Young*[38] the Court of Appeal again considered the application of subparagraph 4(6)(*b*)(ii) and its relationship with the discharge of marital responsibilities under subsection 4(5). Madame Justice Wilson, delivering the judgment of the Court, emphasized that the *prima facie* equal division of family assets should not be set aside by a too detailed examination of each spouse's performance of subsection 4(5) responsibilities:

> I do not think this means that each spouse need contribute equally to the discharge of each of these responsibilities and that every husband who puts more into his career than he does into his family is in peril of inequality. Conversely, I do not think the wife is exposed to unequal division because she elects to be a full-time homemaker and contributes little to the financial provision for the family.[39]

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[35] 31 O.R. (2d) 141, 118 D.L.R. (3d) 72 (C.A. 1980).
[36] *Id.* at 151, 118 D.L.R. (3d) at 82.
[37] 127 D.L.R. (3d) 63 (Ont. C.A. 1982).
[38] 32 O.R. (2d) 19, 120 D.L.R. (3d) 662 (C.A. 1981).
[39] *Id.* at 24, 120 D.L.R. (3d) at 666-67.

Her Ladyship further suggested that for entitlement to a share of non-family assets under subparagraph 4(6)(*b*)(ii) it must be shown that the "division of the family assets was inequitable because the assumption by her of *more than her fair share* of the s. 4(5) responsibilities enabled her husband 'to acquire, manage, maintain, operate or improve' [the non-family assets]".[40] This proposition, coupled with the intention not to put the earning spouse to "the peril of inequality" in the division of family assets, appears to lead to a clearly inequitable result. The earning spouse may discharge a fair share of subsection 4(5) responsibilities while "putting more into his career than he does into his family". Such discharge will quite possibly result in the acquisition of significantly more non-family assets than the non-earning spouse can acquire while performing an equally fair share. However, because the shares are deemed to be fair there can be no unequal division of family assets and no division of non-family assets. It is submitted that this is not only an inequitable result but one not supported by the wording of subparagraph 4(6)(*b*)(ii) which clearly speaks of the consequence of the assumption of *any* of the subsection 4(5) responsibilities and does not restrict its application to situations where one spouse has assumed more than a fair share of those responsibilities. However, even Madame Justice Wilson, in the *Young* decision, seemed to equivocate on the issue of whether subparagraph 4(6)(*b*)(ii) must be given a very narrow interpretation. In considering the wife's assumption of only her fair share of subsection 4(5) responsibilities, she stated:

> I do not think it was such as to make the division of family assets by the trial Judge inequitable *in all the circumstances of this case, particularly having regard to* the wife's failure to pay the rent of their apartment in 58 Fernwood to the husband as promised and the retention by her of the entire proceeds of the sale of 58 Fernwood. I would therefore reject her claim under s. 4(6)(*b*) of the Act.[41]

It would appear therefore that, even according to *Young*, the performance of no more than one's fair share of subsection 4(5) responsibilities is not automatically fatal to a claim under subparagraph 4(6)(*b*)(ii); it is but one factor to be considered in all the circumstances. It should be noted that in the circumstances of *Young* the division of assets (family and non-family) resulted in an award of approximately one-half of them to Mrs. Young without recourse to paragraph 4(6)(*b*). Clearly this case is distinguishable on its facts from both the situation in *Bregman* and the hypothetical case in the introduction and is far from being clear authority for a restrictive view of subparagraph 4(6)(*b*)(ii).

In a decision rendered after *Young*, but without reference to it, the Court of Appeal appears to have reiterated a broad interpretation of subparagraph 4(6)(*b*)(ii). The Court overturned the trial decision in *Couzens v. Couzens*[42] in which the non-earning spouse was awarded a

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[40] *Id.* at 24, 120 D.L.R. (3d) at 666 [emphasis added].
[41] *Id.* at 24, 120 D.L.R. (3d) at 667 [emphasis added].
[42] 34 O.R. (2d) 87, 126 D.L.R. (3d) 577 (C.A. 1981).

share of non-family assets under section 8 because of her assumption of the major responsibility for child care and household management. However, despite the fact that there was no suggestion that the non-earning spouse had performed more than a fair share of the responsibilities under subsection 4(5), the Court of Appeal held:

> Having regard to the almost 20 years duration of the cohabitation under the marriage and to the other circumstances made relevant by ss. 4(4)(*f*) and *4(5)*, we are satisfied that the division in equal shares of the main family assets, namely, the net proceeds of the sale of the matrimonial home, would be inequitable.[43]

The Court then decided not to make a division under paragraph 4(6)(*b*), not because its application was precluded by the failure of the non-earning spouse to discharge more than a fair share of subsection 4(5) responsibilities, but because "the result of this unequal division of the family assets would not be inequitable and there would be no need to resort to s. 4(6)(*b*)(ii) for the division of the Proctor and Redfern shares".[44]

3. *The Supreme Court of Canada*

The only case dealing with subsection 4(6) to have been considered by the Supreme Court of Canada is *Leatherdale v. Leatherdale*.[45] Chief Justice Laskin, for the Court, appears to have set forth a very narrow interpretation of its applicability. His Lordship stated that while subsection 4(6) is imperative and subsection 4(4) permissive, "[i]t is plain to me,. . . that both provisions (ss. 4(4) and 4(6)) are dependent upon a finding thereunder that the equal division of family assets is inequitable".[46] In a brief discussion of the decided cases, he suggested that such inequity has been found where one spouse assumed a greater share of the subsection 4(5) responsibilities, specifically mentioning *Silverstein* and *Bregman* as cases where "it was also found that the wife had carried the larger share of the joint responsibilities delineated under s. 4(5)".[47] He also noted that in two later cases (*Peterson v. Peterson*[48] and *Young v. Young*[49]) the Ontario Court of Appeal declined to make a division under subparagraph 4(6)(*b*)(ii) where it found "that there was no such larger burden of family responsibilities assumed by the wife as to entitle her to a share of the non-family assets under s. 4(6). . .".[50]

Unfortunately, Chief Justice Laskin's comments on subparagraph 4(6)(*b*)(ii) are very brief, for he endorsed the Court of Appeal's view that

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[43] *Id.* at 91, 126 D.L.R. (3d) at 581 [emphasis added].
[44] *Id.*
[45] *Supra* note 6.
[46] *Id.* at 53, 30 R.F.L. (2d) at 236.
[47] *Id.* at 54, 30 R.F.L. (2d) at 237.
[48] 12 R.F.L. (2d) 319 (H.C. 1979).
[49] *Supra* note 38.
[50] Leatherdale v. Leatherdale, *supra* note 6, at 54, 30 R.F.L. (2d) at 237-38.

it had no applicability on the facts of the case.[51] However, it is not clear that the Supreme Court of Canada has provided authority for restricting the applicability of subparagraph 4(6)(*b*)(ii) to cases where a non-earning spouse has carried out more than a fair share of family responsibilities and for holding that no matter how zealous a homemaker may be, or how many assets an earning spouse has acquired, there will be no entitlement to a division of the non-family assets unless such disproportionate share is found. Indeed, in drawing the distinction between sections 4 and 8, Chief Justice Laskin appears to have returned to a broad view of subsection 4(6):

> Section 4 comes into play upon the dissolution or breakdown of a marriage. It provides in subs. (1) for a *prima facie* equal division of family assets between the spouses. Subsection (4) then empowers the Court, upon a consideration of the factors set out in that subsection, to make a division of family assets which is not equal. Subsection (6) empowers the Court to have recourse to non-family assets *if a division limited to family assets would be inequitable*, having regard to the total assets, family and non-family, held by the parties or either of them. The purpose of the division contemplated in s. 4 is set out in subs. (5).[52]

Although *Bregman* was referred to, mistakenly the author would suggest, as a situation where the non-earning spouse was found to have performed more than a fair share of joint responsibilities, Chief Justice Laskin clearly identified the basis of the non-earning spouse's claim in that case; that is, Mrs. Bregman's assumption of "household management and child care was held to bring her into s. 4(6) as entitled to a share in the non-family assets *because the husband was thereby freed to acquire them*".[53] Furthermore, in supporting his statement that subsection 4(6) is only relevant where there has been an improper or inequitable division of family assets, Laskin C.J.C. quoted with approval the decision of the Court of Appeal in *Leatherdale* that recourse to subsection 4(6) shall be had "where the result of the division of the family assets would be inequitable in all the circumstances and having regard to the statutory factors".[54] These circumstances must certainly include the extent of non-family assets held by each spouse. Moreover, one of the statutory factors identified in subsection 4(6) is the effect of one spouse's assumption of the responsibilities in subsection 4(5) on the other spouse's acquisition of such assets. As Chief Justice Laskin noted in relation to *Bregman*, one spouse's performance of the domestic responsibilities may have a positive effect by freeing the other spouse to engage in activities resulting in the acquisition of assets. A finding of the assumption of more than a fair share of subsection 4(5) responsibilities would not therefore be mandatory to invoke subparagraph 4(6)(*b*)(ii). The comments made by the Chief Justice on the earlier cases and their finding,

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[51] It should be noted that the non-earning spouse in *Leatherdale* possessed significant non-family assets.

[52] *Supra* note 6, at 55-56, 30 R.F.L. (2d) at 239 [emphasis added].

[53] *Id.* at 54, 30 R.F.L. (2d) at 237 [emphasis added].

[54] *Id.* at 52, 30 R.F.L. (2d) at 235.

or failure to find, a disproportionate share of joint responsibilities undertaken by a spouse may be seen as an identification of a sufficient, but not a necessary, condition for the division of non-family assets (or a compensating, unequal division of the family assets). Indeed, before introducing those cases, the Chief Justice stated:

> In my opinion, there is nothing in the facts of this case to warrant alteration of the equal division of the family assets arrived at by the parties and to find a basis for a larger share to the wife under s. 4(4) or to give her a share of the non-family assets under s. 4(6) while leaving the equal division of the family assets undisturbed.[55]

Given the extent and the ownership of the two spouses' non-family assets, this conclusion seems correct. Unlike the situation in the hypothetical posed in the introduction, the earning spouse in *Leatherdale* had, after final division, fewer assets than did the homemaking spouse. However, even in such a situation, paragraph 4(6)(*b*) might still be applied to divide the non-family assets of one spouse if the other spouse has performed a disproportionate share of subsection 4(5) responsibilities. As Chief Justice Laskin noted, the facts in *Leatherdale v. Leatherdale* did not support such a finding.

IV. Conclusion

At the beginning of the article the facts of a hypothetical marital relationship and division of family responsibilities were presented. It is clear that whichever spouse becomes the full-time homemaker would forego asset-acquiring opportunities equivalent to those enjoyed by the earning spouse. These would be foregone in order to undertake a fair share of joint responsibilities which were non-asset producing. The manner in which the responsibilities are divided would assist the other spouse in the acquisition of assets. Consequently, on breakdown of the partnership, one spouse has title to substantially more assets than does the other.

It is this very kind of inequity that attracted much criticism and which led to the demand for matrimonial property law reform. The Family Law Reform Act[56] was an attempt to meet many of these criticisms. While it did not adopt a full community property regime, it did recognize the matrimonial relationship as a form of partnership in which the spouses shared equally in the various responsibilities. It also gave, *via* subparagraph 4(6)(*b*)(ii), an equitable discretion to the court to divide non-family assets in circumstances where the disparity in assets between spouses resulted in part from the way their joint responsibilities were divided, provided that the result of a division of family assets alone would be inequitable.

In the hypothetical, where each spouse exercises equal earning power, it is clear that there would be an inequity if spouse *A* were

[55] *Id.* at 53, 30 R.F.L. (2d) at 236.
[56] R.S.O. 1980, c. 152.

restricted to a share of the family assets. However, the inequity exists whenever one spouse is precluded from, while the other is facilitated in, acquiring the assets by the way subsection 4(5) responsibilities are divided, regardless of the spouses' respective occupational qualifications. This does not mean that the court must always divide non-family assets; it merely means that it must do so when, in the circumstances of the case, it is equitable to do so to recognize the contribution of each spouse to the marital partnership. *Bregman*[57] stated this position clearly. The later cases did not deal with subparagraph 4(6)(*b*)(ii) as carefully, but this does not mean that they have changed the law. The Court of Appeal in *Young*[58] and *Leatherdale*[59] was dealing with situations very different from those in the hypothetical and in *Bregman*,[60] yet even in those cases a consideration of an entitlement of the non-earning spouse under subparagraph 4(6)(*b*)(ii) was not precluded. The Supreme Court of Canada appears to have given subparagraph 4(6)(*b*)(ii) even less detailed attention in its decision in *Leatherdale*[61] and to have approved the holding of the Court of Appeal that it was not applicable on the particular facts of the case.

It should be re-emphasized that subparagraph 4(6)(*b*)(ii) can be applied in two distinct situations. Applying what may be called the broad view, it may be used to divide non-family assets where each spouse has performed a full and equal share of subsection 4(5) responsibilities but where the nature of the duties assumed by each spouse has facilitated the acquisition of non-family assets by one spouse but not by the other. However, subparagraph 4(6)(*b*)(ii) may also be used in situations where the key factor is one spouse's non-performance of a fair share and where an unequal division of family assets is considered on the facts to be an inadequate way to redress this inequity. In the more recent cases, the courts seemed to have focussed on the latter application. Moreover, the Supreme Court of Canada's decision in *Leatherdale* went so far as to state that *Bregman* was decided on the basis of one spouse's failure to perform a fair share of duties. Such a finding would have been a strange one on the facts of that case and was clearly not indicated in Mr. Justice Henry's judgment. However, despite the tendency to try and narrow the decision in *Bregman*, it is submitted, as argued above, that a careful reading of all the appellate decisions shows that they are quite consistent with the broad view of subparagraph 4(6)(*b*)(ii) taken in *Bregman*. Furthermore, this view is itself consistent both with the wording of the Act and the declared intention of the legislators. Of course, while the latter intent may not be appropriate for judicial consideration, judicial interpretation is appropriate for legislative consideration. Should it be the case that the lower courts are persuaded by the argument that a new, more limited role has been created for subparagraph 4(6)(*b*)(ii) than that

[57] *Supra* note 28.
[58] *Supra* note 38.
[59] *Supra* note 35.
[60] *Supra* note 28.
[61] *Supra* note 6.

set forward in *Bregman*, then the legislators should amend the legislation to remove any doubt as to its purpose and meaning. However, that should not be necessary. No appellate decision has precluded the division of non-family assets to recognize the contribution of a homemaker *qua* homemaker to the marital partnership even where that contribution constitutes no more than the homemaker's fair share of joint marital duties. It is to be hoped therefore, in appropriate circumstances, that the courts will continue to use subparagraph 4(6)(*b*)(ii) to prevent inequity to the homemaking spouse.