

FARR v. FARR: *TOO FAR?*
A CASE COMMENT
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Introduction

The seventies witnessed the first major reforms of family law to be carried out since the wave of *Married Women's Property Acts*¹ nearly one hundred years previously. But while it took nearly a century to evolve from the idea of 'property for married women' to 'matrimonial property', it has taken less than a decade to produce renewed calls for a second major overhaul. Paradoxically, the rural, agrarian Western provinces of Canada, which produced the problem of *Murdoch v. Murdoch*² and a solution through *Rathwell v. Rathwell*³, now bring us an important Supreme Court comment on the application of modern matrimonial property legislation. The case of *Farr v. Farr*⁴ not only provides a thorough examination of the basic assumptions underlying the reforms of the seventies, but also contains, in the words of one commentator, "the most important statements on the application of matrimonial property legislation in Canada to date".⁵

Although the reasons for decision in *Farr* have been criticized by academics⁶ and reformers,⁷ it is the thesis of this comment that the result obtained by the Supreme Court is in keeping with the spirit of enlightened Western matrimonial property legislation that was the legacy of *Murdoch*. As well, from a comparative law viewpoint, *Farr* illustrates the inadequacies of the Ontario approach to the distribution of matrimonial property whereby the 'means' of division (particularly, the nature of the property to be brought into the regime and the degree of judicial discretion to be allowed in the scheme) have come to overshadow the 'ends' of equality and partnership in the division.⁸

The Decisions in *Farr*

The Farrs were married for over thirty years. At the time of their marriage, the husband brought with him a half-section of farmland and a half-interest in the farm machinery. The wife brought no assets into the marriage. Over the next thirty years, the Farr's farming business prospered.

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1. See particularly, the *Married Women's Property Act*, 1882, 45 & 46 Vict., c. 75 (U.K.), and *The Married Women's Property Act*, S.O. 1884, c. 19.
2. [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367, [1974] 1 W.W.R. 361 (hereinafter referred to as *Murdoch*).
3. [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289, [1978] 2 W.W.R. 101.
4. [1984] 1 S.C.R. 252, 7 D.L.R. (4th) 577, [1984] 4 W.W.R. 1, rev'ing (1983) 21 Sask. R. 320, 32 R.F.L. (2d) 302 (C.A.); rev'ing (*sub. nom. Farr v. Farr* No. 2) (1981) 11 Sask. R. 409, 22 R.F.L. (2d) 350 (Q.B.) (hereinafter referred to as *Farr*).
5. J.G. McLeod, "Annotation to *Farr v. Farr*" (1984), 39 R.F.L. (2d) 2 at 2.
6. *Ibid.*
7. Law Reform Commission of Saskatchewan, *Tentative Proposals for Reform of the Matrimonial Property Act*, (Saskatoon: The Commission, 1984).
8. An eloquent summary of these 'ends' was given by the Law Reform Commission of Saskatchewan, which stated:
The Commission is of the opinion that marriage is a partnership of equals. The partnership is founded on both status and the contributions of the husband and wife. The contribution of each may be as material as money or as ethereal as love and understanding. It will be different in each case. It will vary from time to time and from marriage to marriage. Because we see marriage as a partnership of equals, founded on both status and contribution, we see the solution to the problems inherent in distribution of matrimonial property as requiring a combination of certainty and flexibility of approach. Our proposals for reform attempt to meet this objective.

Tentative Proposals for Reform of Matrimonial Property Law, Third Working Paper (Saskatoon: The Commission, 1974) 3.

More land and machinery was purchased, and the couple acquired such luxuries as a cottage and an aircraft. Furthermore, by the end of the marriage, due to inflation, the value of agricultural land in Saskatchewan had appreciated greatly. At the time that Mrs. Farr brought her application for distribution of matrimonial property under the Saskatchewan *Matrimonial Property Act*,⁹ the property subject to distribution amounted to \$1,680,125.00.

Prior to an analysis of the reasons for judgment in *Farr*, it is important to consider some preliminary points in regards to the applicable law. It should be noted that the Saskatchewan Act, unlike such matrimonial property legislation as Ontario's *Family Law Reform Act*,¹⁰ defines matrimonial property by an 'acquisition' rather than a 'use' test. A 'use' test separates family assets and commercial assets on the basis of whether the property was ordinarily used by both spouses or the children for family purposes. While 'family' assets are subject to the presumption of equal division under the 'use' approach, 'commercial' assets may only be intruded upon where a judge so decides to exercise his discretion and at that, only within the limits of an enumerated list of allowable circumstances set out in the Act.¹¹ An 'acquisition' test, on the other hand, is followed in the three prairie provinces and provides a much greater possibility for the sharing of commercial assets, since the definition of marital property concentrates on *when* the property was acquired.¹² The Saskatchewan Act, thus, exempts the fair market value of property owned by an individual at the time of the marriage, while recognizing that all other property acquired during the marriage should be shared equally. And, as in the Ontario Act, a shopping list enumeration of situations where courts in their discretion may vary the presumption of equal division is also included.¹³

The choice of which test is to be used to determine the matrimonial property liable to equal division strongly reflects the enacting legislature's attitude towards both the basic presumption of partnership in marriage and the exercise of judicial discretion in varying a fifty/fifty sharing. Subsection 4(5) of the Ontario *Family Law Reform Act* states that

inherent in the marital relationship there is a joint contribution, whether financial or otherwise . . . entitling each spouse to an equal division of the *family* assets. [emphasis added]¹⁴

By Section 20 of the Saskatchewan Act, however, the same recognition of contribution and equal distribution extends to all *matrimonial* property, that is, both family and commercial assets acquired post date-of-marriage. The practical result of this difference is twofold. First of all, a Saskatchewan judge need not enter the slippery slope of separating 'family' and 'commercial' assets, and secondly, he need not undertake the often unpleasant

9. *The Matrimonial Property Act*, S.S. 1979, c. M-6.1.

10. *The Family Law Reform Act*, R.S.O. 1980, c. 152.

11. *The Family Law Reform Act*, R.S.O. 1980, c. 152, s.3(b), s.4, s.8.

12. See *The Matrimonial Property Act*, R.S.A. 1980, c. M-9, s.7; *The Marital Property Act*, S.M. 1978, c. 24 (M45) s.4; *The Matrimonial Property Act*, S.S. 1979, c. M-6.1, s.23.

13. *The Matrimonial Property Act*, S.S. 1979, c. M-6.1, s.21.

14. *The Family Law Reform Act*, R.S.O. 1980, c.152, ss. 4(5).

task of applying a contribution test to determine to what extent indirect, non-financial contributions can create an interest in the other spouse's 'commercial' assets. Thus, whereas an Ontario wife becomes subject to an implicit burden of proof where she must favourably compare her marital contributions to those of an 'ideal' wife before she is entitled to share at the Court's discretion, in non-family property, the Saskatchewan wife shares equally in all matrimonial assets *as of right* and may only be disentitled under certain enumerated circumstances.

At trial, Mrs. Farr was awarded an equal share of the net total of matrimonial assets available for distribution. The trial judge, in accordance with the above analysis correctly dismissed as irrelevant an attempt by the *wife* to import a contribution test (although his remarks would of course apply equally to both parties):

The effect of the combination of sections 20 and 21(1) of the Act is that, prima facie, each spouse shall receive an equal division of the matrimonial property. This equal distribution may be varied if the court is satisfied that any of the equitable considerations mentioned in section 21(2) apply. Extra effort by one of the spouses towards accumulation of the matrimonial property is not one of the factors listed in that subsection.¹⁵

Halvorson J. also dismissed the husband's attempt to gain a larger share through the use of the Capital Base Theory. Under this approach, a spouse would be granted more than an equal share of property where matrimonial assets subsequently acquired could be said to have arisen from the investment base of the original exempt capital brought into the marriage by that spouse.

On appeal, the Capital Base Theory was applied by a unanimous Saskatchewan Court of Appeal, which used its discretion to produce an unequal sharing in favor of the husband. A one third — two thirds split, with the husband receiving a larger share of the farm land, was held to be fair and equitable, taking into account the husband's initial contribution to the marriage. The Court of Appeal also based its decision on the assertion that an equal share would be uneconomical:

In the distribution of the farm land the learned trial judge gave the wife 6 quarters of land. This places the husband in the position where he has equipment suitable for a farm of 1,835 acres and he has fewer than 6 quarters of land. The wife has no machinery and although not a farmer she was given 6 quarters of land. As the husband is a man of 54 years of age there is little possibility that he can again rebuild his land holdings particularly as the cost of farm land has increased so greatly.¹⁶

The Supreme Court overturned the Court of Appeal in a unanimous decision. McIntyre J., writing for a five justice bench, provided three distinct reasons for overruling the Capital Base Theory. The court did not, however, deal with the Court of Appeal's second assertion, noted above.

On a level of statutory interpretation, the Court held that the Capital Base Theory resulted in a discretionary evaluation of assets brought into the marriage, contrary to the fair market value exemption provided under

15. *Supra* n. 4, R.F.L. at 354 (Q.B.).

16. *Supra* n. 4, R.F.L. at 307 (C.A.).

section 23 of the *Act*. A general judicial discretion, the Court noted, should not be used to override the specific rule for measuring the exempted value. Analysing the shopping list approach of the Saskatchewan Act, which sets out a finite series of exemptions to the presumption of equal sharing, the Court further held that while the Capital Base Theory attempted to overcome this presumption, it did not fit within any of the specific exemptions. Finally, Mr. Justice McIntyre implied that the Capital Base approach was an indirect attempt to import a contribution test into the presumption of equality. The Court refused to recognize the argument that a special contribution made by a spouse who brings into the marriage assets that appreciate in value, thus permitting the acquisition of further assets, entitles that spouse to a larger share. Rather, it held, in what is submitted to be the most important and far reaching of its reasons for judgment, that, "contribution to the growth of assets after the marriage is presumed to be equal and the proceeds therefrom to be equally divisible".¹⁷

Post *Farr* — Reform?

The crux of *Farr*, it is submitted, remains the articulation of the concept of marriage as an equal partnership. The Supreme Court of Canada upheld the presumption contained in section 20 of the *Act* — that inherent in the marital relationship is a joint contribution entitling both spouses to share equally, even if one was 'merely' a housewife and mother. The inadequacies of *Murdoch* and the *Married Womens' Property Acts*¹⁸ have thus been overcome.

Attempts to import a contribution test and as such to evaluate spousal contributions have been resisted. Judicial discretion to adopt economic rationales that implicitly favor the income earning husband has been reined in or ignored. Surely the reforms of the seventies have been vindicated by the Supreme Court. Or have they?

Judicial Reform

McLeod, in an annotation to *Farr*, criticizes the judgment for its insufficiency:

To date no clear philosophical statement has been forthcoming from the courts as to what entitles one spouse to share in the assets acquired by another. If it is a presumption that the unit has had a major impact on the value of the asset, the Court ought to respond to the problem caused when the value results solely or largely through the efforts of one of the spouses alone or external factors.¹⁹

In other words, McLeod is requesting guidance as to when the presumption of equal division would be rebutted. By implication, his query suggests the necessity for a valuation of spousal contributions and/or judicial recognition that, where inflation increases the value of property, this windfall should go to the spouse who brought appreciating property into the marriage.

17. *Supra* n.4, S.C.R. at 263.

18. See particularly, the *Married Women's Property Act*, 1882, 45 & 46 Vict., c.75 (U.K.), and the *Married Women's Property Act*, S.O. 1884, c.19.

19. *Supra* n.5, at 3.

It is respectfully submitted that such a critique is valid, not in the Prairie Provinces where the presumption of partnership and equal division is paramount, but rather in Ontario where dependent wives need clear philosophical statements from the courts in their battles against the burden of proof required to break into the pool of commercial assets. If Saskatchewan judges were allowed to go beyond the enumerated list of exceptions contained in the *Act* and examine external factors, they would be importing the Ontario regime whereunder dependent wives would be disqualified from inflationary gains accruing to the farming unit simply because they would not be able to prove a contribution. It must be remembered that, under the present *Act*, the Saskatchewan husband is awarded the value of the capital base that he brought into the marriage, at the time of the marriage and that further inflationary gains are in no way his contribution. The boom of inflation or the bust of drought are to be shared by the unit. Further judicial statements that clarify entitlement or disentitlement are required as swords for dependent wives in Ontario, not as shields for farm husbands on the Prairies.

Legislative Reform

The Law Reform Commission of Saskatchewan has issued tentative proposals for reform of *The Matrimonial Property Act*²⁰. In essence, these proposals adopt McLeod's thesis that contributions to the appreciation of property value should no longer be *presumed*. Rather, a right to share should be proven. To buttress this argument, the Law Reform Commission resurrected the issue of the economic viability of large farms, last raised by the Court of Appeal in *Farr*. The Commission lamented that if inflation is divided between spouses this may cause the loss of farms and with it the loss of the husband's only livelihood.²¹ The Commissioners go on to explain the emergence of the Capital Base Theory as a somewhat flawed attempt to circumvent a perceived inequity in the exemption rules of the Saskatchewan Act which deny the proprietor spouse his full appreciation in value. Responding to McIntyre J.'s criticism in *Farr*, that the Capital Base Theory is incompatible with the presumption of equal division, the Commission concludes:

The proposed Act provides a broader exemption than is available under the present Act. Unlike the capital base theory it achieves a fair result without opening the door to consideration of the relative contributions of the spouses, thus avoiding any conflict with the basic approach of the act to contribution.²²

This summation (and apology) is flawed. First, as was stated in response to McLeod, the proposed changes would force a spouse, invariably the wife, to bring evidence as to why the new rule of exemption on appreciation should not apply in the particular circumstances. This is a clear regression to the Ontario approach, as can be seen in the Commission's annotation of the proposed amendments:

20. *Supra* n. 7.

21. *Ibid.*, at 43-44.

22. *Supra* n. 7, at 48.

An exemption should be reduced, for example, where spouse A relies on the efforts of spouse B to maintain the family, while the efforts of spouse A are directed to increasing the value of spouse A's exempt property.²³

Secondly, it is obvious that the proposed amendments would be difficult to apply. Judges would have to exempt the *present* market value from distribution, then identify the pure inflationary portion of this exemption, and finally deduct the wife's direct and indirect contributions to the total. Such an approach is unwieldy at best and impractical at worst.

Finally, while the presumption of equal distribution contained in the Saskatchewan Act, as it now stands, is in no way worded so as to deny one spouse a windfall due to inflation, it should be reiterated that this presumption also allows for an equal division of *deflation*, and as such is predominantly equitable, in that both the 'booms' and the 'busts' are shared.

Conclusion

It has been submitted in this comment that the themes of equality and partnership in marriage should prevail over perceived criticisms of 'unfairness' resulting from economic factors — whether it be the effects of inflation or the viability of the prairie farm. Saskatchewan's proposed legislation is a step back from the heights of *Farr*. The result can only be the grafting of Ontario's problems on to the backs of Saskatchewan's farm wives. Through *Farr* the Supreme Court has created an almost irrebuttable presumption of equality, subject to a restricted list of statutory exceptions. This favours the dependent spouse. The reforms, on the other hand, will import a scheme of unequal division with reliance on the discretion of judges to rectify the situation based on the ability of wives to prove a contribution.

As outlined above, the theoretical critiques of *Farr* are surmountable when one keeps the presumption of equality in mind. In fact, prairie judges had already begun, prior to *Farr*, to formulate adequate *practical* solutions to the economic arguments raised against that judgment.

In *Earl v. Earl*,²⁴ a one million dollar farming and ranching operation was equally divided — yet the business continued. The Alberta trial judge, to prevent disruption, awarded the majority of the farm land to the husband, subject to a ten year mortgage to the wife to secure an equalization payment. The lands transferred to the wife were leased back to the husband for the same ten year term. Thus the farm could continue, while equal division was ensured.

In *Marks v. Marks*, Hamilton J. of the Manitoba Queen's Bench, countered the windfall arguments against dividing appreciation by underlining the basic assumption which critics of the *Farr* decision too often forget:

It might be argued that it would be "clearly inequitable" to permit the wife to share in the increase in the value of the farm "just by being there". The answer to that argument is two fold. The husband has also shared in the increase in value "just by being there". The increase

23. *Supra* n. 7, at 125.

24. (1982), 29 R.F.L. (2d) 89 (Alta. Q.B.).

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.²⁵

Farr is not too far. For Western Canadian couples, marriage should remain a partnership, for better or for worse, *and* for appreciation or depreciation.

25. (1982), 17 Man. R. (2d) 209 at 220; aff'd (1983), 22 Man. R. (2d) 300, 35 R.F.L. (2d) 173 (C.A.) (leave to appeal to the Supreme Court of Canada refused 19 June 1984).

