

authoritatively that in a viable socialist society, neither sex should be placed in a subordinate position to the other.

V. MARITAL PROPERTY

Professor Luryi's thorough analysis of marital property rights in the Soviet Union has led perhaps to the greatest number of surprises. One would assume that the legal implementation of a true collectivist philosophy would inevitably result in the abolition of most of the old bourgeois capitalistic concepts of "separate" property and that it should be immaterial whether or not such separate property was acquired by industry or enterprise or by inheritance or windfall. By and large this does not appear to be the case. What is perhaps even more surprising is that the good old fashioned doctrine of culpability, or *fault* seems to play an important role in the disposition of marital property in the Soviet Union. This particular aspect of Soviet family law will be dealt with in some greater detail when the subject of maintenance is discussed.

In the Common Law world, every decade appears to spawn its own particular brand of legal populism. During the 1950's, due probably in great part to the aftermath of World War II, international law was in the forefront of legal scholarship.²⁵ The early 1960's spawned the growth of Ralph Nader and the consumer protection movement. The latter part of the 1960's and the first half of the 1970's gave rise to the evolution and growth of environmental law. Nobody can deny that the cutting edge of the legal sword during the latter part of the 1970's is that of marital property and the disposition thereof, at least in those Common Law jurisdictions that do not adhere to a community of property matrimonial regime. From the vantage of hindsight, it is interesting to compare the more salient provisions of the Soviet law in this regard with some of the recently developed Canadian legislation. For the sake of brevity, we will deal with two rather typical statutes in this regard.²⁶

In the Soviet Union, according to Section 22 of the Family Code, the *personal* property of a spouse consists of:

- a) property acquired by the spouse prior to marriage, and
- b) property acquired by either of the spouses as the result of an inheritance.
- c) Personal goods such as clothing. It is interesting to note that jewellery and similar chattels are considered "objects of luxury" and as such are considered common property.
- d) "Tools of a trade" and professional equipment determined to be part of an individual's work are considered separate property, at least insofar as the ultimate disposition of this property on separation or divorce.²⁷

The analogies that can be drawn to recent legislative enactments in the Canadian sphere are nothing short of amazing. In Manitoba, pursuant to *The Marital Property Act*, the following types of real and personal property are considered to be "separate":

25. To wit: look at the ascendancy of Myres McDougal, the intellectual darling of legal scholarship, during the fabulous fifties. *The Index to Legal Periodicals* indicates that no less than 15 articles were penned by McDougal during that time, being directed solely to the international law field.

26. Namely, *The Marital Property Act*, S.M. 1978, c. 24 (M45) and the *Family Law Reform Act*, S.O. 1978, c. 2.

27. Luryi text, *Supra* n. 93.

1. Assets acquired while married to but living separate and apart from the other spouse.
2. Assets acquired while married to a former spouse.
3. Assets acquired while unmarried.²⁸
4. Assets disposed of by spousal agreement.²⁹
5. Assets that have been transferred and are no longer owned by the spouses.³⁰
6. Any asset acquired by a spouse by way of gift or trust benefit from a third person.³¹
7. Proceeds or the cash surrender value of any insurance policy where the premiums of the policy were paid by a third person by way of gift in favour of a spouse.³²
8. Assets acquired by a spouse on their own behalf by way of inheritance.³³
9. Damage awards for personal injuries.³⁴
10. Any asset that has already been shared equally by the spouses.³⁵

Although Manitoba does not have an exemption equivalent to the "tools of a trade" and "professional equipment" as set forth in the U.S.S.R. legislation, nevertheless there are provisions incorporated into the Manitoba legislation granting judicial discretion to vary the equal division of "commercial assets."³⁶

In Ontario, the following property is considered "separate":

1. Property that the spouses have agreed by a domestic contract is not to be included in the family assets.³⁷
2. Any asset that is not deemed to be a "family asset" under the provisions of the legislation.³⁸

Compared to the Ontario example, the U.S.S.R. Family Code is a marvel of legislative simplicity in that it defines common property as "that property acquired through the combined income from the work of both spouses."³⁹

28. S.M. 1978, c. 24, s. 4(1).

29. S.M. 1978, c. 24, s. 5(1).

30. S.M. 1978, c. 24, s. 6(4).

31. S.M. 1978, c. 24, s. 7(1).

32. S.M. 1978, c. 24, s. 7(2).

33. S.M. 1978, c. 24, s. 7(3).

34. S.M. 1978, c. 24, s. 8(1).

35. S.M. 1978, c. 24, s. 9.

36. S.M. 1978, c. 24, s. 13(2).

37. *Family Law Reform Act*, S.O. 1978, c. 2, s. 3(b).

38. S.O. 1978, s. 3 Although there are no specific statutory guidelines incorporated into the Ontario legislation setting forth what assets are excluded from a presumed presumption of sharing between spouses, nevertheless the Ontario Act does state that on separation or divorce each spouse is entitled to have the following "family assets" divided in equal shares:

1. A matrimonial home as determined by the legislation and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes, and includes:
 - (i) money in an account with a chartered bank, savings office, credit union, or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.
 - (ii) where property owned by a corporation, partnership or trustee, would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property.
 - (iii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse.
 - (iv) property disposed of by a spouse but over which the spouse has, either alone, or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke, or dispose of the property, if the property would be a family asset if it were owned by the spouse.

Although property acquired by inheritance or gift is not excluded from "family assets", nevertheless, the act states in s. (4) (e) that the court has the jurisdiction to vary the division in equal shares of an inheritance or a gift.

39. Luryi text, *Supra* n. 95-96.

Manitoba, like Ontario, has opted for precise statutory definitions of "family assets", and indeed has borrowed heavily from the Ontario legislation in this regard.⁴⁰

The enactment of "opting out" clauses was a bone of contention to the feminist movements in Canada during the many public hearings and briefs presented prior to actual reform of existing marital property law. The privilege of "opting out" or contracting out of any existing matrimonial regime had long been firmly established in those Civil Law jurisdictions where the regime of community of property was the legislative norm.⁴¹ The doctrine of freedom of contract was always a substantial underpinning of the Common Law. Therefore, although much bitter opposition was encountered by law reform bodies and law amendment committees, the concept of "contracting out" has not yet been abrogated, in any Canadian jurisdiction to my knowledge.⁴² In a similar manner, an equivalent privilege is granted to Soviet citizens and this appears to be a fundamental right. The right of contracting out is guaranteed by Article 8 of the Principles of Civil Legislation in the Soviet Union.⁴³ The main argument propounded by the most vociferous exponents of Canadian women's rights was that the "opting out" privilege would lead to an erosion of the concept of community of property, a right that had long been denied to women. Experience has shown that this had not proven to be the case in most Civil Law jurisdictions where the regime of community of property is both the social and legal standard.

The principle of "opting out" in the U.S.S.R. is of limited applicability. Property acquired by husband and wife during subsistence of their marriage is considered, at law, to be common property at the time of division, even though an agreement to the contrary might have been entered into by the parties.⁴⁴ That is, no agreement can be entered into regarding *future* property.

There is no distinction in Soviet law between commercial and non-commercial family assets. In Canada, though, there is an obvious line of demarcation drawn between the two types of assets.⁴⁵ The reasons for this

40. S.M. 1978, c. 24, s. 1(2), which defines "family assets" as follows:

"Family asset means an asset owned by two spouses or either of them and used for shelter or transportation, or for household, educational, recreational, social, or aesthetic purposes, including, without restricting the generality of the foregoing,

- (i) a marital home,
- (ii) money in a savings account, chequing account or current account, with a bank, trust company, credit union or other financial institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and savings bonds and deposit receipts intended to be used for those purposes
- (iii) where an asset owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the asset,
- (iv) an asset over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse, if the asset would be a family asset if it were owned by the spouse and
- (v) an asset disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to use or dispose of the asset, if the asset would be a family asset if it were owned by the spouse.

41. *E.g.*, Quebec in Canada and Louisiana and California in the United States.

42. *See e.g.*, *The Marital Property Act*, S.M. 1978, c. 24, Ss. 1(f), 5 and the *Family Law Reform Act*, S.O. 1978, c. 2, ss. 2(9), 42 (1)(b), 51-59.

43. Luryi text, *Supra* n. 101.

44. *Ibid.*

45. *Ibid.*

distinction in a capitalistic society are obvious; the courts and the legislature do not wish, if at all possible, to impede in any way the viability of commerce. Cynics may say that as commercial assets in the Soviet Union would theoretically at least be of little import, so would assets of any nature, for in a communist society the opportunity is lacking to amass property in any significant amount. There are, however, many examples of individuals who have acquired considerable wealth in the Soviet Union. For instance, Professor Luryi writes of a wife who successfully contested the disposition of the proceeds of the sale of a piano and several other items which were owned by her prior to her marriage.⁴⁶

VI. MAINTENANCE

Once again, the similarities in legal obligations, at least in theory, far overshadow the differences. In the U.S.S.R., spouses are obliged to maintain each other.⁴⁷ As previously stated this has been the Canadian situation in the sphere of divorce since 1968.⁴⁸ In the sphere of separation, Ontario was the first to pass legislation in this regard,⁴⁹ followed closely by Manitoba.⁵⁰

In his article, Professor Luryi, following accepted European practice, refers to the term "alimony" to encompass all elements of what we know as "maintenance." Technically speaking he is correct; the term "alimony" is of Latin origin meaning the payment of an alimentary allowance, or a payment for sustenance and support. Hence, "alimony" encompasses every branch of the law of maintenance. In the Common Law world, "alimony" gradually came to acquire a very restrictive and technical meaning, and now generally refers to maintenance payments made by a husband to his wife during the subsistence of their marriage. Maintenance is the much broader term, connoting all aspects of a support obligation.

Perhaps the most surprising aspect of Professor Luryi's treatment of alimony or maintenance in the U.S.S.R. is the role that fault can sometimes play in the determination of a maintenance award.⁵¹ Fault or culpability is a

45. See e.g., *The Marital Property Act*, S.M. 1978, c. 24, ss. 1(b), 13(2).

46. Luryi text, *Supra* n. 98.

47. *Id.*, at n. 125-126.

48. *Divorce Act*, R.S.C. 1970, c. D-8, s. 11, which provides as follows:

"(1) Upon granting a Decree Nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the wife,
(ii) the children of the marriage, or
(iii) the wife and children of the marriage;

(b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the husband,
(ii) the children of the marriage, or
(iii) the husband and the children of the marriage; and

(c) an order providing for the custody, care and upbringing of the children of the marriage."

49. *Family Law Reform Act*, S.O. 1978, c. 2, s. 15.

50. *The Family Maintenance Act*, S.M. 1978, c. 25, s. 2(1), which provides as follows:

"Spouses have the mutual obligation to contribute reasonably to each other's support and maintenance."

51. Luryi text, *Supra* n. 131.