LAW REFORM COMMISSION OF SASKATCHEWAN DISCUSSION PAPER

COMMON LAW RELATIONSHIPS UNDER THE MATRIMONIAL PROPERTY ACT

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EXECUTIVE SUMMARY

This paper examines the question of whether property relations between men and women cohabiting outside marriage should be governed by *The Matrimonial Properiy Act.* Although the primary focus of the paper is on "common law" relationships, it also discusses issues surrounding possible application of the *Act* to other cohabitees, such as persons living in long-term same-sex relationships. The paper makes no formal recommendations, though a tentative approach to the issues is suggested to facilitate discussion. The paper is intended to provide background for public discussion of the issues. It will have achieved its purpose if it contributes to informed discussion.

In 1996, 14% of Saskatchewan residents lived in common law relationships, and approximately 25% had cohabited outside marriage at some time. Common law relationships are a social reality. The Commission concludes that the time is approaching when policy decisions about the appropriate legal framework for resolving property disputes between couples in non-traditional relationships must be made. Moreover, the present law is vulnerable to challenge under *The Charter of Rights and Freedoms.* The Supreme Court has held that different treatment can be accorded to married and common law couples only if the difference in treatment reflects a functional difference between the two types of relationship. The logic of this decision will almost certainly be extended to matrimonial property legislation.

After examining empirical studies of common law relationships, the Commission finds that a strong case can be made for the proposition that *long-term* common law partners behave in ways that make their relationship functionally equivalent to marriage as it is conceptualized in *The Matrimonial Property Act.* It is tentatively suggested that the *Act* should be amended to apply to long-term common law partners unless they contract out of the property regime established by the legislation.

The parallels between heterosexual common law unions and cohabitation of couples of the same sex are obvious. Nevertheless, it cannot be lightly assumed that same sex cohabitation should be regulated by the same legal regime as common law relationships. The cultural and social context of same sex unions is different. There is no persuasive evidence that a majority of long-term same sex couples model their relationship after the norms of heterosexual marriage, or would seek to assume the incidents of marriage on anything other than a consensual basis. A stronger case can be made for pennitting same-sex cohabitees to contract to assume the obligations imposed on spouses by *The Matrimonial Property Act* rather than imposing the *Act* on them.

I. INTRODUCTION

This paper examines the question of whether property relations between men and women cohabiting outside marriage should be governed by *The Matrimonial Property Act.* Although the primary focus of the paper is on common law" relationships, it also discusses issues surrounding possible application of the *Act* to other cohabitees, such as persons living in long-term same-sex relationships. The paper makes no formal recommendations, though a tentative approach to the issues is suggested and argued to facilitate discussion.

When the Commission canvassed public opinion as part of the research for its report, *The Matrimonial Property Act: Selected Topics,* it found that many people are uncertain about the issues and problems involved in extending matrimonial property legislation to couples who are not legally married. But common law relationships are increasingly common, and the courts have akeady been called upon to adjudicate the rights of individuals cohabiting outside of marriage. We believe that the time is approaching when policy decisions about the appropriate legal framework for resolving property disputes between couples in non-traditional relationships must be made. This paper is intended to provide background for public discussion of the issues. It will have achieved its purpose if it contributes to informed discussion.

In 1996, 14% of Saskatchewan residents lived in common law relationships, and approximately *25%* had cohabited outside marriage at some time[t]. The number of common law relationships is increasing, up from 6% in *1985.* Common law relationships are most common among young people. Statistics Canada estimates that 42% of Canadian couples less than 30 years of age are cohabiting outside marriage.[2] But common law relationships are not confined to young couples. According to Statistics Canada, common law relationships are increasingly seen as an alternative to marriage rather than as a form of "trial marriage". If the incidence of common law relationships continues to increase at the present rate, they will be as common as legal marriage by 2022g. Saskatchewan law recognizes established common law relationships for some purposes, including child-support, spousal maintenance, and pension rights. The piecemeal process of reform has not yet reached property rights, but the time when it will be necessary to do so cannot be long delayed.

The property rights of common law spouses now routinely come before the courts m Saskatchewan and elsewhere in Canada. Although matrimonial property legislation in Saskatchewan

'Statistics Canada, *Report on the Demographic Situation in Canada 1996,* 1997.

[2]Statistics Canada, *Mothers & Children, One Decade Later,* 1996.

[3]Statistics Canada, *Report on the Demographic Situation in Canada 1996,* 1997.

(and all but one other province) applies only to legally married couples, the courts have applied the doctrines of resulting and constructive trust to award a share of one common law spouse's property to the other in cases in which it would be unjust not to take spousal contribution to acquisition of property into account'. This development is evidence that property relations between common law spouses are a matter of increasing significance. Common law cohabitation raises many of the issues that led to adoption of matrimonial property law to correct inequities between married couples. The general principles of trust law can prevent injustice in some cases, but it is limited in its scope. Unlike matrimonial property legislation, trust law cannot take into consideration the indirect and often intangible contributions cohabiting spouses make to one another over the course of a long relationship[2]. Trust law may produce appropriate results in some cases, but not in others.

Because the courts have a more limited remedy available to them in cases involving long-term common law relationships than in cases under *The Matrimonial Property Act,* the present law is vulnerable to challenge under *The Charter of Rights and Freedoms.* In a recent decision, *Miron v. Trudel,* the Supreme Court of Canada held that different treatment can be accorded to married and common law couples only to the extent that the difference in treatment reflects a functional difference between the two types of relationship. Thus it was held that a statutoly definition of "spouse" that deprived a common law spouse of insurance monies payable to the "spouse" of a deceased policy holder infringes the *Charter*[3]. Common law spouses are denied relief under *The Matrimonial Property Act* by reason of status alone; the *Act* does not apply even if the financial arrangements during cohabitation were functionally indistinguishable from those in a conventional marriage. The blanket exclusion of common law spouses from matrimonial property legislation can be expected to produce *Charter* litigation. In a case comment on *Miron v. Trudel,* a well-known authority on family law, Winnifred Holland, predicted that the logic of that decision will ultimately be extended to matrimonial property legislation. She also observed that *"Charter* litigation is lengthy, time-consuming and costly, and it would preferable to have the issues resolved by legislation.[4]

There is wide acceptance that the law governing property relations between common law spouses needs to be reconsidered. Law reform agencies in Canada and elsewhere in the

'See Herauf, Wison and Kovatch, "Saskatchewan" in MacLoed and Mamo, *Matrimonial Property Law in Canada,* 1993, p. S-12.

[2]See *Becker v. Petkus* [1980] 2 SCR 834.

[3](l995) 13 RFL (4th) 1 (SCC).

[4] W. Holland, "*Miron v. Trudel*: Unmarried Couples and the *Charter",* (1995) 13 RFL (4th) 131.

Commonwealth have researched the issue. Several Australian states have adopted legislation giving some form of recognition to common law unions in matrimonial property statutes. Newfoundland recently became the first Canadian province to give legislative recognition to the property rights of common law spouses. However, these law reform efforts have not found a consensus about the treatment that should be accorded to common law relationships in matrimonial property law. Two conflicting views or models of the common law relationships appear to be at issue. On one hand, most people recognize that a common law relationship can be a marriage in all but name, characterized by shared responsibilities and mutual dependance. On the other hand, most people are also aware that a couple may choose not to marry because they wish to retain independence and avoid the legal obligations of marriage. Both views are at least partial truths. Recent legislation and policy recommendations seek a balance between them, but the weight given to each model of the common law relationship differs substantially from jurisdiction to jurisdiction.

The Newfoundland *Family Law Act* preserves a clear distinction between marriage and common law relationships. Common law spouses are entitled to opt into the matrimonial property regime established by the *Act.* Thus they are given an opportunity to define their relationship as one that attracts the incidents of marriage. However, if there is no contractual agreement to opt in, the *Act* does not apply. This approach has also been recommended by the Alberta Law Reform Commission', The Quebec Council on the Status of Women, and several academic commentators.[2]

The Ontario[3] and Nova Scotia[4] law reform commissions place emphasis on the similarity between established common law relationships and marriage. They would not require common law spouses to make a deliberate decision to opt into matrimonial property legislation. However, both commissions conclude that short-term cohabitation should not be regarded as equivalent to marriage for purposes of matrimonial property law. The Nova Scotia Commission would apply matrimonial property law only to common law relationships "of some permanence"; Ontario would apply matrimonial property law if the common law spouses have a child or have cohabited for three years.

'Alberta Law Reform Commission, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* ", (Report No. 53), 1989.

[2]E.g. C. Davies, "Cohabitation Outside Marriage: The Path to Reform", in M. E. Hughes and E. D. Pask, *National Themes in Family Law,* 1988.

[3]Ontario Law Reform Commission, *Report on the Rights and Responsi bilities of Cohabitants under the Family Law Act,* 1993.

[4]Nova Scotia Law Reform Commission, *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act,* 1996.

Both would also permit common law spouses (like legally married couples) to opt out of the matrimonial property regime.

Australia and New Zealand have produced what amounts to a compromise between the "opt in and "opt out" approaches outlined above. Under the New South Wales *Defacto Relationships Act, 1984,* the court may "adjust" property rights between common law spouses if trust law would not achieve an equitable result in the circumstances of the case. In making the "adjustment," the court may consider some, but not all, of the factors relevant in a property division between married persons[1]. Similar legislation has been adopted in three other Australianjurisdictions. The Queensland Law Reform Commission has recommended a modified version of the New South Wales legislation. In its view, if the court has concluded that trust law is not an appropriate means of resolving a property dispute, matrimonial property legislation should apply as if the parties were married[2]. A similar proposal has been advanced in New Zealand[3].

It is worth noting that neither the Commission's consultation with the public nor any of the proposals for reform canvassed above evidence rigid attitudes toward common law relationships. Common law relationships are now a social reality, and the need to place them in an appropriate legal framework is recognized by most people. Differences of opinion have to do with the *degree* of legal control that is appropriate. The issues are not abstract, but turn instead on the nature of common law relationships as they actually exist in Saskatchewan and other jurisdictions with similar experience. We believe that if the issues are clearly understood, realistic options can be formulated. Informed public discussion will point the way toward a consensus rather than exacerbate differences.

A consideration of the legal status of common law relationships inevitably leads to discussion of a related, but perhaps more controversial issue: The legal status of same sex cohabitees. If the common law relationship should be treated for some purposes in law as the functional equivalent of marriage, it would seem to follow that it may appropriate in some cases to apply similar legal rules to same- sex cohabitees. This issue will be discussed in the last part of this paper.

[1]The legislation followed recommendations of the New South Wales Law Reform Commission *(Defacto Relationships,* 1983).

[2]Queensland Law Reform Commission, *Defacto Relationships,* 1992.

[3]Working Group on Matrimonial Property and Family Protection, *Report to the Cabinet Social Equity Committee,* 1988. Matrimonial property law would be applied to common law relationships if "justice so requires", or alternatively, a rebuttable presumption that matrimonial property law should apply would be established.

II. THE COMMON LAW RELATIONSHIP

Common law relationships cannot easily be forced into a single mold. Some are temporary alliances. Others are lifelong commitments. In some cases, a couple drifts into long-term cohabitation without considering the legal status of their union; in others a deliberate choice is made to live common law in order to avoid the legal entanglements of marriage. Any satisfactory legal framework for common law relationships must recognize this diversity. It is important, therefore, to look carefully at the realities of common law cohabitation before attempting to formulate policy.

Although common law relationships have not been studied in detail in Saskatchewan, there is enough available empirical data to ground informed discussion. Statistics Canada has conducted Canada-wide research on changing family patterns, and in 1984 the Alberta Law Reform Commission published a *Survey ofAdult Living Arrangements* in Alberta[1]. The findings of these studies are almost certainly relevant in Saskatchewan. It is clear that the common law relationship has become a significant social institution that is accepted by a large part of the community. As Christine Davies wrote in a comment on the Alberta study, "We cannot blinker our eyes and escape reality. In *fact* heterosexual couples are living together in marriage-like relationships. "[2]

The studies also (and perhaps more importantly) address the question ofjust how marriage-like common law relationships really are. If statistical averages are considered, some important differences between common law relationships and marriage are evident. The Alberta study found that the average length of time common law interviewees had been living together was 2.08 years, much shorter than the average for married interviewees of 13.33 years. This suggests that common law relationships are usually of shorter duration than marriage, and more apt to be dissolved. The study also found that work force participation is 20% higher among women in common law relationships than among married women, and that significantly fewer common law spouses describe themselves as full-time homemakers. A minority of common law spouses pool financial resources, whereas a majority of married couples do. The study also found that fewer common law spouses than married couples are home owners, and fewer of the common law home owners are joint owners of their residence.

Averages can be misleading, however. The studies have also shown that there is a wide range of variation in the life styles of common law couples. It is important to recognize that the averages

[1] Alberta Institute of Law Research and Reform, *Survey of Adult Living Arrangements (Research Paper No. 15),* 1984. -

[2] C. Davies, "Cohabitation Outside Marriage: The Path to Reform" in M. Hughes and D. Pask, *National Themes in Family Law,* 1988.

are heavily weighted by the prevalence of common law cohabitation among people less than 25 years of age. These include a disproportionately high percentage of short-term relationships in which expectations are very different than in longer term common law relationships. However, recent data collected by Statistics Canada suggest that the proportion of long-term common law relationships is increasing. Statistics Canada found that about one-quarter of common law couples marry within three years of beginning cohabitation, but 51% of those who do not marry stay together for more than three years. Of these, 33% became parents within three years of beginning cohabitation.

The fact that there is a growing number of long-term common law relationships is of particular importance in any discussion of the appropriate property regime to apply to common law couples. The Alberta study showed that differences between common law and married couples with respect to pooling financial resources and joint ownership of assets largely disappears in common law relationships of more than 10 years duration. Couples in short-term "trial marriages" usually perceive their relationship as something different than traditional marriage. They typically do not pool resources, purchase property together, or make long-term financial commitments to one another. But if the relationship survives for more than a few years, the Alberta study suggests that common law couples begin to behave more like their married counterparts. A home is often purchased jointly. Financial resources are pooled in ajoint bank account, and the mutual obligations of parenthood are often assumed.

56.7% of respondents in the Alberta study described their relationship as a "common law marriage," while the remainder usually characterized themselves as living in a "close personal relationship." The Alberta Commission attached significance to this distinction, noting that those who described their union as a "common law marriage" were more apt to have a life style similar to the community expectation of legal marriage. The study found that there was a strong correlation between the length of cohabitation and characterization of the relationship as a "common law marriage."

The reasons why couples live common law rather than marrying also point to important differences in expectations and life style. An English study identified four basic reasons for cohabitation outside marriage: (1) rejection of traditional marriage as a matter of principle; (2) rejection of state-imposed financial obligations that attach to marriage;(3) legal impediment to marriage; and (4) the desire to postpone marriage or enter a "trial relationship" before making a permanent commitment[1]. The Canadian data appear to confirm this analysis.

Since the liberalization of divorce laws in 1968, few people have entered common law relationships because they are unable to many. However, some individuals do not obtain a divorce before beginning cohabitation with a new partner.

[1]M. Freeman and C. Lyon, *Cohabitation Without Marriage,* 1983.

Some may not seek a formal divorce for religious or social reasons, and some common law partners may be within prohibited degrees of consanguinity and thus unable to many. In fact, the percentage of Alberta common law couples who gave "inability to marry" as a reason for living common law is about 25%, higher than might have been expected.

The high rate of participation of young people in common law relationships suggests that trial cohabitation and cohabitation between persons who are not yet ready for a long-term commitment is an important social phenomenon. This type of common law relationship appears to explain the short average duration of cohabitation. People in long-term common law relationships, on the other hand, do not regard their cohabitation as a "trial marriage" or view it as a less permanent commitment than legal marriage.

No doubt, some common law spouses seek to avoid the financial obligations of marriage. Evidence is provided by the low average rate of pooling of financial resources and low percentage of common law couples who own assets jointly. This category of relationship overlaps with short-term "trial marriages", but is not confined to it. During the course of our research, we encountered several examples of older couples, at least one of whom had previously been married, who choose a common law union for the express purpose of maintaining separate property. In many cases, a primary intention was to protect property for the benefit of children of the first marriage. However. it should not be concluded that the only principled reason for rejecting the institution of marriage is avoidance of state-imposed financial obligations. Traditionally, marriage has been regarded as a religious as well as legal ~nsti~tion, and people married as much for religious as legal reasons. It is significant, therefore, that only 25% of common law couples interviewed in the Alberta study said that religion was important in their lives.

As Christine Davies notes, legal marriage remains the norm for heterosexual couples. Those who reject the institution of marriage have chosen to do so. But it cannot be concluded that the decision to live common law, any more than the decision to many, is always made after careful consideration of the legal consequences of the choice. On one hand, it is likely that young people entering a trial cohabitation do so with the expectation that no legal obligations are assumed, at least in the short term. On the other hand, some researchers have found that many people in long-term common law relationships believe that they have legal rights similar to married couples, including both a right to financial support (which is usually the case) and a right to share in "matrimonial" property (which is usually not the case)[1]. Moreover, the changing attitudes over the course of cohabitation identified in the Alberta study suggest that many couples may drift into a long-term relationship without careful consideration of the legal consequences. What began as a trial relationship with no firm expectation of permanency may become

[1]Ontario Law Reform Commission, above.

a "common law marriage" in which the expectations of the parties are no different from those of many legally married couples.'

In sum, although common law relationships are varied, the empirical data points to an important dichotomy between short and long term relationships. Many of the differences in expectations and life styles among common law couples appear to correlate with length of cohabitation. Short-term cohabitees are typically young people who are living together in what has become a socially accepted manner without a fixed expectation that the relationship will endure. This type of common law relationship is quite different from traditional marriage. Most long-term common law relationships are more like traditional marriages. Overtime, mutual dependence increases. Ifthere are children in the relationship, parental responsibilities no different than those of legally-married parents inevitably affect expectations and roles. For these people "common law marriage" is a functional marriage.

III. POLICY CONSIDERATIONS

Because common law relationships where once regarded as strictly extralegal unions, it is not surprising that legal regulation has developed in an uneven fashion[2]. In six provinces, one common law spouse may be ordered to pay support to the other if the parties separate. In Saskatchewan, the obligation arises if the parties have a child or have cohabited for a period of at least five years[3]. Newfoundland permits common law couples to contract to be bound by the province's matrimonial property regime[4]. No other province makes any legislative provision for division of property between common law spouses, but Manitoba does extend possessory rights in the matrimonial home to common law cohabitees[5]. Cohabitation contracts, which might include support and property division

[1]5ee C. Bruch, "Property rights of defacto spouses including some thoughts on the value of homemaker's services" (1976) 10 *Family Law Quarterly.*

[2]For a summary of current Canadian law see W. Holland and B. Stalbecker-Pountney, *Cohabitation: The Law In Canada* (loose-leaf).

[3]*TheFamilyMaintenanceAct,* S.S. 1990-91, c. 2(1)(iii).

[4]*FamilyLawAct,* R.S.N. 1990, c.F-2, s.63.

[5]*The Family Maintenance Act,* R.S.M. 1987, c.F-20, s.14(1). The right arises if the parties have a child or have cohabited for five years. In Ontario, their are conflicting decisions on the application of possessory rights to common law spouses. See N. Bala and M. Cano, "Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together" (1989), 4 *Canadian Family Law Quarterly.* –

clauses, were once regarded as contrary to public policy', but now appear to be enforceable in Saskatchewan[2]. Three provinces make express legislative provision for recognition of cohabitation agreements.

Designing an appropriate legal framework is complicated by the variety of common law relationships. Because the expectations and needs of common law spouses differ, many commentators argue that all should not be treated in the same way. Similarly, it has been argued that a functional equivalence to marriage for one purpose (such as support) does not necessarily imply equivalence for another (such as property division)[3]. Policy reasons for and against recognition of common law relationships generally, or for specific purposes, have been reviewed by legal commentators and in law reform commission reports. These are useful guides to policy issues, but it should be noted that the discussion is often based on anecdotal information about the real experiences of common law couples[4]. Too often the conclusions reached by commentators appear to reflect untested, *apriori* assumptions about the expectations of common law spouses.

The central argument against attaching legal consequences to common law cohabitation places emphasis on individual autonomy. R. Deech suggests that the expectations of common law cohabitees are different from those of married couples. Cohabitants, Deech notes, "have freely chosen not to marry" for variety of reasons, all of which amount to rejection of the social and legal norm of marriage. The trend in law reform toward imposing the incidents of marriage on cohabitees is regarded by Deech as an abridgement of the freedom of individuals to choose alternative life styles. "There ought to be a corner of freedom for such couples to which they can escape and avoid family law," Deech writes[5]. Deech would not give legal status to cohabitation for any purpose. Other commentators who place emphasis on autonomy and choice recognize a need to place legal

[1] *Fendry v. St. John-Mildmay,* [1938] 3 All E.R. 40 (H.L.).

[2] *Chrispen v. Topham* (1986), 59 Sask. R 145 (C.A.).

[3] See C.Davies, above, where this argument is developed.

[4] The Alberta Law Reform Commission's report *Towards Reform of the Law relating to Cohabitation outside marriage* is an exception, since it was grounded in the Commission's empirical study. Ironically, its recommendations have been rejected. For a summary of the policy debate and bibliographical references, see Orlando, "Exclusive Possession of the Family Home: The Plight of Battered Cohabitees", (1987) 6 R.F.L. (3d).

[5] R. Deech. "The case against legal recognition of cohabitation" in J. Eekelaar and S.N. Katz, *Marriage and Cohabitation in Contemporary Societies,* 1980.

obligations on cohabitees for some purposes, but not for others. Thus, for example, C. Davies recommends that a common law spouse with custody of a child of the relationship should have possessory rights in the matrimonial home, but would not provide for division of matrimonial property between common law spouses'.

Most other arguments against recognition are variations on the autonomy theme. Both Deech and Davies argue, for example, that the institution of marriage was designed to protect women in an age in which they were assumed to be the "weaker sex". It is, they argue, inappropriate to impose the obligations of marriage on women who reject this model of marriage. Davies suggests that "once a woman marries it is all too easy for her to fall into the traditional role expected of her. She subordinates her own career goals for her family [and] becomes largely dependent on her husband." Marriage is no longer as monolithic an institution as this point of view contends, but it remains a special status that should not, in the view of some observers, be extended without caution. Thus the New South Wales Law Reform Commission argues that marriage is now best viewed as a public commitment to assume certain mutual obligations. A common law union may (or may not) function like a marriage, but in any event, it lacks the essential element of public commitment. Cohabitees have chosen, by not marrying, to avoid the obligations of marriage[2].

The central argument in favour of legal recognition of cohabitation rests on the proposition that at least in long-term common law unions, the relationship is functionally equivalent to marriage. The Ontario Law Reform Commission argues that

> Many relationships formed by unmarried couples resemble marriages. Common law spouses pool their resources and make joint economic plans, they provide each other financial and emotional support, and they raise children. Society values these functions. To the extent that the *Family Law Act* provides an effective legal regime to deal with the economic consequences of marriage, it should apply equally to unmarried heterosexual couples in functionally similar relationships[3].

On this view, people in long-term common law relationships need the same protections as married couples. The focus of the argument is functional equivalence, not the deliberate choices made by cohabitees. As C. Bruch has observed, the life style choices made by common law spouses, no less than legally married couples, create expectations of mutual support and obligation that ought not to be ignored by the law. Opponents of recognition attach significance

[1]C. Davies, above.

[2]New South Wales LRC, above.

[3]Ontario Law Reform Commission, above.

to the fact that the reasons for choosing to cohabit are varied, but so are the reasons for marrying. In neither case can it be assumed that the legal consequences of the choice have been fully understood or considered'.

There is no doubt merit in both arguments based on autonomy of choice and on the functional equivalence of common law unions with marriage. The studies of common law relationships discussed above clearly indicate that some people do enter common law relationships to avoid the obligations of marriage, but they also show that many couples in long-term common law relationships have lifestyles and expectations functionally similar to marriage. It is hard to disagree with Davies' general assertion that the argument against according all common law cohabitees a status akin to marriage is "overwhelming". That, however, is not the real issue. *The question that must be addressed is whether it is possible to identify a class of common law cohabitees who should be brought within the ambit of matrimonial property law.*

We have reached the tentative conclusion that such a group does exist. Marriage is not a monolithic institution, and is becoming more varied as family patterns change. Nevertheless, marriage in our society typically entails a distinct set of expectations that makes it possible to define a paradigm of the marriage relationship. The purpose section of *The Matrimonial Property Act* points to those aspects of the marriage relationship that are relevant to property division between spouses:

> 20. The purpose of this Act ... is to recognize that childcare, household management, and financial provision are joint and mutual responsibilities of 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 that entitles each spouse to an equal distribution of the matrimonial property.

The studies of common law cohabitees discussed above demonstrate that similar "mutual responsibilities" are accepted by most people in long-term common law relationships. Long-term cohabitees typically pool their financial resources, jointly own a home, and share responsibility for child care and other domestic duties in the same manner as many married couples. These are indicia of a web of mutual dependance and obligation that create a relationship similar to marriage as it is conceptualized in section 20 *of TheMatrimonialPropertyAct.* For the purposes the Act is intended to achieve, there is a functional equivalence between marriage and long-term common law relationships. In our view, there is no reason apart from history for treating the property relations of long-term cohabitees differently from those of married couples.

If *The Matrimonial Property Act* is not amended to bring long-term cohabitees within its ambit, the courts will likely find that

'C. Bruch, above.

the legislation violates *The Charter of Rights and Freedoms*. *InMiron v. Trudel,* the supreme Court adopted a functional equivalence test. Although it applied the test to rights under an insurance policy, not matrimonial property, the court clearly signaled that common law relationships should be treated like marriages unless it can be shown that, in the particular context, there is a significant difference between marriage and cohabitation. The considerations outlined above suggest that there is little reason to regard long-term common law relationships as significantly different than marriage in the context of matrimonial property law.

If the functional equivalence of marriage and long-term common law relationships is accepted as a matter of fact, most of the arguments against extending matrimonial property legislation to them lose their force. However, two aspects of the counter arguments require further comment. The first is the argument advanced by the *New South Wales Law Reform Commission* that marriage is distinguishable because it is a deliberate, public assumption of a status with defined incidents. The public aspect of marriage is clear evidence of intention to create a relationship with recognized responsibilities. However, expectations and responsibilities can be created by a pattern of behaviour as well as by the formal act of marriage. *The Matrimonial Property Act* imposed new legal obligations on spouses to give recognition to the expectations and social obligations associated with marriage. These expectations and obligations were not recognized in law as incidents of marriage prior to adoption of the legislation. The realities of marriage, not the legal status it creates, justified the legislation. If long-term common law relationships are functionally similar, the mechanism by which the status is created is less important than the fact that the status entails social expectations that are usually associated with marriage. This analysis is inherent in the approach adopted by the Supreme Court in *Miron v. Trudel.* In concluding that the common law relationship in that case was equivalent to marriage, the court looked to the way the parties functioned in their relationship, not the legal status of their union.

If a common law relationship that is functionally equivalent to marriage is brought within the scope of matrimonial property legislation, the freedom of choice of the cohabitees is no more curtailed than that of married couples. In both cases, the legislation protects the rights of spouses by recognizing their legitimate expectations. However, it can be argued that the common law relationship is more amorphous than marriage. The obligations the parties expect to assume differ from case to case. It is suggested by the critics that while it might be acceptable in principle to impose *The Matrimonial Property Act* on common law spouses who have governed their affairs like a married couple, it is difficult to devise a legal test of equivalence that would be workable in practice.

Certainly, there is a danger of over or under inclusiveness when a class of cohabitees is identified for a specific legal purpose. However, as a matter of fact, the correlation between length of cohabitation and functional similarity to marriage is strong enough to provide the basis for policy making. The matrimonial property regime should not be imposed on young couples in "trial marriages" who keep their assets separate. In our view, limiting recognition to long-term

relationships would avoid significant over inclusiveness. There are no doubt some common law couples in long-term relationships who have made a deliberate decision to avoid the "entanglements of marriage", and who have arranged their affairs accordingly. But these people are a minority, and, perhaps more important, can be expected to protect their autonomy by contracting out of the matrimonial property regime. The majority of long-term cohabittees who, like most married couples, do not closely consider the legal consequences of separation, should not be penalized to accommodate those who are better situated to protect their own interests. Moreover, marriage itself is not monolithic. Many married couples do not fit the paradigm as well as many common law spouses, but this does not undermine the policy of the legislation. *The Matrimonial Property Act* begins with a presumption of equal sharing between spouses. But because some relationships do not fit the model, the courts are given discretion to depart from equal sharing. If long-term common law relationships are brought within the *Act,* the same discretion will be available to temper over inclusiveness.

We have concluded that logic and principle lead to the conclusion that long-term common law relationships should be governed by *The Matrimonial Property Act.* Nevertheless, a change in the legislation can be justified only if the protection of the *Act* would make a practical difference for people living common law. We believe that it would. Two aspects of the legislation are important in this context: Possessory rights and property division.

Under *The Matrimonial Property Act,* a spouse may apply for exclusive possession of the matrimonial home'. A possessory order can be made regardless of the state of title, and, if the court so orders, will continue even if the home is awarded to the other spouse. Such orders are intended to be protective. They ensure that a spouse who is living in the home and needs to remain in it for the benefit of children of the marriage or other reason can remain in undisturbed possession. Possessory orders are particularly important in cases in which an abusive or harassing husband attempts to return to the home. The circumstances that warrant making a possessory order to protect a married woman are no less common when a common law relationship breaks up. As Orlando argues in "Exclusive possession of the matrimonial home: The plight of battered cohabitees", there is a pressing need to provide the same protection for abused and harassed common law spouses as for married women[2].

Although *The Matrimonial Property Act* does not presently apply to common law couples, the courts have on occasion ordered a redistribution of property between cohabitees by applying the doctrines of resulting and constructive trust. A resulting trust arises when property is purchased with funds provided by X, and title is taken by Y. Unless it can be shown that X intended to make a gift

'Section 7.

[2]Orlando, above,

to Y, the court will find that Y holds the property in trust for X. A constructive trust arises when X makes a contribution to acquisition of property by Y under circumstances in which it would amount to unjust enrichment if the property is retained solely by Y. The availability of these remedies in property disputes between common law spouses was confirmed by the Supreme Court of Canada in *Pettkus v. Becker.* In that decision, Chief Justice Dickson held that:

> Where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it'.

No doubt, the doctrines of resulting and constructive trust can prevent injustice when a common law relationship breaks up. However, the remedies are not as far-reaching as a property division under *TheMatrimonialPropertyAct.* The remedies only apply when a financial contribution can be traced to the applicant. While some indirect financial contributions may be taken into account, contributions to the mutual relationship such as childcare and household management are not relevant. In *Pettkus v. Becker,* the applicant was awarded a property interest in her common law husband's property only because the court found that she had supported him from her income during the time he was building up assets and because she supplied unpaid labour in the business operated by him. Had she been a housewife, no remedy would have been available. In addition, the court held that "it is not every contribution which will entitle a spouse to a one-half interest in the property. The extent of the interest must be proportionate to the contribution." Under *The Matrimonial Property Act,* equal sharing is deemed to be inherent in the joint undertaking of the spouses.

In *Pettkus v. Becker,* Dickson observed that

> I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period. This was not an economic partnership, nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived as man and wife for almost twenty years. Their lives and their economic well-being were fully integrated.

The court went as far as it could without the aide of legislation to treat the relationship between Pettkus and Becker as the functional equivalent of marriage. It is difficult to identi~' a policy reason why matrimonial property legislation should not be available in cases such as this.

[1] *Pettkus v. Becker,* above.

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If it is concluded that *The Matrimonial PropertyAct* should apply to established common law relationships, several matters that have not been discussed will have to be addressed. They will only be mentioned here. First, a definition of the relationships to be brought into the *Act* must be formulated. It may be that the definition presently applicable to support obligations between cohabitees is appropriate. Certainly, the birth of a child is a good indication that the relationship should be regarded as equivalent to marriage. The length of relationship is also obviously relevant, but whether the five-year period of cohabitation deemed sufficient to trigger support obligations is also appropriate for purposes of property division is a question that may require further consideration.

Second, a mechanism must be included in the legislation to deal with conflicts when there are both a common law spouse and a legal spouse. Some critics have suggested that this is a serious problem. We do not agree. Under the Act as it stands at present, the court may consider "the duration of the period the spouses have lived separate and apart[1]." Thus, for example, in *Beud.'y v. Beudry,* the court declined to divide assets acquired by the husband in the 14 years after the parties separated[2]. This provision in itself would eliminate most of the problem, allowing the courts to apportion assets between two spouses of the same individual. In addition, the *Act* permits the court to take into account third-party claims in dividing property. This could be used to permit the court to adjudicate the claims of a legal and common law spouse together, even in the absence of any special mechanism for the purpose.

It would be desirable, of course, to make express provision for cases in which a party has more than one spouse. Amendments might, for example, expressly direct the court to identify the assets attributable to each relationship if there is more than one. In Ontario, matrimonial property is defined at present as property acquired between date of marriage and date of separation. The Ontario Law Reform Commission has recommended redefinition of the commencement date as the date on which cohabitation commenced[3]. This would avoid overlap. In Saskatchewan. matrimonial property is defined as property acquired between date of marriage and the date when an application is brought under the *Act.* Thus redefining the commencement date would not avoid overlap between successive relationships in all cases. Nevertheless, it might be useful to stipulate that in a case in which there is more than one spouse who can make a claim, the property available for distribution to each should ordinarily be property acquired during cohabitation.

[1] Section 21(2)(c)

[2] (1982) 17 Sask. R. 400 (C.A.).

[3] Ontario L.R.C., pp. 65-66.

A related matter that should be addressed is the limitation period. Under the *Act,* an application for division must be brought prior to divorce. A common law spouse should be required to make application within a reasonable time after cohabitation has ceased. The Ontario Law Reform Commission has suggested a two-year limitation period running from date of separation'. However, since most divorces are now granted after the one year minimum waiting period required under the federal *Divorce Act,* a shorter limitation period might be appropriate to treat common law and legally married spouses in similar fashion.

IV. SAME SEX COHABiTATION

The parallels between heterosexual common law unions and cohabitation of couples of the same sex are obvious. Nevertheless, it cannot be lightly assumed that same sex cohabitation should be subjected to the same legal regime as common law relationships. The argument for applying *The MatrimonialProperty Act* to a class of common law relationship rests on the fact that most long-term common law relationships are functionally similar to marriage. The reasons why this is so are varied, but it is not surprising to discover that heterosexual couples, whether married or not, have similar life styles in long term relationships. Marriage remains the pervasive model for heterosexual unions. The cultural and social context of same sex unions is different. There is no persuasive evidence that a majority of long-term same sex couples model their relationship after the norms of heterosexual marriage, or would seek to assume the incidents of marriage on anything other than a voluntary, consensual basis.

In *Egan and Nesbit v. R*[2]*,* a case decided by the Supreme Court on the same day judgement was issued *inMiron v. Trudel,* the majority of the court declined to extend the logic of the latter case to same sex relationships. The majority did not accept the proposition that a same sex relationship can be regarded as the functional equivalent of marriage. Mr. Justice Gounthier stated the proposition most forcefully:" [The] ultimate raison d'etre [of marriage]... is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate." In our opinion, this is not a satisfactory distinction between same sex and heterosexual cohabitation. Some same sex couples raise children together, and assume parental roles and obligations similar to those of heterosexual parents. But it does not follow that it is appropriate to apply the model of traditional marriage to all long-term cohabitees.

A perhaps more valid distinction was made at the Court of Appeal level by Mr. Justice Mahoney. He observed that

'Ontario L.RC., pp. 66-67.
2 (1995) 12 RF.L. (4~) 201.

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> Many couples live together in relationships excluded from the definition. Cohabitation by siblings is a commonplace example; persons otherwise related by blood or marriage do so as well and so do persons not related. They do so for countless personal reasons and combinations thereof . . . Unless subjective pressures are in play, sex, whether same or opposite, need not be a consideration in choice of live-in companion. There are those, like the appellants, whose sexual orientation is a determining factor in their choice of partner. Many, possibly most, of those couples do not represent themselves as spouses so that they would not benefit from the remedy the appellants seek.

There are some same sex couples whose relationship is functionally similar to marriage: One may financially support the other, resources may be pooled, and a network of dependancy and obligation may be created. It is not the fact of cohabitation in a sexual relationship that creates the equivalence, however. In the case of long-term heterosexual cohabitation, social pressures create a functional equivalence of marriage. Thus in recommending a policy in regard to common law relationships, we have placed emphasis on the evidence that such relationships usually come to be marriage-like. Same sex relationships may— but are not so frequently predestined--- follow the same route. Thus it is appropriate to place more emphasis on preserving autonomy and choice in same sex relationships.

We are of the opinion that same sex partners should have the opportunity to regulate their relationships by agreement and consent. While the matrimonial property regime should not automatically apply, a mechanism for opting into it should be provided. The Ontario Law Reform Commission has reached a similar conclusion, and has suggested a mechanism that we believe deserves consideration. It would allow cohabittees, regardless of sexual orientation, and whether or not they cohabit in a sexual relationship at all, to enter into a Registered Domestic Partnership. Support, property division, and other legal rules governing family units would apply to the partners unless they contracted out in whole or part. As the Ontario Commission noted:

> The introduction of a Registered Domestic Partnership scheme would allow individuals to choose to incur the economic rights and obligations associated with marital status, without affecting the institution of marriage, which has particular cultural and religious significance'.

In our opinion, the Registered Domestic Partnership is an idea that should be discussed. It would allow any two persons, regardless of the nature of the relationship between them, to make a legallybinding contract to regulate their financial affairs and property relations.

'Ontario Law Reform Commission, above.