

OF LINENS AND LAWNS: THE EROSION OF THE PRESUMPTION OF EQUAL SHARING UNDER THE MARITAL PROPERTY ACT

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The majority decision by the Manitoba Court of Appeal (Hall, J.A., Monnin, C.J.M. concurring) in *Marks v. Marks*¹ affirms a trial judgement which at worst may well reverse the statutory sharing scheme of *The Marital Property Act*² and at least raises serious procedural and evidentiary questions.

The Facts

The parties were married in October 1970 and separated in November 1978. For the wife it was the third marriage, and for the husband the second. The wife was 50 and the husband 51 when they married. The husband had an older teenage son at the time of the marriage, who continued to live in the home. The marriage was highly unsuccessful. The husband complained that the wife neglected the housework, did not always have meals ready on time, had to be asked to change the linens on the son's bed, and took drugs (once to excess) for a pre-existing psychiatric condition. For his part, the husband admitted writing a letter to his son-in-law which detailed his own violent physical abuse of his wife. She left for about eight months, and a reconciliation attempt was unsuccessful.

The sole issue of concern centered on the wife's claim for an accounting, under *The Marital Property Act*, for the increase in value, during the marriage, of the husband's farm property. At trial, Hamilton J. reached the conclusion that there had been a net increase in value of the property, during the marriage, of \$49,266, due solely to inflationary increases in market values. His conclusion, based on authorities, was that the farm was a commercial asset. He then went on to consider the submission of the husband's counsel that the commercial asset should be divided other than equally.

The power to make an unequal division of a commercial asset is provided in s.13(2) of the Act. In making the decision that a commercial asset should be divided unequally, the court must be satisfied, having regard to any circumstances that it deems relevant, that an equal division of the asset would be clearly inequitable. The statute then lists eight factors which might be considered.

The Reasons at Trial³

Hamilton, J. recited s.13(2) of the Act, specifically considering clauses (d), (e) and (g) in application to the facts of the case. He concluded that none of the facts, considered in light of those clauses, warranted an unequal division of the asset.

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1. Man. C.A., unreported, July 25, 1983, Suit No. 366/83.

2. S.M. 1978, c. 24 (M45).

3. *Marks v. Marks* (1982), 29 R.F.L. (2d) 74 (Man. Q.B.) (hereinafter referred to as *Marks*).

He next considered the argument of the husband's counsel that it was clearly inequitable to permit the wife to share in the inflationary appreciation of the farm property "just by being there", i.e. by being in the marriage at the critical time. Counsel for the husband appears to have been looking for a ruling which would have placed commercial assets in Manitoba on the same footing as those in provinces which have sharing schemes similar to that of Ontario's *Family Law Reform Act*.⁴ Under such schemes, commercial assets are *prima facie* non-shareable. The court has the discretion to order that the asset be shared, if the non-titled spouse establishes that he or she has made a real and significant contribution to the acquisition or appreciation of the asset. In *Leatherdale v. Leatherdale*,⁵ the Supreme Court of Canada ruled that ordinary housekeeping and child care do not constitute a real and significant contribution for the purposes of this test. Hamilton, J. noted the differences between the scheme created by the Manitoba statute, and schemes established elsewhere. He then carefully distinguished authorities based on other statutory schemes. In rejecting both the policy and substance of the argument put forward by the husband's counsel, he said:

The answer to the argument is twofold. The husband has also shared in the increase in value "just by being there". The increase in value is not due to additional work on his part. The increase is due to general economic and market conditions.

The second answer is that the spirit of the Act is to recognize the right of married persons to the equal division of their assets upon separation. It is only in the circumstances enumerated in s.13 that an unequal division may be made . . .⁶

Finally, he conceded,

In the present case it is difficult to obtain guidance from s.13(2) of the Act. Having found no reason for an unequal division in the enumerated examples (a) to (h), I must fall back upon and consider the general direction of the subsection to see if there are "any circumstances the court deems relevant" that would warrant an unequal division.⁷

With respect, what appears to have happened is that the learned trial judge agreed with the husband's position that it was somewhat unfair that this woman should get half of the inflationary gain in a property which she did not own, especially since the marriage was unsuccessful from the start. But, though he concluded that he did not wish to order an equal division, he was at a loss to justify that conclusion. So, he searched for a legal principle to support what, at best, was a wholly subjective decision. The Act, in its express delineation of the bases and parameters of his discretion, afforded him no obvious answer. The only argument advanced by the husband's counsel was a transparent hypocrisy, which Hamilton, J. rightly rejected out of hand. With little room left to manoeuvre he found an answer in judicial interpretation of the preamble to the Act. In light of the Court of Appeal's subsequent endorsement, the case constitutes high authority for such an interpretation, an idea which, previously, had been only a last resort for the court in difficult cases.

4. R.S.O. 1980, c. 152.

5. (1983), 45 N.R. 40 (S.C.C.).

6. *Supra*, n. 3, at 83-84.

7. *Ibid.*, at 85.

Hamilton, J. said, noting the precedent set by Solomon, J. in *Kozak v Kozak*,⁸

In addition to considering the basic principle of equal sharing evident in the Act, the Act nevertheless does anticipate that the parties have equally shared the marital responsibilities. The first paragraph in the preamble to the Act says:

WHEREAS marriage is an institution of shared responsibilities and obligations between parties recognized as enjoying equal rights;

The decision of Solomon J. in *Kozak* . . . in effect recognizes the equal responsibilities presumption as a relevant circumstance when considering s.13(2).⁹

He then recited the husband's litany of complaints against the wife as evidence of her failure to have shared the marital responsibilities, concluding,

I can understand that a wife's contribution in many farm situations will be made in the home and in others by assisting in the actual farm business. In each case the question remains: Having in mind *the principles of shared responsibilities and obligations*, the presumption of equal sharing and the different tests for the division of family and commercial assets, would it be clearly inequitable to divide the commercial assets on an equal basis?

In this case, I answer the question in the affirmative . . . [S]he played no part in . . . [the] operation [of the farm], and performed less than her share of the overall responsibilities and obligations of the marriage.¹⁰

The Response of the Court of Appeal

Hall, J.A., writing the majority opinion for the Court of Appeal, stated simply that by concluding that the wife had carried an unequal share of the marital responsibilities, Mr. Justice Hamilton had:

relied upon the general direction set out in s.13(2) . . . and . . . I would not differ with his opinion that it would be clearly inequitable for the wife to share equally in the increased value of the farm.¹¹

Though couched in the negative language often used when an appeal is dismissed, the import of the majority reasons is that it would be clearly inequitable for the wife to share unequally in the increased value of the farm.

Now, the issues of this case come clearly into focus: What equities dictate unequal sharing? Are those equities considerations open to the discretion of the trial judge, within the terms of reference given in s.13(2)?

The only "equity" considered by Hamilton, J. was the wife's supposed failure to carry her share of the marital responsibilities. Even if one accepts his factual findings, as the Court of Appeal was bound to, it is not at all clear that such an inferential conclusion was warranted in this case. Indeed, Philp, J.A. dissented on that very issue. But going one step further and accepting that the conclusion was justified, as did the majority on appeal, there remains the crucial question of whether that is a proper consideration on which to deny the right to equal sharing. Thus, in its most general terms, the issue in *Marks* is whether *The Marital Property Act*, taken as a whole,

8. (1981), 22 R.F.L. (2d) 377 (Man. Q.B.) (hereinafter referred to as *Kozak*).

9. *Supra*, n. 3, at 85.

10. *Ibid.*, at 86 (emphasis added).

11. *Supra*, n. 1, at 1-2.

makes equal sharing of assets contingent upon the court finding that the parties shared equally the responsibilities, obligations, duties and chores of their life together.

By inference, the Court of Appeal has answered that question in the affirmative. With respect, it is suggested that the majority decision of the Court of Appeal in *Marks v. Marks* is based on an incorrect interpretation of the Act, and of the preamble in particular. It is further suggested that the decision cannot be supported by authorities, including the prior decisions of the Court of Appeal. This decision raises the twin spectres of the judicial imposition of subjective values of inter-spousal behaviour, and of assessment of the conduct of a relationship on the basis of allegations made after separation and marital breakdown.

Conditional Basis for Equal Sharing?

The preamble sets the tone for the statute in a general sense. It reads as follows:

WHEREAS marriage is an institution of shared responsibilities and obligations between parties recognized as enjoying equal rights;

AND WHEREAS it is advisable to provide for a presumption . . . of equal sharing of the . . . assets . . .¹²

The first clause is declaratory. The legislature acknowledges certain constituent elements of the institution of marriage, and recognizes those elements as existing between equals. There is no standard of conduct imposed, and nothing legislated by those words.

The second clause indicates an intention to legislate certain consequences. It is submitted that the legislature concluded that these consequences ought to flow from the facts recognized in clause one. Having so declared their intention, the legislators enacted s.12, which gives parties to a marriage "the right to have their assets divided equally between them." There are no conditions attached to this right. It flows automatically to the parties as an incident of marriage, subject only to the limited judicial discretion to vary, as set out in s.13. It is not necessary to prove that a marriage, in substance, met some subjective test of equality before the right in s.12 vests.

Taken together, the preamble and s.12 are analogous to provisions of *The Matrimonial Property Act* of Saskatchewan:

The purpose of this Act, and in particular of this Part, is to recongize that child care, household management and financial provision are the 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, subject to the exceptions, exemptions, and equitable considerations mentioned in this Act.¹³

This provision is closely followed by a clarification in s.25:

12. S.M. 1978, c. 24 (M45).

13. S.S. 1981, c. M-6.1, s. 20.

For the purpose of making any determination under s.21, 22 or 23, no court shall have regard to immoral or improper conduct on the part of a spouse unless that conduct amounts to dissipation or has otherwise been substantially detrimental to the financial standing of one or both spouses.¹⁴

In *Smith v Smith*¹⁵ Matas J.A., Hall J.A. concurring, said,

The Act is premised on the principle of equal sharing of assets . . . That principle is expressed throughout the Act, subject to exceptions which are either stipulated or left to the discretion of the court. The burden of showing the non-applicability of the sharing provisions rests on the appellant, [the party seeking unequal sharing] in this case.¹⁶

In other words, equal sharing is the rule, and unequal sharing is the exception. Equal sharing does not require evidence of any fact other than marriage to justify it, while unequal sharing does.

Hamilton, J. himself, just three months before giving judgement in *Marks*, wrote in *Brodaway v. Brodaway*:¹⁷

The facts of this case are that one spouse worked harder and contributed more. One could argue it would be fair that she receive more than the husband.

In spite of that I do not think, in view of the general principle of the Act requiring equal sharing, that it could be said that an equal sharing would be grossly unfair or unconscionable. What the wife is saying, in effect, is that she does not accept the sharing principle of the Marital Property Act. If I were to accede to that position, not only would I be rejecting the basic thrust of the Act, but I would be changing the law to re-introduce the principles of separate property and the consideration of measuring the value of the contribution of each party to the marriage and the division of the family assets on that basis. If those principles ever did guide courts, they were done away with the establishment of the Marital Property Act.¹⁸

In his dissenting reasons in *Marks*, Philp, J.A. noted the similarities of the test applied to unequal division of family assets in Ontario with the test set out in s. 13(2) of the Marital Property Act, and adopted the following enunciation of the Ontario rule from Galligan, J. in *Silverstein v. Silverstein*:

I am convinced that the legislature did not intend the court to be entitled to exercise any broad jurisdiction to divide . . . assets in accordance with what an individual judge may think is fair and equitable in a particular case . . . The rule of law now is that there is equal sharing of . . . assets.¹⁹

Philp, J.A. then referred to the *Brodaway* decision, and concluded,

[W]ith respect to the equal sharing of family or commercial assets, there is not an underlying principle of the equal sharing of responsibilities and obligations of the marriage.²⁰

and further enunciated a policy consideration in support of that statement,:

. . . [I]t is implicit in the legislation that the parties to a marriage will effectively divide and share the responsibilities and obligations of the marriage in a manner that they consider fair and comfortable. Having done so, the court, on the breakdown of the marriage, ought not to

14. *Ibid.*, at s. 25.

15. [1980] 6 W.W.R. 289 (Man. C.A.) (hereinafter referred to as *Smith*).

16. *Ibid.*, at 291.

17. (1982), 28 R.F.L. (2d) 54 (Man. Q.B.) (hereinafter referred to as *Brodaway*).

18. *Ibid.*, at 59 (emphasis added).

19. (1978), 1 R.F.L. (2d) 239 at 256 (Ont. H.C.) (hereinafter referred to as *Silverstein*).

20. *Supra*, n. 11, at 14.

engage in an inquiry into the extent to which each party shared the responsibilities and obligations of the marriage.²¹

There are at least four authorities for the contrary view. In Bisset-Johnson and Holland (eds.) *Matrimonial Property Law in Canada*, Robert Carr and Shawn Greenberg, co-authors of the chapter on Manitoba law, wrote

Though it is difficult to predict how s. 13(1) will be interpreted, s. 13(2) certainly seems wide enough to include marital fault as a circumstance to consider in the exercise of discretion.²²

In *Sawchuk v. Sawchuk*²³ Kennedy, C.C.J. wrote,

In any marital situation, the contribution of the parties differs significantly, and one must consider as one of the factors in determining whether there are circumstances of the spouses which would warrant an unequal sharing, whether the parties have each contributed to the limits of their respective abilities . . .²⁴

Perhaps the high water mark of judicial review of spousal sharing of responsibilities is the decision of Solomon, J. in *Kozak*, relied on by Hamilton, J. in *Marks*. The following extract from the decision reveals both the essential facts and the judge's subjective evaluation of the wife's conduct:

As I have mentioned earlier, I am satisfied that the wife did not carry her share of family responsibility. To find more excitement and challenge, she left her husband with three small children in 1972 and accepted a job which gave her an opportunity to travel all over Canada and abroad. During that time her husband had to discharge the duties of a father and mother at the same time. He had to be the bread-winner and maintain his pension, his home and his family. The wife made very little financial contribution towards the maintenance of the family from her employment income with Klassen. She made no contribution towards the pension nor towards the payments for the marital home. It is true that she travelled extensively and satisfied her desire for excitement. She obviously benefited from that employment personally, but her input into the family was minimal.

After she quit her job with Klassen, she secured employment in 1977 at a ski resort in a neighbouring town, where she worked for the respondent, Noel Later. Before long, she started to work into the early hours of the morning, and her husband was suspicious that she was doing more than working. Later events showed that his suspicions were justified. When he finally was able to confirm that the relationship between his wife and Later was more intimate than an employer-employee relationship, he asked her to quit her employment. Instead of quitting her job, she packed her belongings and went to live at the ski resort in August 1978.

At the time of this hearing, the wife was living in a common law relationship with the respondent, Noel Later, together with the child of this union. The evidence convinced me that long before the physical separation in August 1978, the wife had decided in favour of Later and the summer resort. According to her own evidence, she was working long hours at the ski resort business without bringing home any money for the support of the marital home and the family, but leaving it as an investment in this new enterprise. The court was not told the value of her interest in the ski resort business, but there was some evidence that Mr. Later was advertising his business for sale at a price of one-half million dollars.

I am satisfied that this case is a classic example of one in which the court should exercise its discretion and not divide a commercial asset between the two spouses equally. As a matter

21. *Ibid.*, at 16-17.

22. Robert Carr and Shawn Greenberg, "Manitoba Law", in *Matrimonial Property Law in Canada* (Bisset-Johnson and Holland eds.) M-25.

23. (1981), 24 R.F.L. (2d) 250 (Man. Co. Ct.) (hereinafter referred to as *Sawchuk*).

24. *Ibid.*, at 252 (emphasis added).

of fact, I am convinced that this pension plan should not be shared by the wife at all, but go to the husband who maintained it without any help from his wife. Indeed, it could be said that the husband was able to maintain the payments in spite of his wife's actions. *For this court to do otherwise would be equivalent to taking the money earned and saved by the husband and paying it to the wife, who was shirking her family responsibilities and spending her own money on herself and on her ski resort.* To order this pension money to be divided equally would permit the wife to keep her nest egg that she established at the ski resort at *the expense of marital responsibilities*, and to share in the fund to which she made no contribution.²⁵

Although it was the wife's adultery, and not her employment habits and financial contribution, which was the *causa causans* of the marriage breakdown, Solomon, J. assessed the later circumstances as culpable behavior and penalized the wife by denial of her s. 12 right to an equal share of the pension asset.

Finally, the decision of Osborne, J. in *O'Reilly v. O'Reilly*²⁶ is instructive. The facts were very similar to *Brodaway*. The spouse seeking unequal sharing alleged, and proved, that she had done far *more* than carry an equal share of the marriage responsibilities, instead of alleging that the other spouse had done less than was to be expected. In that case, unlike *Brodaway*, the court concluded that it ought to examine conduct and grant unequal sharing, saying

Surely, if the product of an equal sharing of child care and household management responsibilities is an equal division of . . . assets, then an unequal sharing of those responsibilities should, under appropriate circumstances, result in an unequal division of . . . assets.²⁷

In his annotation accompanying the reported decision, Professor Hovius commented,

This may mean simply that a spouse should emphasize his own contribution rather than point out the shortcomings of the other spouse. It is unrealistic to think that such an approach does not, at least inferentially, point out the lack of contributions made by the other spouse.

However, it may be that the court was suggesting that the actual division of responsibility for child care and household management is only relevant where one spouse's assumption of these responsibilities has enabled the other to acquire non-family assets. Certainly, *O'Reilly* is an example of such a situation.²⁸

Interestingly, that is precisely the approach rejected by Hamilton, J. in *Brodaway* as a rejection "of the basic thrust of the Act and a change in the law".

Clauses of the type found in the preamble to the Manitoba statute, and in s.20 of the Saskatchewan legislation, lend themselves to one of two interpretations. On the one hand, they might be said to impose a standard of shared responsibility on marriage partners. If it is shown that responsibility was not shared, a court ought not to make an equal distribution of property. Under such an interpretation the court is vested with power to review conduct during the marriage and assess it subjectively, whenever a party alleges

25. *Supra*, n. 8, at 382 (emphasis added).

26. (1979), 9 R.F.L. (2d) 1 (Ont. H.C.) (hereinafter referred to as *O'Reilly*).

27. *Ibid.*, at 11.

28. Annot. (1979), 9 R.F.L. (2d) 2, at 4.

either excessive contribution by themselves or a shortfall in contribution by their spouse.

An alternate view is that the clause constitutes acknowledgement by the legislature that the parties to a marriage will, in the words of Mr. Justice Philp, effectively divide and share the responsibilities . . . ,²⁹ and that courts ought not to enter into post hoc review of the equities of the sharing arrangements the parties had worked out for themselves and with which they lived. On the contrary, the court is to presume the responsibilities were equally shared, and therefore any assets were acquired in a milieu of mutual support and each partner contributed equally to that acquisition.

The latter interpretation enables the court to give remedial effect to the legislation, and to avoid entering into a prolonged consideration of the roles played by the parties during the marriage. It is submitted, therefore, that the words of the preamble should be interpreted as meaning that there is a presumption of equally shared responsibility, giving rise to a right to an equal share of the assets. This is preferred to an interpretation that either an equal right to the assets can flow only when an equal share of responsibility has been proved, or that the equal right can be denied because one spouse has either exceeded, or fallen short of, the judicial conception of what his or her other role ought to have been.

Discretion to Vary from Equal Sharing

Section 13(2) creates judicial discretion to vary the equal sharing of assets in cases where it would be inequitable having regard to *any circumstances the court deems relevant*. The question in *Marks* is whether the emphasized words include the circumstances of neglecting marital responsibilities. *Prima facie*, there appears to be no question that they do. The problem is that the issues of fault and conduct are not found in the context of the eight express factors listed in the statute as being included in "any relevant circumstances". There are essentially three species of factors listed:

Time: ss. (d) (e)

Financial Status: ss. (a) (b) (f) (g) (h)

Private Agreements: ss. (c)

Of these, only "unreasonable impoverishment" in clause (a), is in any way connected with the issue of fault. That clause concerns fault as related to conduct which bears directly on the availability of the assets for sharing. It is well removed from the question of shared marital responsibilities.

The words "responsibilities and other circumstances of the marriage" appear in clause (h), but not in connection with evaluation of those circumstances per se. Rather, the words appear in connection with the economic consequences for the parties. Under this clause, the sharing of responsibilities is a factor only to the extent that such sharing has created any obvious distinction in the ongoing economic status of either spouse.

29. *Supra*, n. 11, at 16.

Clearly, other factors than those specifically expressed above may be considered. Having considered the combination of the general tenor of the Act and an express restriction on the use of evidence of shared marital responsibilities in any one of the given categories, it is submitted that three canons of statutory construction — *ejusdem generis*, *expressio unis est exclusio alterius*, and avoidance of disharmony — operate to limit the circumstances which may be considered relevant. In particular, there is no support to be found in s. 13(2) for a view that failure to achieve a subjective standard of marital responsibility constitutes a proper ground for deviating from the prima facie norm of equal sharing.

Consequences of *Marks* in Practice

The *Marks* decision does not expressly state that one must prove equal sharing of responsibility in order to enjoy equal sharing of assets. It does assert that unequal sharing of responsibility may lead to unequal sharing of assets. It is an important distinction. However, the fear is that it may be only a difference in procedure. *Marks* leaves the burden of proof where *Smith* placed it — on the party seeking unequal sharing. What *Marks* adds is an open invitation to parties to allege inequality in the sharing of responsibilities. Once that is alleged, the burden of rebuttal falls on the opposing party. This virtually places that party in the position which *Smith* rejected — having to justify the right to equal sharing.

This raises concerns for the conduct of trial of *Marital Property Act* applications. If *Marks* is correct, courts may be constrained to enter into prolonged consideration of the roles played by each spouse in the marriage. This will mean that the courts will be confronted with considerable contradictory evidence as to who carried out which duties and responsibilities in respect to the housekeeping, income earning, childcare, and yard work, among others.

As Philp J.A. wrote in *Marks*:

... the circumstances highlight the difficulty if not the impossibility, of a court weighing the respective contributions of the parties. In the circumstances of this case, how is fieldwork to be equated with household duties.³⁰

This difficulty will be compounded by the antagonism between the parties. Professor Hovius wrote, in discussing the *O'Reilly* case, that

O'Reilly raises the spectre of embittered spouses presenting detailed evidence concerning the division of marital responsibilities in order to support allegations of laziness and irresponsibility. Indeed, in this case, there was "some limited dispute . . . as to who did what and under what circumstances."³¹

Inquiries of that type would be little different from those which courts were engaged in prior to the enactment of reform statutes, when fault and proof of contribution were considerations in marriage settlement cases. Such a result would be contrary to the remedial nature of the legislation, and

30. *Ibid.*

31. *Supra*, n. 28.

would run directly against the policy behind the law, which finds expression in provisions analagous to Saskatchewan's s. 25.

Finally, it is not clear when such inquiries are acceptable.

Osborne J. in *O'Reilly* said:

It is, in my view, important to consider the evidence, on the issue of household management and child care, in positive terms, rather than negative terms. By that I mean it seems to me that the *Family Law Reform Act*, as it is structured, does not necessitate an inquiry as to which spouse did not do certain things that might be regarded as acceptable in terms of child care and household management. Rather the Act, in my opinion, emphasizes a consideration being given to the spouse who does in fact assume responsibility for child care and household management.³²

Professor Hovius concluded that:

Perhaps, therefore, the reasoning in *O'Reilly* cannot be extended to the example postulated earlier where one spouse's abdication of marital responsibilities has had only a negative effect.³³

However, as noted above, that approach was rejected by Hamilton J. in *Brodaway*. Thus, Mr. Justice Hamilton's decisions indicate a tendency towards the exact opposite of that taken in *O'Reilly*.

Conclusions

The *Marks* decision is a significant, though regrettable, instance of judicial law reform at the highest level. The policy which found expression in the reform legislation, such as the *Marital Property Act*, was revolutionary in at least two concepts:

- Courts were no longer to be post hoc arbiters of inter-spousal conduct during marriage; and
- A non-titled person could enjoy property rights by virtue of being married to the person with title.

The Act was drafted to give effect to both of these policies, by enunciating that there was to be a presumption that the responsibilities arising during the marriage had been equally shared. This would give rise to an equal right of each spouse to share equally in the acquired assets.

With a two page stroke of the pen, the Manitoba Court of Appeal has reversed the legislature, and replaced that policy with a declaration that an equal right to acquired assets is contingent on the court's satisfaction that responsibilities were equally shared. In place of a free acknowledgement that couples in married cohabitation, deciding what is best for themselves, are sharing the work and duties in a mutually satisfactory manner, we now have grounds for the imposition of judicial opinions about how they ought to have shared the work. The penalty of unequal sharing — of denial of a right created by the legislature — awaits those untitled spouses whose conduct falls short of the judicial standard.

32. *Supra*, n. 26, at 7.

33. *Supra*, n. 28.

In its last session, the legislature, has passed Bill 64, *An Act to Amend the Marital Property Act*, which was proclaimed in force on 1 October, 1983.³⁴ As a result Subsection 13(3) has been added to Act, which provides; the following subsection (3) to s.13 of the Act:

In exercising its discretion under this section, no court shall have regard to conduct on the part of a spouse, unless that conduct amounts to dissipations.³⁵

It is suggested that the discretion allowed under s.13(3) is in harmony with the analysis of the clauses of s.13(2). This subsection ought not to be used as a basis for continued judicial review of inter-spousal sharing of domestic responsibilities.

These amendments should eliminate judicial review of conduct as exemplified by *Marks*. The challenge will be to persuade the courts to adopt a "common sense" definition of dissipation, and to resist the temptation to work their personal predilections about division of responsibilities into the limited discretion open to them.

In the mean time, change those linens and mow that lawn — their lordships may be watching you!

34. It should be noted that the Bill as initially introduced added an additional avenue of discretion. The clause 13(3) read as quoted above and continued by saying "... or has otherwise been substantially detrimental to the financial standing of one or both spouses."

35. *An Act to Amend the Marital Property Act*, S.M. (1983) (2nd Session), c. 53, s. 8.

