Dividing Family Assets During Divorce: Comparative Legal Regimes Between Canada (Manitoba) and Germany

By Claudia Wendrich

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DIVIDING FAMILY ASSETS DURING DIVORCE: COMPARATIVE LEGAL REGIMES BETWEEN CANADA (MANITOBA) AND GERMANY

by

CLAUDIA WENDRICH

A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirements of the degree

MASTER of LAWS

To David and Rosi

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List of Abbreviations

Abs.	Absatz (subsection)
a.F.	alte Fassung (old version)
AG	Amtsgericht (County Court)
A.J.C.L.	American Journal of Comparative Law
Alta.Q.B.	Alberta Court of Queen's Bench
Akron L.Rev.	Akron Law Review
Ark.L.Rev.	Arkansas Law Review
Art.	Article
BB	Betriebsberater
B.C.C.A.	British Columbia Court of Appeal
B.C.L.R.	British Columbia Law Reports
B.C.S.C.	British Columbia Supreme Court
Bd.	Band (volume)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGH	Bundesgerichtshof (German Supreme Court)
BGHZ	Amtliche Entscheidungssammlung des BGH in Zivilsachen (Official Collection of Decision of the BGH in Civil Disputes)
BT-Dr.	Bundesdrucksache
C.A.	Court of Appeal
Calif. Western L. Rev.	California Western Law Review
Can. Bus.	Canadian Business
Can. Community Property J.	Canadian Community Property Journal
C. Bar Rev.	Canadian Bar Review
C.F.L.Q.	Canadian Family Law Quarterly
C.J.F.L.	Canadian Journal of Family Law
C.J.L.S.	Canadian Journal of Law and Society
C.J.W.L.	Canadian Journal of Women and the Law
Col.S.C.	Supreme Court of Colorado
Community Prop.J.	Community Property Journal
Cornell L.Rev.	Cornell Law Review
Dalhousie J.L.S.	Dalhousie Journal of Legal Studies
D.L.R.	Dominion Law Reports
DM	Deutsche Mark
FGB	Familiengesetzbuch der DDR (Family Law Act of former East-Germany)
F.L.Q.	Family Law Quarterly
GDR/DDR	German Democratic Republic (former East-Germany)
GG	Grundgesetz (Constitution)
Hb.	Halbband (half volume)
I.C.L.Q.	International and Comparative Law Quarterly
J.Fam.L.	Journal of Family Law
J.L. & Religion	Journal of Law and Religion

Fam.Advo.	Family Advocate
FamRZ	Zeitschrift für das gesamte Familienrecht
Ky.App.	Kentucky Court of Appeal
Loyola L.A.L.Rev.	Loyola University Los Angeles Law Review
LG	Landgericht (Higher County Court)
Man.C.A.	Manitoba Court of Appeal
Man.Co.Ct.	Manitoba County Court
Man.L.J.	Manitoba Law Journal
Man.Q.B.	Manitoba Court of Queen's Bench
Man.R.	Manitoba Reports
Mich.C.A.	Michigan Court of Appeal
NJS	New York Supplement
NJS C.A.	New York State Court of Appeal
NJW	Neue Juristische Wochenschrift
Nr.	Nummer (number)
N.W.	North Western Reporter
OLG	Oberlandesgericht (Higher Court of Appeal)
Ont.C.A.	Ontario Court of Appeal
Ont.Ct. of Just.Gen.Div.	Ontario Court of Justice General Division
Ont. Dist.Ct.	Ontario District Court
Ont.H.C.	Ontario High Court of Justice
Ont.U.F.C.	Ontario Unified Family Court
O.R.	Ontario Reports
Ottawa L.Rev.	Ottawa Law Review
para.	Paragraph
Q.B.	Court of Queen's Bench
Rdnr.	Randnummer (Margin Number)
Rev. Gen. D.	Revue Generale de Droit
R.F.L.	Reports of Family Law
R.S.O.	Revised Statute of Ontario
R.S.M.	Revised Statute of Manitoba
S.	Satz (sentence)
Sask.L.Rev.	Saskatchewan Law Review
S.C.	Statute of Canada
S.C.C.	Supreme Court of Canada
S.O.	Statute of Ontario
S.S.	Statute of Saskatchewan
S.W.	South Western Reporter
Tulane L.Rev.	Tulane Law Review
U.Chicago L.Rev.	University of Chicago Law Review
U.Kan.L.Rev.	University of Kansas Law Review
U.T.L.J.	University of Toronto Law Journal
U.T.Fac.L.Rev.	University of Toronto Faculty of Law Review
U.W.O.L.Rev.	University of Western Ontario Law Review

Washburn L.Rev.	Washburn Law Review
Wisc. C.A.	Wisconsin Court of Appeal
W.R.L.S.I.	Windsor Review of Legal and Social Issues
W.W.R.	Western Weekly Reports
ZPO	Zivilprozeßordnung (Civil Procedure Act)

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Introduction

> *Divorce is the one human tragedy that reduces everything to cash.*
> Rita Mae Brown as quoted by J. Stanley, Divorces from Hell (1994)

Unfortunately, divorce law and all of its divisible matters have become more and more significant. The social conditions in western culture have created the highest divorce rate in history.[1] In fact, among currently marrying couples it can be suggested that only 40 -50% will still be married to each other after they have reached the age of fifty.[2] Apart from divorce law, other areas of family law are significant because "no other area of law matters more to people than family law. Not many people do corporate takeovers, most do not commit crimes but absolutely everyone has a family."[3] This thesis contributes to bringing the understanding of family law out of its own shadow.

Although everyone wants to have a happy family, "marital happiness is not theoretically interesting, but divorce is."[4] This paper primarily deals with a comparative analysis of the laws in Manitoba and Germany regarding the distribution of marital property after divorce. Apart from custody of their children, the distribution of marital assets usually is the most disputed issue,

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[1]) W.J. Goode, "World Changes in Divorce Patterns" in L. Weitzman and M. MacLean (eds.), *Economic Consequences of Divorce: The International Perspective* (Oxford: Clarendon Press, 1992) at 11.

[2]) *Ibid.*, at 16.

[3]) R.S. Abella, "The Law of the Family in the Year of the Family" (1994) 26 Ottawa L.Rev. at 533.

[4]) *Supra*, note 1 at 12.

even if in most cases there is less at stake than in the case of the Saudi Arabian magnate, Adran Khashoggi, whose ex-wife sued for $ 2.5 billion![5]

After a short historical introduction, I present a general juxtaposition of the statutory matrimonial property regimes in Manitoba and Germany. Both jurisdictions have a so-called deferred community property regime, with some similarities but also significant differences. Due to the limited scope of this thesis it is impossible to compare every legal aspect with the corresponding law in the other country. Therefore, only a few detailed issues such as the dissipation and tracing of assets are discussed. The third chapter then deals with the consideration and valuation of certain kinds of assets. Special attention is paid to the consideration of new forms of property, in particular to career assets, like university degrees and licences to practise, because these assets are not adequately taken into account upon marriage breakdown in both jurisdictions. The last section gives an overview of the very few cases where an unequal division of assets has been granted.

The reader has to bear in mind that there is no "patent remedy" for solving legal problems associated with financial divorce. No matter what the present legal situation is like, there will always be a compromising of conflicting interests, but there can never be complete "justice", at least in the minds of the two parties.

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[5]) E. Wachtel, "The 50-per-cent Solution" (1980) 93 McLean's at 46.

Part I: Historical Background

1. German Beginnings

Until the twentieth century the history of matrimonial property law in Germany amounted to a battle for uniformity.[6] Linked directly with a legal system that did not permit divorce, no substantive marital property law could be developed.

Even in the old Germanic tribal laws,[7] spouses could terminate their marriage by a contract between them, and the husband could also terminate by a contract with the wife's relatives. Grounds for divorce included for example a wife's infertility.[8] Tribal laws preferred community of property but they could differ significantly. There were property regimes which covered all property of the spouses and others which applied only to property acquired during the marriage.[9] The further development of territorial laws[10] caused a wide range of marital property regimes. In the *Mirror of Saxony* there was separation of property within

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[6]) E.D. Graue, "German Law" in A.K.R. Kiralfy (ed.), *Comparative Law of Matrimonial Property* (Leiden: Sijthoff, 1972) at 114.

[7]) See for example: Lex Salica and Lex Burgundonium. For a detailed explanation about these laws see F. Ebel and G. Thielmann, *Rechtsgeschichte - Bd.I Antike und Mittelalter* (Heidelberg: C.F. Müller Verlag, 1989) at 109-116.

[8]) M. Rottleuthner - Lutter, *Gründe von Ehescheidungen in der BRD*, (Köln: Bundesministerium der Justiz, 1992) at 20.

[9]) *Supra*, note 6.

[10]) The most famous one among German territorial laws was the *Mirror of Saxony* (*Sachsenspiegel*, 1215-1235). For a detailed discussion about it see C. Schott, *Der Sachsenspiegel* (Zürich: Manesse Verlag, 1991). Apart from the *Mirror of Saxony* there were other territorial laws, such as the *Mirror of Swabia* (*Schwabenspiegel*, 1275) and the *Mirror of Franconia* (*Frankenspiegel*, 1328-1338). For an overview of both see *supra*, note 7 at 142.

marriage coupled with the husband's right of administration.[11] It reflected the idea of the tutelary powers of the husband over his wife.[12] By contrast the community of acquests (Errungenschaftsgemeinschaft), i.e., the community of property acquired during the marriage, was the major matrimonial property regime in the Frankish areas.[13]

The medieval church and its canon law halted development of any secular matrimonial property laws because divorce in the modern sense was not permitted.[14] The marriage continued even in the case of adultery. Although there was the sanction of "separation from bed and board" (a mensa et thoro), it only caused cessation of marital obligations, with no impact on property rights of each spouse.[15]

In the sixteenth century Reformation, reformers denied that marriage was a holy sacrament, as preached by the Roman Catholic church, because they found no divine revelation or written evidence for it. They held that the family should not stand beneath the

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[11]) "Svenne en man wif nimt, so nimt he in sine gewere al it gut to rechter vormuntscop": F. Massfelder "Matrimonial Property Law in Germany" in W. Friedmann (ed.), *Matrimonial Property Law* (Toronto: Carswell, 1955) at 369.

[12]) *Ibid.*

[13]) *Ibid.*, at 370.

[14]) J. Witte, "The Reformation of Marriage Law in Martin Luther's Germany: Its Significance Then and Now" (1986) 4 J.L. & Religion 293 at 306.

[15]) Although it was first mentioned at the Council of Trent (1545-1563) this system was in practice throughout the Middle Ages: *supra*, note 8; and R.H. Helmholz, *Marriage Litigation in Medieval England* (London, New York: Cambridge University Press, 1974) at 100-107.

church but alongside it.[16] Both marriage law and court procedure changed.[17] Marriage was still considered indissoluble, not because of former ecclesiastical authority but because a secular authority was appointed by God.[18] The Reformation , therefore created two German legal systems: the Protestant lands where religious authorities relinquished jurisdiction over marriage to their secular rules, and the Catholic areas where the medieval ways remained. This produced a tension that resulted in the evolution of a new social concept of marriage, which transformed the family law in Germany over the next centuries.

2.From the Enlightenment until the Nineteenth Century

In the seventeenth and eighteenth centuries, family law further separated from ecclesiastical influence. In both Protestant and Catholic jurisdictions in Germany, natural law became the starting point for the further development of the German territorial laws,[19] among which Prussia had the most generous regime.[20] There were three other major divorce law regimes in Germany by the nineteenth century: the French *Code Civil* (1804),

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[16]) *Supra*, note 14 at 308.

[17]) Throughout the sixteenth century there was the so called Aktenversendungsverfahren (file sending procedure): *supra*, note 10 at 319.

[18]) *Supra*, note 8.

[19]) The exact expression for these territorial laws is "Partikularrechte".

[20]) For more details about the divorce law in Prussia see: para. 670-714 *Prussian General Code* (*Preußisches Allgemeines Landrecht*, 1794).

the *Civil Code of Saxony* (1863)[21] and the general German *jus commune* ("common law")[22] which split into Catholic and Protestant legal regimes. Under Catholic "common law", a relic of the pre-Reformation canon law, marriage remained indissoluble. But after enactment of the *Marital Status Act*[23] the "separation from bed and board"[24] was replaced by a uniform German divorce law.[25] However, there was still a wide variety of matrimonial property regimes in Germany. Apart from the already mentioned separation of property[26] in Northern Protestant Germany and the community of acquests in Catholic Bavaria, Württemberg and Hannover, there was community of movables (Fahrnisgemeinschaft), i.e., where all property acquired during the marriage plus the combined moveable properties of both spouses formed a larger community property. This was the system adopted from the French *Civil Code* and it remained the statutory regime in western parts of Germany, for example in Baden and parts of Schleswig Holstein.[27] Modifications to these main regimes resulted in about one hundred different matrimonial property

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[21]) *Sächsisches Bürgerliches Gesetzbuch* (BGB).

[22]) To the English legal tradition this is a misleading expression, because this continental European "common law" means the full secular system in contrast to its ecclesiastical or "canon law", hence this "common law" simply means the "general" or "standard" laws.

[23]) *Reichspersonenstandsgesetz,* 1875, see para. 77 for more details.

[24]) *Supra*, note 15.

[25]) *Supra*, note 8 at 22.

[26]) *Supra*, note 11.

[27]) *Supra*, note 11 at 370.

regimes in Germany at the turn of the century![28]

3. Manitoba Beginnings

While German law was characterised by an immense diversity, Manitoba family law was transplanted from the English common law. This was antiquated but at least uniform and deprived married women of any separate legal personhood. Husband and wife were to be considered in law as one person, and the husband is the one.[29] In Canadian common law jurisdictions, property legislation that concerned husband and wife defined the husband's control and management.[30] Although the concept that the husband could manage his wife's property existed in German law,[31] he did not assume the status of its owner, as in the English law, where he could dispose of it during his lifetime or through his will without her consent. There was one exception to this rule: a man could not get ownership over his wife's real estate but he gained the authority to manage it and receive profits and rent from this property.[32] Both English and German law reflected an awareness of the continued importance of real estate to the wife's interests. While it did not become

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[28]) *Ibid.*, at 371.

[29]) W. Blackstone, *Commentaries on the Laws of England* (New York: Collins & Hannay, 1830) at 442.

[30]) F.C. Auld, "Matrimonial Property in the Common Law Provinces of Canada" in W. Friedman (ed.), *Matrimonial Property Law* (Toronto: Carswell, 1955) 239 at 241.

[31]) *Supra*, note 11.

[32]) S. Allen, "One hundred years of solitude: Judicial resistance to reform of married women's property law in the West" (1995) 4 Dalhousie J.L.S. 175 at 178.

property of the husband under common law it also remained in the separate property of the wife and was excluded from the community property under the regime of community of movables in Germany.[33] Under English common law a woman could not make a contract or a will.[34] Although theoretically available to all married women only in a few cases were trusts actually established for women, to protect their own earnings, gifts from third parties or inherited property.[35]

When Manitoba joined Canada in 1870 this became the law in Manitoba where, like the majority of women in the western world, wives were primarily housekeepers.[36] When old common law rules were considered out of date and discriminatory, equity modified them. The most important modification was the doctrine of separate property, which allowed the wife to protect her property from her husband and his creditors, even if it was only held in trust for her.[37] The next step toward complete separation of property for women was enactment of the *Married Women's Property Act (U.K.) 1882,* which allowed married women to hold and dispose of their own

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[33]) *Supra,* note 27 and accompanying text.

[34]) Manitoba Law Reform Commission, *Report on "The Married Women's Property Act" and related matters* by C.H.C.Edwards, K.B. Foster, L. Gibson, J.C.Irvine, G.O. Jewers, (Winnipeg: The Commission, December 1985) at 5.

[35]) S Day, "The Charter and Family Law" in E. Sloss (ed.), *Family Law in Canada: New Directions,* (Ottawa: The Advisory Council on the Status of Women, 1985) 27 at 28.

[36]) Statistics Canada, *Law and the Family in Canada,* (Ottawa: the Minister for Supply and Services, 1989) at 36.

[37]) *Supra,* note 34.

personal and real property.[38] The first *Married Women's Property Act* in Canada[39] came in 1884 in Ontario.[40] In Manitoba[41] there was a rather gradual development. Since 1875 married women could enjoy their own real and personal property,expect for their earnings.[42] These were considered separate property after further reforms in 1881,[43] and since legislative changes in 1900 married women could dispose of their property by will.[44] The same incremental development took place concerning a married woman's capacity to enter into contracts.[45]

Although these reforms improved married women's rights to control their own property, they did not force the husband to share his wealth. They had little impact on the practical life of women

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[38]) Canada Law Reform Commission, *Tentative draft on part 1 of Commissions working paper on matrimonial property,* (Ottawa: The Commission, March 1974) at 2.

[39]) *Married Women's Property Act,* S.O. 1884.

[40]) For a comparative analysis about this development in Canada and the United States see: N. Bala, "Family Law in Canada and the United States: Different versions of similar realities" in M. Hughes and D.Pask (eds.), *National Themes in Family Law,* (Toronto: Carswell, 1988) 241 at 262.

[41]) Today matrimonial property legislation is still under provincial legislation because the Constitution Act, S.C. 1982, ss. 91-92 divided the legislative jurisdiction over family law. See: D.J. MacDougall, *Marriage Resolution and Recognition in Canada* (1995) 29 F.L.Q. at 541.

[42]) An Act respecting separate rights of property of married women, S.M. 1875, c.25, s.1.

[43]) An Act to amend certain of the Acts forming part of the consolidated Statutes of Manitoba, S.M. 1881, c.11, ss. 74-75.

[44]) *The Married Women's Property Act,* S.M. 1900, c.27, s.3.

[45]) For a more detailed analysis of these developments see *supra,* note 34 at 9-11. For a married woman's capacity to dispose of her property by will see *supra,* note 34 at 12.

because most of them did unpaid housework within the marital home[46] and had little or no property solely in their names. By contrast separation of property, community of acquests and community of movables[47] already reflected the idea of marriage as an economic partnership, because certain property belonged to the community. In separation of property, spouses are treated like legal strangers. Although this regime guaranteed independence and freedom it did not protect the economically weaker party, i.e., the wife who stayed at home and looked after the children.[48] Separation of property was real progress when compared to the English common law rules but it was halfway along the road to a concept of equal partnership in marital property law.

4. Marital Property Law Reforms, 1900-1950

The industrial revolution made social life much more complex, resulting in a new importance and new forms for the law of property. Urbanisation also transformed family life from rural, agricultural into more formalised, centralised and commercial patterns.[49] The different territorial laws in Germany were no longer a match for the new social life. Codification of the *Civil*

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[46]) *Supra*, note 35 at 29.

[47]) *Supra*, note 27 and accompanying text.

[48]) F. Steel, "The ideal property regime - What would it be?" in E. Sloss (ed.), *Family Law in Canada: New Directions*, (Ottawa: Advisory Council on the Status of Women, 1985) 127 at 129.

[49]) M.A. Glendon, *The new family and the new property*, (Toronto: Butterworths, 1981) at 107.

Code (1896)[50] came into effect on January 1, 1900, creating the first uniform German matrimonial property law out of more than one hundred localised regimes. The most practical solution seemed to be one statutory system with contractual variations. After modification of the former separation of property regime, coupled with the husband's right of administration,[51] the community of administration (Güterstand der Verwaltung und Nutznießung)[52] became the new statutory matrimonial property regime. The husband would still manage the wife's non-reserved property and enjoy the benefit of it without becoming its owner.[53] Community of administration, however, distinguished three different kinds of property: first, the husband's property which was not affected by the marriage; second, the reserved property and third, the non-reserved property of the wife.[54] Reserved property included, for example, things of personal use[55] such as clothing and anything the wife acquired through her work,[56] as well as inherited property[57] and assets declared to be reserved property by contract.[58] Everything else was

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[50]) *Bürgerliches Gesetzbuch* (BGB).

[51]) *Supra*, note 11.

[52]) See for more details: M.A.Glendon, "Matrimonial Property: A comparative study of law and social change" (1974-75) 49 Tulane L.Rev. 21 at 39.

[53]) Para. 1370 BGB a.F.

[54]) *Supra*, note 11 at 372.

[55]) Para. 1363 BGB a.F.

[56]) Para. 1367 BGB a.F.

[57]) Para. 1369 BGB a.F.

[58]) Para. 1368 BGB a.F.

non-reserved property. This regime still imposed the husband's will on his wife, which is why some writers say it was outdated before it was enacted.[59]

However, one has to bear in mind that the whole process of codification had been influenced by conservative, property-owning males at the end of the nineteenth century.[60] Although the German legal profession favoured a system of deferred community of property, as already existed in Sweden, they could not assert themselves against the legislature.[61] Spouses could opt out of this antiquated regime and agree about general community of property,[62] community of acquests, community of movables[63] or separation of property by contract.[64] This regime of choices survived both the Weimar Republic and the Third Reich. The Weimar Constitution[65] provided that men and women have equal legal rights, which was primarily understood as a mere declaration rather than a legal rule. Thus the validity of the matrimonial property law, which was

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[59]) W. Vogegli and B. Willenbacher, "Property Division and Pension Splitting in the FRG" in L. Weitzman and M. MacLean (eds.), *Economic consequences of divorce: The international perspective* (Oxford: Clarendon Press, 1992) 163 at 164.

[60]) W. Müller-Freienfels, "Family Law and the Law of Succession in Germany" (1967) 16 I.C.L.Q. 409 at 410.

[61]) *Supra*, note 59.

[62]) Under this regime both property acquired before and after the marriage became community property. It reflected best the idea of marriage. See also *supra*, note 11 at 370.

[63]) *Supra*, note 27 and accompanying text.

[64]) For more details see: *supra*, note 11 at 374.

[65]) Art. 119 *Weimar Constitution* (*Weimarer Reichsverfassung, 1919*).

obviously unconstitutional, was never denied. The Nationalist Socialist government was also not interested in changing the law, because a male-dominated family fulfilled their ideology.[66] Reforms to the divorce law were necessary because of the 1938 Austrian union with Germany, but these did not have any impact on the matrimonial property regimes. The *Marriage Act*[67] only modified grounds for divorce.[68]

During the same period Manitoba law hardly changed. Only the last relics from the common law were abolished, for example the husband's liability for his wife's torts.[69] Separation of property remained the major regime. At the end of the 1940s both Canadian and German law was characterised by the idea that the husband was the head of the family. Women's interests were legally ignored.

5. Marital Property Law Reforms Since 1950

After World War II, the new German Constitution[70] came into force on 23 May, 1949. Article 3 declared that "men and women have equal rights". Unlike the old Art. 119 of the Weimar Constitution, this was no longer a non-mandatory exhortation.[71] In the twentieth century the demand for gender equality was one of the most

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[66]) *Supra*, note 6 at 117.

[67]) *Ehegesetz vom 06. Juli 1938*.

[68]) Para. 47-53 Marriage Act. See for more details: *supra*, note 8 at 25.

[69]) *An Act to amend "The Married Women's Property Act"*, S.M. 1937, c.28, s.1.

[70]) *Grundgesetz* (GG).

[71]) *Supra*, note 60 at 424.

fundamental reforms in the world including the United States and Scandinavia.[72] German matrimonial property law had remained out of time and unconstitutional. The new constitutional law-makers gave the legislature four years to update the law to the new constitution.[73]

Attempts to create a new matrimonial property law before the deadline on 31 March, 1953 failed, mainly because there was no majority support for such enactment[74] and too little time.[75] Only five months before the deadline, the government and the Ministry of Justice introduced a bill to the Upper House of the Parliament.[76] After 31 March, 1953, German courts faced a completely unexpected problem. Because the old law was now declared unconstitutional, and there was no new law, they had to make case law.[77] The former community of administration was replaced by the separation of property as the "statutory" regime.[78] The idea that the separation of property regime might be unconstitutional as well, because it did not adequately reflect the idea of equality between husband and wife, was never considered. During this short period in the 1950s

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[72]) W. Müller - Freienfels, "Equality of Husband and Wife in Family Law" (1959) 8 I.C.L.Q. 249 at 251.

[73]) Art. 117 GG.

[74]) For more details about the controversial viewpoints of different parties see: *supra*, note 6 at 118.

[75]) F.W. Bosch, "Entwicklungslinien des Familienrechts in den Jahren 1947-1987" (1987) NJW 2617 at 2618.

[76]) BT - Dr. 3802 vom 23. 10. 1952.

[77]) *Supra*, note 6 at 118.

[78]) D. Reinecke, "Zum neuen ehelichen Güterrecht" (1957) NJW at 889.

Germany and the common law provinces of Canada had the same matrimonial property regime, separation of property.

At the end of 1953 the German government introduced a second bill.[79] In the following year there was a lot of discussion and comparative study on the subject. The Austrian community on death, the Swedish approach and the law of Costa Rica, which were deferred community of property regimes in different modifications, were examined in detail.[80] Neither complete separation of property nor community of acquests was considered appropriate as a German statutory regime because they did not protect the wife adequately.[81] A regime with wide judicial discretion did not find much support because it created too much uncertainty; and community of property, which included assets acquired before marriage, was considered to be unjust.[82]

Finally the law-makers decided to create a regime which combined the advantages of the Austrian, Swiss and Swedish systems. The new *Law concerning the Legal Equality of Men and Women in the Area of Private Law (Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiet des Bürgerlichen Rechts* kurz *Gleichberechtigungsgesetz)* came into force on 1 July, 1958. This *Equality Act* introduced the present statutory matrimonial property

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[79]) BT - Dr. II/224.

[80]) *Supra*, note 6 at 119.

[81]) *Ibid.*, at 120.

[82]) *Supra*, note 59 at 165. For a more detailed discussion about the advantages and drawbacks of each of these regimes: see *supra*, note 11 at 378-387.

regime, the community of surplus (Zugewinngemeinschaft). The name is misleading because the law provides a kind of separation of property rather than a community. During their marriage spouses keep their property separately and only upon its termination the spouse with the higher surplus has to make an equalisation payment to the other.[83] The main advantage of this is its ease in application.[84] It also reflects the economic partnership between spouses because it considers unpaid housework to be as valuable as paid labour outside the home.[85] In the Summer of 1958 the goal of the law-makers was reached: to create a marital property law not inconsistent with the constitution and with guaranteeing equal rights for both spouses.[86] Apart from the statutory regime, there are two contractual regimes that spouses can agree about: separation of property[87] and general community of property.[88] The former community of acquests and community of movables were abolished.[89] In contrast to the community of administration or the separation of property, which was still the main marital property regime in Manitoba, community of surplus made major progress in the

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[83]) Para. 1372-1387 BGB. The legislature tried to create a law which was in between the two extremes of separation and community of property.

[84]) *Supra*, note 11 at 389.

[85]) *Supra*, note 60 at 428.

[86]) For a short overview of the development of German matrimonial property law from 1896 until 1958 see J. Leyser, "New Legislation" (1958) 7 A.J.C.L. at 276-287.

[87]) Para. 1414 BGB.

[88]) Para. 1415-1482 BGB.

[89]) *Supra*, note 86 at 286.

realisation of equal rights for women, because husbands were no longer legally defined to be the head of the family and both spouses have at least in theory, the same rights.

Because of the political and economic divisions of the country, there were two statutory matrimonial property regimes in Germany. In the former East Germany (GDR), the *Family Law Act* (*Familienrechtsgestzbuch der DDR* short *FGB*) had come into force on 1 April, 1966. It provided for the community of property, acquired during the marriage (Güterstand der Eigentums - und Vermögensgemenischaft). This approach was similar to the former community of acquests, but unlike the law in West Germany before 1957, it guaranteed equal rights for both spouses.[90] For example, in dealing with marital property each spouse could act on behalf of the other.[91] Therefore injustices which might have occurred under this regime could be avoided. This statutory regime was abolished after German reunification in 1990.[92]

During the same time little changed in Canadian matrimonial property law. Although social life had changed dramatically the law remained as it was at the end of the nineteenth century. Rosalie Abella described the situation as follows: "We went through two world wars, two conscription crises, votes for women, prohibition, a Depression, a quiet revolution in Quebec, the establishment of

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[90]) For more details about it see: R. Frank, "Germany: Family Law after Reunification" (1992) 30 J.Fam.L. 335 at 336.

[91]) Para. 13 GDR - FGB.

[92]) See below, note 143 and accompanying text.

human rights commissions, the promulgation of the Canadian Bill of Rights, waves of immigration, the introduction of the radio, movies and television and a declaration by the Privy Council that women were persons, and yet hardly a single change was made to the law of the family."[93] During the 1960s, more and more women attended university and the higher education allowed them a greater economic independence.[94] The divorce rate increased rapidly.[95] While there were only 550 divorces across Canada in 1925, there were 11,343 in 1968.[96]

The first step in adjustments to the law was enactment of the federal *Divorce Act* in 1968.[97] Before divorce law had been under provincial legislation, transplanted from the *English Matrimonial Causes Act (1857)* which served as a basis for much of Canada's divorce law, because the federal government failed to enact uniform legislation on the subject of divorce.[98] In 1919 the Judicial Committee of the Privy Council in Britain ruled that the superior courts of the Prairie provinces had jurisdiction over divorce according to English law.[99]

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[93]) *Supra*, note 3 at 535.

[94]) *Supra*, note 35 at 54.

[95]) There was the same development in Germany see *supra*, note 8 at 56.

[96]) For a more detailed overview of this development see: A. Sev'er, *Women and Divorce in Canada: A sociological Analysis*, (Toronto: Canadian Scholar Press, 1992) at 80.

[97]) *Divorce Act*, S.C., 1967-1968.

[98]) W.J.Owen and J.M. Bumsted, "Canadian Divorce after Reform: The case of Prince Edward Island, 1946-67" (1993) 8 C.J.L.S. 1 at 6-7.

[99]) *Ibid.*, at 11.

The *Divorce Act* provided both no-fault divorce[100] and fairer grounds for spousal support. The burden for claim shifted from spousal conduct to the economic consequences of a divorce.[101] This legislation was considered "the most dramatic change in family law since World War II."[102] However, it did not change the matrimonial property law. Even after 1968 separation of property remained the major marital property regime in Canadian common law provinces.

By the middle of this century the development of marital property and divorce law in Canada and Germany went in different directions. While there was a liberal matrimonial property law in Germany, the divorce law of the *Marriage Act* of 1938 remained in force in its "de-nazified" version.[103] In Canada by contrast divorce law was reformed before the marital property law changed. It was not until the 1970s that further reforms improved the law in both countries. The *First Marriage Amendment Act* (*1. Eherechtsänderungsgesetz* kurz *1.EheRG*)[104] reformed German divorce law fundamentally.[105] No-fault grounds for divorce were introduced

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[100]) For a detailed overview of grounds for divorce in all Canadian jurisdictions see: A. Bissett-Johnson and D.C. Day, *The New Divorce Law* (Toronto: Carswell, 1986) at 16.

[101]) For more details about it see: J.D. Payne, "The Dichotomy between Family Law and Family Crisis on Marriage Breakdown" (1989) 20 Rev.Gen.D. 109 at 114.

[102]) M.J. Mossmann and M. MacLean, "Family Law and Social Welfare: Towards a new Equality" (1986) 5 C.J.F.L. 79 at 92.

[103]) *Kontrollratsgesetz Nr. 16 vom 20. Februar 1946.*

[104]) *1. EheRG vom 14. Juni 1974* in force since 1 July, 1977.

[105]) For a detailed discussion of these reforms see *supra*, note 8 at 26-28.

similar to the reforms eight years before in Canada.[106] Although getting a divorce would thereby be easier, in fact it was harder because the new law also provided for a new pension-splitting system,[107] which became so complex that courts today are still unable to deal with it. Apart from this change German marital property law remained the same. Pension-splitting became a procedure completely independent from the equalisation payment upon divorce under the community of surplus regime.[108]

In Canada's common law provinces nothing had changed. Separation of property was still the major marital property regime under which, in case of divorce, each spouse received what he or she owned.[109] Prior to the reforms of matrimonial property law at the end of the 1970s, "women got custody of the children and men got custody of the money."[110] The reason behind it was that property usually was registered in the name of the husband, and when the marriage ended he walked away with assets which his wife helped him to acquire.[111] This caused an unjust hardship for wives

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[106]) The same liberalisation of divorce law took place in many parts of the world, probably because divorce lost its social stigma of immoral behaviour. See about it : R. Phillips, *Putting Asunder: A History of Divorce in the Western World,* (New York: Cambridge University Press, 1988) at 626.

[107]) Versorgungsausgleich see para. 1587-1587p BGB.

[108]) D. Giesen, "The Reform of Family Law in Germany" in A.G. Chloros (ed.), *The Reform of Family Law in Europe,* (Deventer: Kluwer, 1978) 111 at 126.

[109]) *Supra,* note 38 at 3.

[110]) B. Sisler, *A Partnership of Equals: The struggle for the Reform of Family Law in Manitoba,* (Winnipeg: Watson & Dwyer Publishing Ltd., 1995) at 9.

[111]) M.L. McCall, J.P. Horrick and J.E. Wallach, *The Process and Economic Consequences of Marriage Breakdown,* (Calgary: Canadian Research Institute for Law and the Family, 1988) at 19.

who stayed at home and looked after the children.[112] But even if both spouses worked, the earnings of the husband were often used to buy property while the wife paid for living expenses like clothing, food and holidays.[113] Strict application of the separation of property regime resulted in discrimination against the spouse who paid for current expenses during the marriage.[114] It could hardly be considered just that the outcome of the financial divorce depended on who paid for what during the spouses's marriage.[115] The law attached different economic consequences to different family roles. Economic disadvantages were usually divided along gender lines.[116] Even the freedom and independence guaranteed by this regime could not make up for the injustice it created.[117]

The case of Irene Murdoch[118] made the public aware of the shortcomings of this marital property regime. In *Murdoch* v. *Murdoch* the wife had worked twenty-one years on her husband's farm without making any financial contribution to his properties. In a majority

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[112]) M. Neave, "Three Approaches to Family Property Disputes - Intension, Relief, Unjust Enrichment and Unconscionability" in T.G. Youdan (ed.), *Equity, Fiduciaries and Trust*, (Toronto: Carswell, 1989) 247 at 250.

[113]) Canada Law Reform Commission, *Family Property - Working Paper 8*, (Ottawa: The Commission, 1975) at 9.

[114]) There is a long list of problems caused by the separation of property regime, see *supra*, note 8 at 22-23.

[115]) *Supra*, note 36 at 190.

[116]) Canada Law Reform Commission, *Report on Family Law*, (Ottawa: The Commission, 1976) at 35.

[117]) P.M. Jacobson, "Working Paper 8: Family Property" (1976) 8 Ottawa L.R. at 290.

[118]) *Murdoch* v. *Murdoch* (1973), 41 D.L.R. (3d) 367 (S.C.C.)

decision the Supreme Court of Canada ruled that Irene Murdoch did not have any interest in her husband's properties, even if she made substantial contributions to the farm in form of labour.[119] This decision caused a wave of indignation; for example, the Advisory Council on the Status of Women stated that it was "shocked".[120] In Manitoba the *Murdoch* case was used as a model for the famous "Balloon Lady" play.[121] This kind of entertainment made the legal issues of marital property law accessible to the broader public.[122] Women's interest groups demanded a new marital property law which reflected marriage as an economic partnership of legal equals. Contributions such as unpaid housework should be considered as valuable as paid labour outside the home.[123] By 1975 the Law Reform Commission of Canada had recognised that there had to be a fairer sharing of property owned by either spouse upon marriage breakdown.[124] It published a substantial working paper[125] which

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[119]) Q: "Could you tell the court as briefly as you can, the nature of the work you did?"

A: " Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything what was to be done. I worked outside with him just as a man would, anything what was to be done." *Supra*, note 118 at 380.

[120]) Advisory Council on the Status of Women, *Matrimonial Property*, (Ottawa: The Council, 1976) at 7.

[121]) In this play June Menzies, Jean Carson and Muriel Arpin were playing three farmwives who talked about the *Murdoch* case over a cup of coffee. There were about 50 presentations of this play in Manitoba within two years.

[122]) *Supra*, note 110 at 30-31.

[123]) Advisory Council on the Status of Women, *Divorce Law Reform*, (Ottawa: The Council, 1976) at 3-4.

[124]) Canada Law Reform Commission, *Divorce - Working Paper 13*, (Ottawa: The Commission, 1975) at 58.

examined three matrimonial property regimes: first, separation of property with a discretion in court;[126] second, community of property;[127] and third, a system of deferred sharing.[128] The Commission favoured the last approach, as less litigious than the others.[129] However, marital property law remained under provincial legislation. But the predicted chaos[130] which would occur due to different regimes in Canadian provinces failed to materialise, mainly because in the following years all Canadian common law provinces enacted new marital property laws which were more or less similar to the third approach suggested by the Law Reform Commission of Canada.

In Manitoba the government brought in its family law reform legislation at the session beginning 17 February, 1977. Bill 60 (*The Family Maintenance Act*) and Bill 61 (*The Marital Property Act*) became famous as one of the most progressive bills on marital property law in Canada. It provided for an immediate share of the matrimonial home and other family assets acquired during the marriage. Business assets like investments should only be shared upon marriage breakdown.[131] But there was some criticism, that

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[125]) *Supra*, note 113.

[126]) *Ibid.*, at 14.

[127]) *Ibid.*, at 19.

[128]) *Ibid.*, at 27.

[129]) *Ibid.*, at 31.

[130]) *Supra*, note 120 at 7.

[131]) *Supra*, note 110 at 98.

businessmen might leave the province if they were forced to share their business assets upon divorce. Bill 61 was also considered unjust because it affected third parties, such as business partner who had nothing to do with another partner's marriage.[132] Some people thought Bill 61 was an "unnecessary intrusion into private lives which creates suspicion and breeds mistrust".[133] The New Democratic Party government with the help of the Liberal minority, was able to pass the Bills against Tory opposition on 17 June, 1977.[134]

The new law was slated to come into force on 1 January, 1978 but meanwhile the government changed. The Conservatives came to power and appointed a committee to revise Bill 60 and Bill 61.[135] This reform committee recommended that all assets should only be shared upon marriage breakdown[136] and that there should be limited judicial discretion to change the 50-50 split, depending on whether the assets in question were family or business.[137] One writer

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[132]) D. Atkinson, "Bill on marital property will harm business here", *The Winnipeg Tribune* (8 June 1977) at 3. The most surprising suggestion was made by Ken Dillen who stated that assets should go to the government if spouses cannot reach an agreement. See: "Can't settle assets? Dillen has proposal", *The Winnipeg Tribune* (31 May 1977) at 21.

[133]) K. Houston in G. Parley, "Businessman won't stand for property split: Lawyer", *The Winnipeg Tribune* (6 June 1977) at 41.

[134]) *Supra*, note 110 at 115.

[135]) It seems odd that one member was K. Houston, the lawyer who was one of the strongest opponents against these reforms. See S. McCock, "Supporters fear for Family Law", *The Winnipeg Tribune* (7 November 1977) at 44.

[136]) A. Blicq, "Group boosting its pressure on Family Law", *The Winnipeg Tribune* (7 May 1978) at 1.

[137]) M. Pawly, "Equal Sharing would return under NDP", *The Winnipeg Tribune* (8 June 1978) at 1.

called the new system: "What we now have is a limited version of equality."[138] However, Bill 38 (*The Marital Property Act*) and Bill 39 (*The Family Maintenance Act*) became law[139] after public hearings and protests.[140] The new law came into force on 15 October, 1978. It was the result of a struggle which had lasted for more than a decade. It certainly offered a better law than before July 1977, but it was not as far reaching as the NDP Bill 61.[141] However, it marked a beginning.

The German reunification of 1990 forced the latest changes in its marital property law. As the law-makers searched for a speedy solution to end the legal division of Germany,[142] the West German family law was adopted in the former East Germany.[143] By doing so, the German legislature missed its chance to create both an updated marital property law and a modern civil code. On 3 October, 1990 community of surplus became the statutory matrimonial property regime across the unified Germany and the statutory regime of the former GDR[144] ceased to exist.

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[138]) F. Russell, "A limited Version of Equality", *The Winnipeg Tribune* (5 June 1978) at 9.

[139]) J. Martin, "NDP loses late bid to alter Family Law", *The Winnipeg Tribune* (1 July 1978) at 1.

[140]) R. Kuska, "Speakers protest new Family Law", *The Winnipeg Tribune* (8 June 1978) at 17.

[141]) *Supra*, note 110 at 199.

[142]) *Supra*, note 90 at 337.

[143]) Art. 8 *Reunification Treaty (Einigungsvertrag)*.

[144]) *Supra*, note 90 and accompanying text.

Today, in times of still increasing divorce rates[145] there are marital property laws in Manitoba and Germany which guarantee, on paper at least, equal rights to both spouses, but this is far from reality.[146] Neither the Manitoba nor the German law takes into consideration the obvious fact that equal rights do not mean equal opportunities for spouses to go on with their lives after marriage breakdown.[147] The impact of marriage on the value of human capital is still unsatisfactorily addressed in both jurisdictions. In a more service-oriented society, intangible assets such as formal training, academic education and on-the-job-experience are at least as valuable as tangible assets like houses or cash and movables.[148] Although more and more women have been working outside the home since the 1950s,[149] their earning capacity is still adversely affected by the time and assets required for child-rearing.[150]

This thesis will define the main strengths and shortcomings

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[145]) For example between 1963 and 1985 the German divorce rate doubled. See *supra*, note 106 at 619. In the same period of time there was a 500% (!) increase in the Canadian divorce rate. See J. Payne, "Family Law and the Law Reform Commission of Canada" (1985) 4 C.J.F.L. 355 at 365.

[146]) D. Majury, "Unconscionability in an Equality Context" (1991) 7 C.F.L.Q. 123 at 124.

[147]) One writer emphasised that if it is hard for women being treated equally *in* marriage, it is even harder if not impossible to obtain equality *after* marriage. See E.M. Nett, *Canadian Families: Present and Past* (Toronto: Butterworths, 1988) at 261.

[148]) M.J. Trebilcock and R. Keshvani, "The role of private ordering in Family Law: A Law and Economic Perspective" (1991) 41 U.T.L.J. 533 at 552.

[149]) For example in Germany (without the GDR) the number of women working outside the home increased from 7.8 million in 1950 to 9.9 million in 1972. See R. Künzel, "The Federal Republic of Germany" in R. Chester (ed.), *Divorce in Europe* (Leiden: Martinus Njihoff Social Science Division, 1977) 177 at 185.

[150]) M. Neave, "Resolving the Dilemma of Difference: A Critique of "The role of private ordering in Family Law" (1994) 44 U.T.L.J. at 97.

of the current marital property regimes in Manitoba and Germany, by comparing their different approaches to certain legal problems. As always it will be up to the legislatures to make further improvements to current laws, no doubt under pressure from the judiciaries and litigants. Meanwhile spouses can avoid the disadvantages of the two marital property regimes by private ordering, i.e., by making a marriage contract.

Part II: Statutory Matrimonial Property Regimes

1. Introduction

Every marital property regime is a compromise of conflicting interests. Life is much too complex to create a property regime which is appropriate to each couple. There must be the right balance between a wholesale calculated formula which guarantees certainty and detailed provisions to meet the needs of individual cases.

Both in Germany and Manitoba there is a so called deferred community property regime. Its main feature is that there is no property which belongs to the community.[151] The spouses remain the owners of their separate properties, which each can freely dispose of and control, apart from a few exceptions.[152] At the end of the

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[151]) The name "deferred **community** regime" can be misleading. There is property belonging to the community only in community of property regimes such as in California and Texas. For a more detailed comparison between the current community of property, separation of property and deferred community regimes, see F. Steel,"The Ideal Property Regime- What Would It Be?" in E. Sloss (ed.), *supra*, note 48 at 127.

[152]) In German law there are restrictions to disposing of, one's property, in para. 1365 and 1369, *Civil Code* (*Bürgerliches Gesetzbuch*, short *BGB*), regarding the property in its entirety and household goods. For the full text of these provisions, see Appendix B p. 180-181.

In Manitoba there are restrictions to disposing of the marital home (*The Homestead Act*, R.S.M., 1992, c. 46, s. 4). German law by contrast does not protect the marital home much. It is crucial that the property in its entity cannot be disposed freely. Whether any assets are the property in its entirety depends on their value. The larger the value of all assets of one spouse the less likely are some assets in the property to be considered the property in its entirety. Whether only one asset, for example the marital home, can be the property in its entirety is very controversial. The so-called individual theory applies para. 1365 BGB (see: BGHZ 35,134), even in cases where only one asset is disposed of but it is by far the most valuable one owned by the spouse. The opposite opinion does not apply this provision when only one single asset is disposed. The justification of the latter approach is that one spouse can endanger all of his assets, for example by agreeing to act as another persons guarantor. In this case the consent of the other spouse is not required; but it might be much more dangerous than disposing only of the one, even if it is the most valuable asset of the spouse. It is unjust that one spouse can act as

marriage there is only a monetary[153] compensation.[154] The amount of money that has to be paid depends on the assets included in the calculation and on their fate during the marriage. The purpose of the equalisation payment upon marriage breakdown is to share the economic achievements of the marriage[155] and, by doing so, implementing the idea of marriage as an economic partnership. The contributions of each spouse are not decisive.[156]

The wholesale calculation methods adopted in both countries

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another person's guarantor without his or her spouse's consent while a single asset cannot be disposed freely. See: D. Wörbelhauer, "Zum Begriff der 'Verfügung über das Vermögen im Ganzen' (para. 1365 BGB)" (1960) NJW 793 at 797. This approach, however, misses the purpose of para. 1365 BGB, which is to secure the economic stability of the family. It does not matter whether this stability is endangered by the disposition of one valuable asset or of many less valuable assets. See, K. Benthin, "Probleme der Zugewinngemeinschaft heute", (1982) FamRZ 338 at 339. Although Wörbelhauer is right in emphasising that it is illogical that one spouse can act as another person's guarantor without the other spouse's consent, but should not be allowed to dispose of one individual asset, this legislative gap cannot be used to interpret para. 1365 BGB so narrowly. Therefore one spouse cannot freely dispose of the marital home if its value is entirely that of this spouse.

In Manitoba by contrast there is a restriction not to dispose of the marital home regardless of its value and of the value of the other assets of the spouse. This rule guarantees optimal protection and avoids difficult differentiations. However, one has to bear in mind that there are comparatively few German citizens who own a house. In order to create a protective rule even for couples who have a rented apartment, the legislature decided to prohibit the disposition of property in its entirety without dealing with the marital home separately.

[153]) There are exceptions to this rule, for example, para. 1383 BGB, and *Marital Property Act*, R.S.M., 1987, c. M45, s. 17(b) and s. 17(c).

[154]) It must be emphasised that even at the end of the marriage neither spouse acquires any of the other spouse's property as an immediate consequence of marriage breakdown. Apart from Germany and Manitoba, this system is also adopted by other Canadian common law provinces, for example in Nova Scotia, Newfoundland and Saskatchewan. See, B. Welling, "Conflict of Laws Issues Arising from Matrimonial Property Statutes in Canada" (1993) 9 C.F.L.Q. 225 at 269.

[155]) *Supra*, note 78 at 890.

[156]) *Supra*, note 59 at 167.

seem to be simple, but they raise many detailed questions.[157] Moreover, the deferred community property regimes were criticised because they did not provide enough justice in the individual case and they "put a premium on accurate book-keeping."[158] However, in comparison with other regimes, such as community of property or separation of property, they seem to be the best compromise between these extremes.

Obviously it is impossible to compare all assets with equal accuracy. Therefore the different calculation methods are important, as are some of the most interesting legal problems, such as the consideration of personal injury awards and of problems arising from interspousal gifts. The chosen areas of comparative study are neither complete nor all-embracing.

2. General Calculation Methods

a) In Manitoba

The calculation method adopted by the *Marital Property Act* is simple and therefore seldom explicitly mentioned.[159] There is one valuation date,[160] usually the last day of cohabitation, on which the assets that each spouse acquired during marriage are valued.

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[157]) For example: What happens with appreciations of excluded assets? How to deal with inflation? What happens with excluded assets which are converted into family assets? Should interspousal gifts be taken into consideration?

[158]) H.R. Hahlo, "Deferred Community of Gains - a Note of Warning", (1974) 52 C.Bar Rev. 482 at 483.

[159]) For a calculation example, see *Tutiah* v. *Tutiah* (1985), 36 Man.R. (2d) 12 at 22 (C.A.).

[160]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 16.

After deduction of the debts and liabilities, the sum of all assets of the spouse with less assets is subtracted from the sum of the assets of the other spouse. Half of the difference has to be paid by the "richer" spouse to his or her ex-spouse.[161]

For example: Mr. and Mrs. Smith from Winnipeg want to get a divorce. On the last day of cohabitation Mr. Smith has assets of $ 100,000. Mrs. Smith's assets are worth $ 80,000. Each has $ 10,000 liabilities.

Calculation: Mr. Smith:

$ 100,000 - $ 10,000 = $ 90,000

Mrs. Smith :

$ 80,000 - $ 10,000 = $ 70,000

Family Net Worth :

$ 90,000 + $ 70,000 = $ 160,000

Equalisation Payment :

$ 160,000 : 2 = $ 80,000 - $ 70,000 = $ 10,000

Mr. Smith has to make an equalisation payment to his ex-wife of $ 10,000.

b) In Germany

The German calculation method is more difficult because there are two valuation dates, the beginning of the marriage[162] and its

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[161]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 15.

[162]) Para. 1374 Abs. 1 BGB. Usually it is the date of the wedding, but as in Manitoba (see *Marital Property Act*, R.S.M., 1987, c. M45, s. 16) spouses can agree upon a different date: U. Börger, *Eheliches Güterrecht* (Baden-Baden: Nomos, 1989) at 198.

dissolution.[163] The surplus of each spouse is the difference between the value of the assets owned at the end of the marriage and the value of the assets owned at its beginning.[164] The spouse with the higher surplus has to pay half of the difference to the other spouse.[165]

For example: Mr. and Mrs. Schmidt from Berlin decide to divorce. At the beginning of their marriage, Mr. Schmidt has assets worth DM 50,000 and DM 10,000 debts. Upon the termination of the marriage his assets are worth DM 160,000 and he has DM 30,000 liabilities. Mrs. Schmidt has assets worth DM 20,000 at the wedding day and no debt. Upon dissolution of the property regime she has DM 100,000 and DM 10,000 liabilities.

Calculation:	Mr. Schmidt		Mrs. Schmidt	
Initial assets:	DM 50,000	- DM 10,000		
		= DM 40,000		DM 20,000
Final assets:	DM 160,000	- DM 30,000	DM 100,000	- DM 10,000
		= DM 130,000		= DM 90,000
Surplus:	DM 130,000	- DM 40,000	DM 90,000	- DM 70,000
		= DM 90,000		= DM 20,000

Difference: DM 90,000 - DM 70,000 = DM 20,000 : 2 = DM 10,000

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[163]) Para. 1375 Abs. 1 BGB. The property regime ends on the day of pending action, which means the day when the petition for divorce is delivered to the opponent (see para. 253 Abs. 1, 266 Abs. 1, 606 Abs. 1, 608 ZPO). Consequently the valuation dates in Manitoba and Germany are different. While in Manitoba mostly the last day of cohabitation is crucial, in Germany the whole period of separation is included in the accounting. This causes the problem of how to deal with an increase or decrease in the value of assets between the valuation date and the trial. For a detailed discussion, see below p. 82.

[164]) Para. 1373 BGB.

[165]) Para. 1378 Abs. 1 BGB.

In this case, as well, the husband has to pay DM 10,000 to his ex-wife.

c) Where is the difference?

There are cases in which both calculation methods come to the same result. For example, there is no difference in calculation if the value of the assets owned at the beginning of the marriage is subtracted from the value of the assets owned at marriage breakdown, as it is done in German law, or if assets acquired before marriage are excluded from the calculation, apart from the few cases where assets are acquired in contemplation of the marriage,[166] as in Manitoba. But significant differences might arise because of different definitions of "asset". Moreover, the different treatment of an increase or decrease in value, and of inflation, can lead to very different results, even when the value of the assets is comparable.

3. Included and Excluded Assets

a) General Consideration of Assets

Both systems are based on a mathematical calculation, i.e., the more property that is excluded from division the less likely can an equitable division of property be achieved.[167] In other words the higher the value of the initial assets in German law,

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[166]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(2).

[167]) *Supra*, note 111 at 21.

i.e., the more the assets that are considered to be acquired before marriage in Manitoba, the smaller is the surplus of a spouse and the less likely that he or she must make an equalisation payment.[168]

All assets which can be valued are taken into consideration, except for the statutorily excluded assets.[169] Debts and liabilities are subtracted from the value of all assets.[170] As far as inclusion of assets is concerned, neither jurisdiction distinguishes between family assets, such as cars, and commercial assets like shares.[171] Manitoba law distinguishes between these two kinds of assets and protects pre-acquired or excluded assets only in cases where an unequal division occurs;[172] German law does not distinguish at all between commercial and family assets. The provisions in Manitoba have been criticised over and over again.[173] The negative impact on potential business associates, for example in a law firm, has been emphasised, as have cases where one spouse has to sell his or her business interests to make the equalisation payment. The marriage contract which excludes business assets, is

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[168]) For the German system, see D. Schwab, *Handbuch des Scheidungsrechts* (München: Verlag Vahlen, 1989) at 1081.

[169]) *Ibid.*

[170]) For German law, see para. 1374 Abs. 1 BGB, regarding the initial assets and para. 1375 Abs. 1 BGB, concerning the final assets. For Manitoba, see *Marital Property Act*, R.S.M., 1987, c. M45, s. 11(1).

[171]) For the definition of "family" and "commercial" assets see *Marital Property Act*, R.S.M., 1987, c. M45, s. 1(1).

[172]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(1) and s. 14(2).

[173]) For one of the first criticisms see *supra*, note 132.

the only way out of this dilemma.[174]

A statutory provision that would exclude business assets from sharing would not reflect the idea of marriage as an economic partnership. There can be no difference in whether money is invested in stocks or in a cottage. While the contributions of the wife might be the same in both cases, the equalisation payment she might be entitled to would depend on the nature of the assets her husband acquires. Such a provision would open the door to an abuse of the spouse's rights. Therefore the inclusion of both types of assets is appropriate.

b) Individual Assets

aa) R.R.S.P and Other Pension Plans

Pension plans are treated differently in both jurisdictions. In Germany all pension plans which are considered under the so called maintenance settlement procedure are excluded from the division of **property** under the *Civil Code*.[175] Whether the maintenance settlement procedure actually takes place does not matter.[176] This rule does not apply to rights from capital life insurance policies, which are not part of the maintenance settlement procedure. They have to be included in the calculation when valuing the initial assets and the assets owned at the end of

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[174]) M. Crawford, "The 50-50 Marriage Split-up Is Not So Great in Practice", (1986) 59 Can.Bus. 233 at 235.

[175]) Para. 1587 Abs. 3 BGB.

[176]) *Supra*, note 168 at 1082.

the marriage.[177]

In Manitoba by contrast there is no separate procedure dealing with any kind of pension plan. They are part of the property division under the *Marital Property Act*.[178] The purpose of the statutory inclusion of assets like pensions was to avoid the problems which arose in *Isbister* v. *Isbister*.[179] In this case the Manitoba Court of Appeal held that pension plans are not shareable under the *Marital Property Act*, mainly because of the contingencies which may prevent them from being received.

The difference in treating pension plans in both jurisdictions in fact does not really exist. The maintenance settlement procedure in German law is like a "little property division only for pensions" which leads to an equal sharing of pension rights acquired during the marriage. It does not matter whether pension plans are shared in a separate procedure or under the property division provisions. The important thing is **that** they are considered different treatment, which mainly occurs due to administrative reasons which do not have any impact on the policy behind the sharing of pension plans.[180] Therefore the sharing of pensions rights, acquired through the combined effort of the spouses, is considered appropriate in both jurisdictions.

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[177]) BGH FamRZ 1984, 156.

[178]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 9(2).

[179]) (1981), 5 W.W.R. 443 (Man.C.A.).

[180]) O. Wabnik, *Rechtskurs Familienrecht* (München: Hüber-Holzmann Verlag, 1979) at 92.

Individual questions are too complex and extensive to be discussed here in detail.[181]

bb) Household Goods

There is no Manitoba equivalent to the procedure under the *Household Goods Act* in Germany. This procedure provides, like the maintenance settlement procedure for pension plans, for a separate division of household goods, independent from the division of all other properties. Unlike the maintenance settlement procedure the procedure under the *Household Goods Act* is not a "little division of household items" which is based on the idea of equal sharing of assets acquired during the marriage. All household goods which fall under this separate procedure are not taken into consideration when dividing ordinary property under the *Civil Code*.[182] Household items include all things which are used for family purposes in the household,[183] such as carpets, furniture, books and household appliances.[184] They have to be distinguished from "family assets" in the *Marital Property Act*. The definition of the latter is broader. Under the *Marital Property Act* the main feature of family

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[181]) There is a short overview of the German pension-splitting system in H.J. Reinhardt, "The Division of Pension Rights - The German Solution" (1990) 6 C.F.L.Q at 343-357. For details of pension-splitting in Manitoba, see J. Greenberg, "Manitoba" in J.G. McLeod and A.A. Mamo (eds.), *Matrimonial Property Law in Canada*, vol.I (Toronto: Carswell, 1993) at M 54-62.

[182]) G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen* (München: C.H. Beck, 1989) at 98.

[183]) BGH NJW 1984, 484 at 485.

[184]) For a long list of items included in this procedure, see K. Stollenwerk, "Hausratssachen" in B. Künkel (ed.), *Handbuch des Familiengerichtsverfahrens* (Köln: Dr. Otto Schmidt KG, 1994) Rdnr. 145.

assets is that they are shareable, because they were acquired through the effort of both spouses. The division of household goods in Germany by contrast achieves the practical dissolution of the marital life.[185] There is a court order on the division of household goods only in cases where the spouses cannot agree upon a division by themselves.[186] But then the judge has a wide discretion to divide these items as he or she thinks fit.[187]

The procedure under the *Household Goods Act* is completely unnecessary because it makes the difficult division of assets after divorce even more complicated. This procedure does not harmonise with the division of property under the *Civil Code* and it demonstrates the absurdity of sharing assets equally, if spouses do not have many assets apart from household goods. In this case the majority of their assets is divided by judicial discretion. Although household goods that only serve as capital investments are not divided under this procedure,[188] expensive items which are used for family purposes, such as the oriental carpets or leather sofas, are included.[189] This is inappropriate because the equalisation payment arising from the division of property under the *Civil Code* depends on whether one spouse invests his or her money in expensive

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[185]) S. Smid, "Zum Verhältnis von Hausratsverteilung und Zugewinnausgleich" (1985) NJW 173 at 174.

[186]) Para. 1 *Household Goods Act (Hausratsverordnung)*.

[187]) Para. 9 *Household Goods Act*.

[188]) *Supra*, note 183 at 486.

[189]) *Supra*, note 185 at 175.

household goods or shares; the latter are included in the accounting under the *Civil Code*, the former not. Moreover, the term "household goods" is too vague to serve as an appropriate criterion of differentiation, because there are assets which are household goods but which are not divided under the *Household Goods Act*, such as assets solely owned by one spouse.[190] The value of these items is included in the accounting under the *Civil Code*.

Manitoba law solves this problem by not raising it. Household goods are like pensions, as part of the property division under the *Marital Property Act*, except for household items which are jointly held property and consequently not shareable pursuant to section 10 of the *Marital Property Act*. However, in Germany a separate procedure for pension plans for administrative reasons might be understandable, but the independent division of household goods is completely out of place. Thus, Manitoba law provides the better solution because of its simplicity and clarity.

cc) Personal Injury Awards

In Manitoba there is a special provision in the *Marital Property Act* dealing with personal injury awards which provides for the exclusion of these kind of compensation from the accounting under the act.[191] The purpose of this rule is to avoid the sharing of assets which were not acquired through the effort of both

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[190]) Para. 9 *Household Goods Act*. There is a presumption that household goods are joint property unless proven otherwise, see para. 8 Abs. 2 *Household Goods Act*.

[191]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 8(1).

spouses, but to compensate one spouse for harm suffered only by this spouse. There is no provision like this in German law. Thus, the German Supreme Court has included damage awards in the accounting provisions under the *Civil Code*.[192] It justifies its decision by emphasising the inflexible calculation method of the *Civil Code* and by pointing out that personal injury awards are legally protected rights, as any other right which is included in the accounting.[193] The court does not recognise that it is confronted with **two** legal concepts which it is supposed to harmonise. On one hand there are personal injury awards[194] to compensate the victim for personal mental and physical harm, and on the other side each legally protected right - apart from the statutory exceptions - should be considered when making an accounting under the *Civil Code*.[195] As damage awards are legally protected rights, they have to be included in the accounting. Instead of finding a compromise between these two concepts, the German Supreme Court gives the latter absolute priority. The courts have no way out of this dilemma since the rules which provide for an exclusion of gifts and inherited property[196] are not analogously applicable in these cases.[197] Unequal division[198] cannot be

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[192]) BGH NJW 1981, 1836.

[193]) *Ibid.*, at 1837.

[194]) Para. 847 BGB.

[195]) K.H. Johannson, D. Hennrich, *Eherecht, Trennung, Scheidung, Folgen* (München: C.H. Beck, 1992) at 94.

[196]) Para. 1374 Abs. 2 BGB.

[197]) *Supra*, note 192 at 1837.

considered either because the inclusion of personal injury awards was not totally unjust and grossly inequitable.[199]

This decision of the German Supreme Court is just wrong. According to the provisions of the *Civil Code* the surplus of each spouse is "made."[200] Personal injury awards cannot be "made": they are the compensation for harm. Moreover, there is no connection between the award and the marital life. The inclusion of personal injury awards does not serve the purpose of the equalisation payment, i.e., the compensation of the other spouse for contributions to the marriage. A Manitoba man summarised the absurdity of including assets like these with the following words: "She wants to share the award, let her share the disability."[201] Some authors were so disappointed by this decision of the German Supreme Court that they stated that this is unconstitutional![202] Others criticises the court because it does not give a satisfactory explanation for why the rules which provide for an exclusion of

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[198]) Para. 1381 BGB.

[199]) *Supra*, note 192 at 1837.

[200]) Para. 1374 Abs. 2 S. 2 BGB.

[201]) *Hilderman* v. *Hilderman* (1985), 34 Man.R. (2d) 177 at 179 (Q.B.).

[202]) Because it violates Art. 14 Abs. 1 of the Constitution, see *supra*, note 168 at 1092. Schwab suggested three ways out of this dilemma:

1. Para. 1374 Abs. 2 BGB, should be applied analogous to personal injury awards. By doing so, the value of the initial assets is increased by the value of the award, and the surplus of this spouse becomes smaller.
2. The personal injury award is taken into account as any other asset, but it should be especially considered when deciding whether an unequal division of property is appropriate in the particular case.
3. The personal injury award is not taken into consideration when valuing the final assets.

Both the third and the first approach come to the same result. However, the last method has no base in the *Civil Code*. By contrast the first is dogmatically better and should therefore be favoured.

gifts and inherited property cannot be applied in analogy. Both situations are comparable. Gifts, personal injury awards and inherited property are personal rights of one spouse. The other does not make any contributions to achieving them.[203]

In Manitoba, these awards are excluded. The only problem which occurs is that some personal injury awards are not only a compensation for mental and physical harm but also a compensation for loss of future income.[204] But if, for example, one spouse had not been injured in an accident and would continue working as he or she did before, this income would be shareable for the period of cohabitation under the *Marital Property Act*.[205] It is up to the courts to decide whether the compensation the injured spouse receives is only for suffering harm,[206] only for loss of future income[207] or for both.[208] The disadvantage of this approach is that it is hard to tell which amount of money of the award is compensation for harm only.[209] This problem was also recognised by the Manitoba Law Reform Commission. According to their report, the

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[203]) A. Ganter, *Praktische Einführung in das Familienrecht* (Stuttgart, Berlin, Köln: Kohlhammer, 1992) at 90.

[204]) *Supra*, note 201.

[205]) *Dixon* v. *Dixon* (1981), 14 Man.R. (2d) 40 at 43 (Q.B.).

[206]) *Supra*, note 201.

[207]) *Supra*, note 205.

[208]) *Girouard* v. *Girouard* (1992), 40 R.F.L. (3d) 157 at 158 (Man.Q.B.). In this case the husband claimed $ 115,000 for wages lost over a period of 8 years and $ 555,000 for future loss of income and general damages from the insurance company. Whether a settlement could be achieved was unclear by the time of the divorce.

[209]) J. Greenberg, *supra*, note 181 at M33.

only alternative to avoid it, is a blunt exclusion of all personal injury awards in a spouse's shareable estate.[210] That approach can lead to an unjust enrichment of the spouse who receives the award. A compromise between the blunt exclusion and the complete inclusion seems most appropriate. If there is a settlement between the injured spouse and the third party, which contains a splitting of the award into compensation for harm and compensation of loss of future income, it can be used as a starting point. However, in most cases there is no such settlement. But even then, the uncertainty caused by the Manitoba approach, i.e., that it is unclear how much of the amount is really compensation for harm, does not lead to the unjust results of the German approach.

dd) Gifts and Inherited Property

Both jurisdictions exclude gifts and inherited property from the division of assets.[211] In Manitoba such assets are considered excluded; in Germany their value is added to the value of the initial assets. By doing so, they are treated as if they had already existed at the beginning of the marriage.[212] Both approaches lead to the same results. Here the German legislature realised that it would be contrary to the purpose of sharing to include property which was acquired due to a close relationship of

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[210]) Manitoba Law Reform Commission, *Report on Family Law, Paper 2: Property Distribution* (Winnipeg: The Commission, 1976) at 62-63.

[211]) For Manitoba, see *Marital Property Act*, R.S.M., 1987, c. M45, s. 7. For Germany, see para. 1374 Abs. 2 BGB.

[212]) D. Schwab, *Familienrecht* (München: C.H.Beck, 1993) at 117.

one spouse to a third person.[213] Moreover, it could be contrary to the donor's intention if his gift indirectly benefits the spouse of the donee upon divorce.[214] The rules which provide for the exclusion of gifts do not apply to interspousal gifts.[215] They were acquired through the resources of both spouses and they are consequently shareable.

It is questionable whether only inherited property received through a will is excluded or if property inherited in intestacy is also excluded. One could argue that where the donor does not reveal the intention there is no need to respect it.[216] The Manitoba Court of Queen's Bench has rejected this argument.[217] There is no reason why property inherited in intestacy should be treated differently from property inherited under a will.[218] The other spouse does not make any contribution to the acquisition of either of them. There can be no difference, as far as the exclusion of these assets is concerned, whether one spouse inherits under a will after the death of his or her old grandfather or whether this spouse inherits because of the sudden death of one comparatively young parent in a car accident. One cannot interpret the absence of a will as an

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[213]) U. Diederichsen in Palandt, *Bürgerliches Gesetzbuch, Kommentar* (München: C.H. Beck, 1994) para. 1374 Rdnr. 10.

[214]) *Supra*, note 38 at 36.

[215]) K. Frisching and U. Graba, *Handbuch der Rechtspraxis, Familienrecht*, 1.Hb (München: C.H. Beck, 1982) at 59.

[216]) *Jensen* v. *Jensen* (1985), 37 Man.R. (2d) 34 at 37 (Q.B.).

[217]) *Ibid.*

[218]) J. Greenberg, *supra*, note 181 at M30.

absence of intention. In such a case it can be against the intention of the donor that the inherited property is divided upon the divorce of the donee. In German law this problem does not arise because the rule which excludes inherited property does not distinguish between testate and intestate inheritance.[219] Moreover, one could argue that the intention of the donor is only secondary because the law presumes the intention, i.e., no sharing of these assets upon the divorce of the donee.[220]

There is one problem which often occurs in both jurisdictions: how to deal with gifts which are disguised as ordinary contracts of sale for tax purposes? This situation arose in *Dashevsky* v. *Dashevsky*[221], where the husband "bought" land from his parents for $ 20,000. In fact he never had to pay the money. The purpose of this agreement was to save gift taxes. In another case[222] the husband was given an interest in a company by his father. Here again, he never paid his father. While in the first example the court refused to consider the "gift" as a gift, the transaction in the second case was held a gift. The reason behind this different treatment seems to be "policy making" by the court, rather than legal reasoning. If the spouse receives the gift to the

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[219]) Para. 1374 Abs. 2 BGB. For full text see Appendix B p. 182.

[220]) H. Lange in Soergel, *Kommentar zum BGB*, Bd 7 (Stuttgart, Berlin, Köln: Kohlhammer, 1989) para. 1374 Rdnr. 9. There is a similar provision in para. 1418 Abs. 2 BGB, regarding gifts from third persons to the reserved property of one spouse in the contractual regime of community of property.

[221]) (1986), 40 Man.R. (2d) 58 (Q.B.).

[222]) *Waters* v. *Waters* (1986), 4 R.F.L. (3d) 283 (Man.C.A.).

disadvantage of the state, i.e., evades payment of taxes, the court is not willing to give him any additional advantage by considering the transaction as a gift. If, by contrast, the procedure used serves only a business interest, the disguised gift is legal. Unfortunately the court did not indicate what would happen if both motives occurred in the same case. The differentiation between "legal business interests" and "illegal tax purposes" is artificial and remote from everyday life. It is better to look at the real intentions of the parties, as it is done in German law.[223] If the parties intended a gift, the whole transaction should be considered to be a gift even for the property division upon divorce. It is not appropriate that the family court presumes to punish one spouse because of evading payment of taxes by narrowly interpreting certain provisions of the *Marital Property Act*. This is not the task of the family court. Consequently the transaction in *Dashevsky*[224] should have been considered as a gift which is excluded from sharing.

ee) Interspousal Gifts

While in Manitoba dealing with interspousal gifts is comparatively simple, in Germany it is more complex. Under Manitoba law all interspousal gifts are shareable.[225] This provision has

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[223]) See, for example, BGH FamRZ 1986, 565 at 566.

[224]) *Supra*, note 221.

[225]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 7(1), provides only for the exclusion of gifts from third persons.

been criticised because the spouse who received the gift absolutely free is forced to share it upon marriage breakdown. The suggested solution,[226] i.e., the exclusion of interspousal gifts because they were already shared,[227] does not seem adequate. It is unclear why interspousal gifts are already shared assets. Another suggestion is to consider a card or note to the gift as a "release" or "other writing of the spouses".[228] As this would be a spousal agreement in the sense of section 1(1)(f) of the *Marital Property Act*, the gift is excluded. This approach is unpractical and artificial. Which couple concludes an agreement as to whether an interspousal gift should be shared upon marriage breakdown, while living in a happy marriage? Moreover, the inclusion of interspousal gifts is fair, because they were acquired through the combined efforts of both spouses.

Unlike Manitoba, there is a detailed provision in German law which deals with interspousal gifts. They are counted as part of the equalisation payment if spouses agree. As they rarely do, there is a presumption that interspousal gifts have to be taken into account in the equalisation payment, if their value exceeds the value of occasional gifts, according to the living standard of the spouses.[229] This provision was not carefully thought out by the

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[226]) J. Stoffmann and S. Kravetsky, "A Critique of the Manitoba Marital Property Regime" (1988) 3 C.F.L.Q. 269 at 274.

[227]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 9.

[228]) *Supra*, note 226 at 275.

[229]) Para. 1380 Abs. 1 BGB.

legislature. This presumption is remote from everyday life, as is the suggestion in Manitoba to considering cards to gifts as spousal agreements in the sense of section 1(1)(f) of the *Marital Property Act*.[230] There are no discussions regarding spouses on interspousal gifts, whether or not they have to be taken into account in the equalisation payment upon divorce.[231] The *Civil Code* artificially states[232] that interspousal gifts during the marriage are a premature equalisation payment, if they exceed a certain value.[233] This provision is unreasonable. The *Civil Code* does not define the cases in which the value of such a gift exceeds the value of an occasional gift. It is up to the judge to consider an interspousal gift as occasional or extraordinary. It is very doubtful that this practice serves the intention of the legislature, i.e., to put the spouse who made the gift in the position he would have been in if the gift had been a premature equalisation payment.[234]

The German Supreme Court made this rule even more complicated by not adding interspousal gifts to the value of the initial assets of the spouse who received the gift, in cases where the spouses do not want to take the gift into consideration. It justifies its

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[230]) *Supra*, note 226 at 275.

[231]) One might imagine the macabre situation where the husband gives his wife a pair of expensive gold earrings on Valentine's Day and states that, in case there is a divorce someday, he wants to take this gift into account as already a paid part of the equalisation payment!

[232]) Para. 1380 Abs. 1 S. 2 BGB.

[233]) H. Foth, *Ehe - und Familienrecht, Kommentiert für die soziale Praxis*, vol.2 (Berlin, München, Frankfurt/M.: Diesterweg, 1986) at 78.

[234]) G. Motzke, "Anrechnung von Zuwendungen auf den Zugewinnausgleich" (1974) NJW at 182.

decision that the rule which provides for an adding of the value of gifts of third parties and inherited property[235] cannot be applied to interspousal gifts.[236] The *Civil Code* does not state this. Unlike Manitoba's *Marital Property Act*, the German *Civil Code* does not distinguish in its "adding provision" between gifts from third persons and interspousal gifts. Therefore, interspousal gifts should be added to the value of the initial assets just as gifts from third persons.[237] In order to avoid illogical results which would automatically occur under the Supreme Court's approach, the value of the gift is subtracted from the value of the final assets of the spouse who received the gift.[238] A better approach would be to add their value to the initial assets,[239] because the method of the Supreme Court works only as long as the gift is still part of the final assets of the spouse who received it. But if it has been lost or destroyed, this risk is borne by the spouse who made the gift. This result is contrary to the general distribution of any risk of destroying or losing assets in the statutory marital property regime. In "ordinary" cases both calculation approaches come to the same result, regardless of whether or not the spouses agree upon taking into account the interspousal gift in the

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[235]) Para. 1374 Abs. 2 BGB.

[236]) BGHZ 101, 65 at 69.

[237]) D. Grünewald, "Die neue Rechtsprechung und Lehre zu para. 1380 BGB" (1988) NJW 109 at 110.

[238]) For calculation examples, see appendix A example 1 and 2, Method B, p. 170 and 172.

[239]) *Ibid.*, Method A.

equalisation payment.

Problems arise where one spouse made a gift to the other whose value exceeds the equalisation payment this spouse has to make, had the divorce occurred by the time the gift was made.[240] Only in this case is the calculation approach of the German Supreme Court better, because the amount by which the gift exceeded the equalisation payment is then adequately taken into consideration and can lead to an equalisation claim of the spouse who originally made the gift.[241] However, by developing its theory of interspousal gifts the court took these unusual cases as a starting point. Therefore the difficult interpretation of the provision dealing with interspousal gifts is not a "dogmatic progress"[242] but an unnecessary complication in the accounting. If German law dealt with interspousal gifts like the Manitoba method, the result would be much simpler. In the rare cases where one spouse receives a gift exceeding the equalisation payment, and the property-division-accounting does not have an appropriate remedy, general rules, for example provisions dealing with unjust enrichment,[243] can be applied. But this way out of the problem is blocked by the court as well, by indicating that the rules of property division upon

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[240]) In these cases para. 1380 BGB cannot be applied. See T. Morhard, "'Unbenannte Zuwendungen' zwischen Ehegatten - Rechtsfolgen und Grenzen der Vertragsgestaltung" (1987) NJW 1734 at 1735.

[241]) For a calculation example, see Appendix A, example 3, p. 173.

[242]) G. Langenfeld, "Zur Rückabwicklung von Ehegattenzuwendungen im gesetzlichen Güterstand" (NJW) 1986 at 2541.

[243]) Para. 812-822 BGB. For full text see Appendix B, p. 178-180.

marriage breakdown are lex specialis to the general unjust enrichment provisions.[244] The German Supreme Court misses the point that general rules might provide for quite reasonable remedies when the special provision fails.

Concerning interspousal gifts, German law is completely unsatisfactory. It is too complex because the judge has to find out whether the gift has to be taken into account and, if the gift is considered to be a premature equalisation payment, when the two available accounting methods are not perfect. The Manitoba system is much better because interspousal gifts are treated as any other asset. This method is simpler and more reasonable because, without providing for a complex artificial premature equalisation payment theory, it just states that interspousal gifts are shareable, no more and no less.

ff) Assets Acquired Before Marriage

Both in Germany and in Manitoba assets acquired before marriage are excluded from sharing.[245] In Manitoba, however, there is a special rule providing that assets acquired in contemplation of the marriage are included. This provision was cause for several decisions of the courts to define when an asset is acquired "in

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[244]) BGH NJW 1976, 328 regarding the non-application of these provisions to an increase in the value of assets, where rules of the property division do not provide for an appropriate remedy. For details about this problem, see below p. 91.

[245]) For Manitoba see *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(2). For German law see para. 1373, 1374 Abs. 1, 1378 Abs.1 BGB.

contemplation of the marriage".[246]

The purpose of the exclusion of pre-acquired assets is obvious. Something which was not acquired through the combined efforts of both spouses should not be subject to sharing. In

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[246]) The leading case in this area is *Rotzetter* v. *Rotzetter* (1985) 35 Man.R. (2d) 212 (C.A.), where a Swiss couple married in June 1980 and came to Canada after their marriage. The husband had bought a farm in Manitoba six month earlier. After a detailed discussion on the interpretation of the words "in specific contemplation of the marriage," the Court of Appeal stated that the farm was not acquired in specific contemplation of the marriage, mainly because it was also a business venture of the husband and his brother. In the majority of other cases the acquisition of a certain asset was never considered to be acquired "in specific contemplation of the marriage," regardless of whether the asset in question was a house like in *Reimer* v. *Reimer* (1986) 40 Man.R. (2d) 187 (Q.B.) or a cottage as in *Riley* v. *Riley* (1987) 49 Man.R. (2d) 153 (Q.B.). In the latter case the husband bought the cottage while married to his first wife. Therefore section 4(1)(b) of the *Marital Property Act* was applicable instead of section 4(2). This provision requires only an asset to be acquired in "contemplation of the marriage," without providing that this contemplation has to be "specific". But even in this case the court refused to consider the pre-acquired asset to be accumulated in contemplation of the marriage.

Whether acquisition in "(specific) contemplation of the marriage" is a useful factor of differentiation is doubtful. Courts require a "causal connection with the marriage" (see *Riley* v. *Riley*, at 156) under section 4(1)(b) of the *Marital Property Act;* but a "direct relationship between the acquisition and the marriage even though it may not be necessary to show the relationship was causal" (see *Rotzetter* v. *Rotzetter*, at 216) under section 4(2) of the act. It is unclear why, under the higher requirements of section 4(2), a "causal Connection" is not necessary, while under section 4(1)(b) it is required. This contradictory play on words demonstrates that the provisions of both section 4(2) and section 4(1)(b) of the *Marital Property Act* are not satisfactory. Even if the court pays special attention to the circumstances of the individual case such as in *Ross* v. *Ross* (1993) 89 Man.R. (2d) 297 (Q.B.), where it was required that the details of the marriage plan have to be definite to satisfy the test under section 4(2), (see *Ross* v. *Ross*, at 300), or as in *Reimer* (see *Reimer* v. *Reimer*, at 189), where the marriage date should not have been set for tax purposes, the outcomes are not just. How can it be crucial that spouses agree upon a marriage date before or after they bought a cottage? This depends on so many other factors, for example the real estate market. If prices of cottages are high, the couple might decide to postpone the acquisition and the cottage then becomes shareable. If, on the other hand, cottages are cheap, spouses might buy the cottage, even if they have not yet set a marriage date. In this case the cottage is not shareable because it was not acquired in specific contemplation of the marriage. The proposed aspects for differentiation are not helpful. First of all, it is difficult especially after long-term marriages to find out the marriage plans of the spouses; secondly, even if this is possible how can a judge know whether, for example, tax purposes were the dominant motive in deciding when to marry? These few examples demonstrate that the inclusion of an asset acquired in specific contemplation of the marriage is a unnecessary rule. All pre-acquired assets should be excluded from sharing. This is not contrary to the policy behind the *Marital Property Act,* because the expensive litigation caused by rules like this is more disadvantageous to the spouses than the non-sharing of pre-acquired assets in specific contemplation of the marriage, even if these assets might have been accumulated through the effort of both spouses.

Germany the initial assets, i.e., all assets acquired before marriage, include all legally protected rights of the spouses regardless of whether they are heritable or not.[247] If the value of the initial assets cannot be calculated, especially after long-term marriages, the *Civil Code* provides for a presumption that the value of those assets were zero,[248] so that the value of the final assets of the spouse is his or her surplus. As there is no rule like this in the *Marital Property Act*, it is up to the spouses to prove the value of all assets owned by each of them at marriage.

gg) Debts and Liabilities

Debts and liabilities are generally subtracted from the value of the assets. In Manitoba one spouse's debts and liabilities are deducted from his or her assets owned at the valuation date, expect for debts related to excluded assets under section 4 and section 7 of the *Marital Property Act*.[249] In Germany, debts and liabilities of the spouses are subtracted from the value of the initial assets, if they already existed at the beginning of the marriage;[250] and all current debts are deducted from the value of the final assets.[251] Liabilities related to excluded assets such as inherited

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[247]) J. Gernhuber, in *Münchner Kommentar, Kommentar zum BGB*, Bd 5, 1. Hb (München: C.H. Beck, 1989) para. 1374 Rdnr. 6 and 8.

[248]) Para. 1377 Abs. 3 BGB.

[249]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 11(1).

[250]) Para. 1374 Abs. 1 BGB.

[251]) Para. 1375 Abs. 1 BGB.

property are subtracted before the value of the excluded assets is added to the value of the initial assets.[252]

Consequently the treatment of debts is different in both jurisdictions. The Manitoba law distinguishes regarding pre-existing debts, whether or not they are related to an excluded asset. If not they are, to the extent they still exist at the valuation date upon divorce, included in the accounting. There is no rule like that in German law. This provision appears to be unfair, because it is illogical that pre-acquired assets are not shareable while certain kinds of pre-existing debts are indirectly shareable.

For example: Mr. and Mrs. Smith from Winnipeg argue about the equalisation payment upon marriage breakdown. Mrs. Smith has at the end of the marriage $ 20,000 and no debts. Mr. Smith has $ 100,000 and $ 10,000 liabilities, which are not related to an excluded asset and which already existed at their wedding day. He also has assets worth $ 30,000 which are excluded because they were acquired before marriage.

Calculation: Mr. Smith:

$ 100,000 - $ 30,000 - $ 10,000 = $ 60,000

Mrs. Smith:

$ 20,000

Family Net Worth:

$ 60,000 + $ 20,000 = $ 80,000

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[252]) Para. 1374 Abs. 2 BGB.

Equalisation Payment:

$ 80,000 : 2 = $ 40,000 - $ 20,000 = $ 20,000

Mr. Smith has to make an equalisation payment to his ex-wife of $ 20,000.

If the same case occurred under German law, the calculation would be:

	Mr. Schmidt	Mrs. Schmidt
Initial assets:	DM 30,000 - DM 10,000 = DM 20,000	zero
Final assets:	DM 100,000 - DM 10,000 = DM 90,000	DM 20,000
Surplus:	DM 90,000 - DM 20,000 = DM 70,000	DM 20,000
Difference:	DM 70,000 - DM 20,000 = DM 50,000 : 2 = DM 25,000	

Under German law, Mrs. Schmidt would get DM 5000 more than in Manitoba. This result is achieved by deducting the pre-existing debts from the value of the initial assets. An indirect sharing of debts can therefore be avoided. The German approach appear to be better because it is compatible with the policy behind the marital property regime, i.e., equal sharing of assets acquired during the marriage. It cannot be considered just that, in Manitoba there is an equal sharing of assets but an unequal sharing of debts, holding the spouse who was free from debts at the beginning of the marriage liable for certain pre-existing debts of the other spouse.[253]

Moreover, "liabilities and debts" are defined differently in both jurisdictions. Under German law, "liabilities" are all private

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[253]) The same problem occurs in other Canadian common law jurisdictions; for example, in Ontario where the injustice was often criticised, especially by courts; see for example, *DaCosta* v. *DaCosta* (1990) 29 R.F.L. (3d) 422 at 447 (Ont.Ct. of Just.Gen.Div.). For the problem of negative value, where one spouses debts exceeds his or her assets, see below p. 62.

and public debts,[254] regardless of their cause.[255] It does not matter whether the third party really enforces his claim. In Manitoba by contrast the Court of Queen's Bench has rejected an inclusion of debts in the accounting (in *Burke* v. *Burke*), where repayment of a loan to another member of the spouse's family was unlikely and had become unenforceable in court.[256] According to the court, it would be unfair to include debts in the accounting where in fact the owing spouse never is legally bound to make the payment. Although this argument seems reasonable, it is doubtful whether it can be generalised. It might be difficult to find out whether the owing spouse really does not have to repay, due to an intra-family agreement. Moreover, the court had to examine in advance whether each individual liability was enforceable, leading to an additional burden in the accounting process.

hh) Spousal Agreements

In both jurisdictions spouses can modify the inflexible accounting to meet their individual needs. It is proper to protect certain assets in case of divorce, especially if it is the second marriage for one or both spouses and they already had valuable assets when they entered into the marriage.

While there is an explicit provision for spousal agreements in

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[254]) *Supra*, note 220 para. 1374 Rdnr. 8.

[255]) U. Diederichsen, *Vermögensauseinandersetzung bei der Ehescheidung* (Köln: Verlag Kommunikationsforum GmbH, 1991) at 50.

[256]) (1987), 8 R.F.L. (3d) 393 (Man.Q.B.).

Manitoba,[257] there is no rule like this in the German *Civil Code*. However, spouses can, apart from completely opting out of the statutory regime, modify the property-division-accounting. For example, they can exclude certain assets, they can agree upon a value of their initial assets or include assets which were acquired by gift or inheritance.[258] They also can agree upon a value for their final assets.[259] Unlike Manitoba,[260] there are not many spousal agreement disputes in German courts. The reason for this might be that spouses rarely argue about the validity of their own agreements.[261] Because Canadian court decisions usually deal with problems of contract law, they are not discussed here in detail.[262]

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[257]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 5.

[258]) *Supra*, note 247 para 1374 Rdnr. 28.

[259]) *Ibid.*, para. 1375 Rdnr. 34. There is a summary of provisions of the German *Civil Code* which can be subject to spousal agreement, in *supra*, note 168 at 1160-1164.

[260]) In Manitoba the leading case is *Tutiah* v. *Tutiah*, *supra*, note 159, where the parties had an agreement about the amount of money to be paid to the wife. She, however, wanted to have this agreement set aside by the court because, by the time the agreement was reached, she did not know the value of the husband's pension plans and bank accounts. The court had to decide whether full financial disclosure is necessary to consider the agreement as not unconscionable, improvident or manifestly unfair and inequitable. The Manitoba Court of Appeal, in a majority decision, did not set aside the agreement. In other provinces this problem is dealt with differently. See for example, *Swanson* v. *Swanson* (1983), 34 R.F.L. (2d) 155 at 162 (B.C.S.C.).

[261]) *Supra*, note 182 at 56.

[262]) As for example the interpretation of "unconscionability" in *Tutiah* v. *Tutiah*, see *supra*, note 159 at 15.

4. Tracing

The problem of tracing is particularly interesting because different calculation methods mean that this can only arise in Manitoba. As there are two valuation dates in German law,[263] and the "initial assets" and the "final assets" are only units in the equation,[264] there are no tracing problems under the German *Civil Code*. What happens with the individual **assets** during the marriage does not matter because it is the **value** of all assets that counts. Therefore, it is not problematic if an excluded asset is converted into a family asset. The **value** of this asset remains excluded.

The situation in Manitoba is different. Substitute assets of formerly excluded assets are in certain circumstances shareable, for example if they are used as a family asset.[265] This situation occurred in *Hrynchuk* v. *Hrynchuk*,[266] where the husband used excluded money[267] to buy a house and a cottage, which were used for family purposes and were included in the accounting.[268] A similar case was *Hilderman* v. *Hilderman*[269] where the husband used money

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[263]) *Supra*, p. 31. See para. 1373, 1374 Abs. 1 and 1375 Abs. 1 BGB.

[264]) For the initial assets, see *supra*, note 220 para. 1374 Rdnr. 2. For the assets owned at the end of the marriage, see *supra*, note 213 para. 1375 Rdnr. 1.

[265]) *Marital Property Act*, R.S.M., c. M45, s. 6(5)(b).

[266]) (1988), 51 Man.R. (2d) 99 (Q.B.).

[267]) The money was excluded because it was acquired before marriage. *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(2).

[268]) However, due to the unusual circumstances of the case the court allowed an unequal division of assets: *supra*, note 266 at 105.

[269]) *Supra*, note 201.

from a personal injury award and put it in a family bank account.[270]

This Manitoba provision is illogical. For example, if one spouse inherits a Rembrandt and hangs it in the family's living room, the Rembrandt is not shareable.[271] But if this spouse sells the Rembrandt and buys a Picasso with this money, and hangs the Picasso in the family's living room, the Picasso becomes shareable.[272] How can the taste for art of one spouse be the crucial factor of differentiation as to whether or not an asset is shareable?[273] Moreover, this rule imposes restrictions on the spouse who has any excluded assets. That spouse cannot freely dispose of his or her excluded property and use it for whatever reason he or she thinks fit, without bearing the risk of having to share it upon marriage breakdown.[274] This provision of the *Marital Property Act* is as unfair as the inclusion of personal injury awards under German law, because both include assets meant to benefit only one spouse. However, in the example there would be no tracing under German law. The value of the Rembrandt by the time of

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[270]) Cases become even more complicated if a spouse uses only part of the excluded money and converts it into a family asset. This happened in *Longmuir* v. *Longmuir* (1989), 59 Man.R. (2d) 122 (Q. B.), where the court held that only the converted part is then shareable. Another problem is the temporary conversion of excluded money into a family bank account: *supra*, note 256.

[271]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(2).

[272]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 6(5)(b).

[273]) For other criticism of the tracing rules see J. Greenberg, *supra*, note 181 at M29.

[274]) See also, B. Ziff, "Tracing of Matrimonial Property: A Preliminary Analysis" in M. Hughes and D. Pask (eds.), *National Themes in Family Law* (Toronto: Carswell, 1988) 55 at 63.

the inheritance would remain excluded,[275] because it does not matter what one spouse does with his or her excluded assets. They can remain, they can be converted into other assets of the same kind (e.g., the Rembrandt converted into a Picasso), or they can be converted into something completely different (e.g., the Rembrandt converted into a car). This makes more sense. There is no reason why the other spouse should share the Picasso, but not the Rembrandt. It has nothing to do with the marriage. The simplest solution to avoid tracing problems in Manitoba is to abolish section 6(5)(a) and section 6(5)(b) of the *Marital Property Act*. Instead of looking at the individual asset, one should look at its value in order to avoid unjust results, as demonstrated in the example above.

5. Dissipation

It seems very easy to find a way around the equalisation payment. By disposing of all of one's assets and spending lots of money, the value of one's assets will decrease and no equalisation payment will probably have to be made. In order to avoid this abuse there are provisions in both the *Marital Property Act*[276] and the German *Civil Code*[277] to compensate the spouse who might suffer some such loss. In both jurisdictions the value of wasted assets is

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[275]) Para. 1374 Abs. 2 BGB. For the problem of an increase or decrease in the value of assets during the marriage, see below p. 77.

[276]) *Marital Property Act*, R.S.M., 1987, c. M45, ss. 6(7)-6(9).

[277]) Para. 1375 Abs. 2 BGB.

added to the inventory of the spouse who dissipated them. Wasted assets include for example, excessive gifts, gratuitous dispositions or implemented transactions with the intent to cause detriment to the other spouse.[278] One of the few Manitoba cases dealing with this problem was *Schmidt* v. *Schmidt*,[279] where the husband dissipated assets worth $ 7000 within a period of three month, spent DM 5000 within a two-week trip to Germany, and paid $ 8000 to somebody who supervised vacant land for him. The court held that these payments were excessive and added them to the husband's assets as owned on the valuation date.[280]

German courts do not often add the value of wasted assets to the spouses inventory. The method the courts follow when deciding whether a certain asset is dissipated is completely unclear. For example, a gift to the daughter of 7/8 of one spouse's real estate was considered a moral duty and not a waste of assets.[281] Another Court of Appeal came to the same conclusion in a case where one spouse destroyed assets in connection with an attempt to commit suicide.[282] The overdrawing of one's account was also not

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[278]) For a detailed discussion of each of these provisions in German law, see for example, D. Heckelman in Erman, *Handkommentar zum BGB*, vol.2 (Münster: Aschendorff Verlag, 1989) para. 1375 Rdnr. 5-10.

[279]) (20 March 1985), suit no. 225/83 F.M. (Man.Q.B.).

[280]) Sometimes spouses who dissipate assets are unable to make the equalisation payment. In order to protect the other spouse, the law states that the disadvantaged spouse can recover his or her loss from the receiver. For Manitoba law, see *Marital Property Act*, R.S.M., 1987, c. M45, s. 6(10). For German law, see para. 1390 BGB.

[281]) OLG München FamRZ 1985, 814.

[282]) OLG Frankfurt FamRZ 1984, 1097.

considered to be a waste of assets.[283] On the other hand, the disadvantageous separate assessment for income tax purposes is a waste of assets and has consequently to be added to the spouse's inventory.[284]

It is impossible to see any useful system in the decisions of the German courts. On the contrary, it seems to depend on the sense of justice of the particular judge and the cleverness of one spouse to prove an intent to cause detriment in the other spouse's act. This has to be shown in some cases,[285] whether or not a certain asset was dissipated or not. However, these cases have not had a great practical importance in German law.

6. Negative Value

One problem that often occurs is that one spouse has debts and liabilities exceeding the value of the spouse's total assets. Both the Manitoba and the German laws state that the value of all final assets cannot be less than zero.[286] In Manitoba, however, the court can order otherwise.[287] The purpose of this rule is to avoid a sharing of debts which one spouse made during the marriage. Otherwise the non-indebted spouse would indirectly have to pay for

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[283]) OLG Karlsruhe FamRZ 1986, 167.

[284]) BGH NJW 1977, 398.

[285]) Para. 1375 Abs. 2 Nr. 3 BGB. For full text see Appendix B, p. 182.

[286]) For Manitoba see *Marital Property Act*, R.S.M., 1987, c. M45. s. 11(2). For Germany see para. 1375 Abs.1 S. 2 BGB.

[287]) *Ibid.*

these debts by making a higher equalisation payment.[288] But if the value of the final assets of the indebted spouse is considered to be at least zero, there is no risk that the other spouse might become insolvent by having to make an immense equalisation payment.[289]

The treatment of debts which existed before marriage is different. While in Germany the value of the initial assets has at least to be zero,[290] in Manitoba the pre-existing debts which are not related to an excluded asset are taken into account in the equalisation payment.[291] That this leads to contradictory results has already been shown.[292] In order to avoid unjust results, Manitoba courts often refuse to allow a negative value of the final assets.[293] However, this does not work if the value of the final assets is positive, and one spouse was in debt at the beginning of the marriage but paid his or her debts which were not related to an excluded asset during the marriage. In this case the spouse who was not indebted at the beginning of the marriage shares the other

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[288]) For a calculation example, see The Law Reform Commission of Canada, *Studies on Family Property Law* (Ottawa: The Commission, 1975) at 287.

[289]) *Ibid.*, at 288.

[290]) Para. 1374 Abs. 1 BGB.

[291]) See for example, *Sutton* v. *Sutton* (1986), 50 R.F.L. (2d) 302 (Man.Q.B.), where the husband's debts of $ 58,000 were included in the accounting.

[292]) *Supra*, p. 53.

[293]) *Marital Property Act*, R.S.M.,1987, c. M45, s. 11(2). For example, *Sutton* v. *Sutton*, *supra*, note 291, and *Surka* v. *Surka* (1992), 79 Man.R. (2d) 243 (Q.B.). In *Marvins* v. *Marvins* (1993), 90 Man.R. (2d) 124 (Q.B.), by contrast the court allowed the negative value in the wife's accounting because her debts came from legal fees she paid for her husband to defend criminal charges against him.

spouse's debts.[294]

But if the value of the initial assets is considered to be at least zero, as it is done in German law, there is an additional problem. Should excluded assets acquired during the marriage, for example a gift, first credit the deficit or should even in this case the value of the initial assets be considered zero?[295] The deficit should probably be balanced first.[296] Otherwise the indebted spouse would be advantaged twice. This spouse could

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[294]) For an accounting example, see *supra*, p. 54.

[295]) For example: At the beginning of their marriage Mr. Schmidt from Berlin has assets worth DM 10,000 and DM 20,000 liabilities. During the marriage he inherits DM 30,000. Mrs. Schmidt has initial assets worth DM 50,000 and no debts. At the end of the marriage Mr. Schmidt has assets worth DM 100,000. His wife has DM 5,000 liabilities and assets worth DM 60,000.

If the value of the initial assets is not considered zero in this case, and the inherited property is first taken to credit the former deficit, the accounting would be:

	Mr. Schmidt	Mrs. Schmidt
Initial assets:	DM 10,000 - DM 20,000 = - DM 10,000	DM 50,000
Adding of the inherited asset:	- DM 10,000 + DM 30,000 = DM 20,000	0
Final assets:	DM 100,000	DM 60,000 - DM 5,000 = DM 55,000
Surplus:	DM 100,000 - DM 20,000 = DM 80,000	DM 60,000 - DM 55,000 = DM 5,000

Difference: DM 80,000 - DM 5,000 = DM 75,000 : 2 = DM 37,500.
In this case Mr. Schmidt has to make an equalisation payment of DM 37,500.

If in the example the value of the initial assets is considered to be at least zero, the calculation would be:

	Mr. Schmidt	Mrs. Schmidt
Initial assets:	DM 10,000 - DM 20,000 = 0	DM 50,000
Adding of the inherited assets:	0 + DM 30,000 = DM 30,000	0
Final assets:	DM 100,000	DM 60,000 - DM 5,000 = DM 55,000
Surplus:	DM 100,000 - DM 30,000 = DM 70,000	DM 60,000 -DM 55,000 = DM 5,000

Difference: DM 70,000 - DM 5,000 = DM 65,000 : 2 = DM 32,500.
Consequently if the inherited asset is not first used to credit the former deficit, the other spouse receives a smaller equalisation payment.

[296]) See also J. Gernhuber, *Lehrbuch des Familienrechts* (München: C.H. Beck, 1980) at 503.

exclude the whole value of the gift and could decrease the equalisation payment of the other spouse by half of the deficit. This result is as unjust as the Manitoba approach, where the indebted spouse can include pre-existing debts unrelated to excluded assets.

In order to avoid unjust enrichment under the Manitoba approach, pre-existing debts should not be taken into account, regardless as to whether or not they are related to an excluded asset, as far as these debts exceed the value of the assets acquired before marriage. But in cases where the indebted spouse receives an excluded asset during the marriage, this asset should balance the former deficit first, and only the value of the excluded asset which exceeds the former debt should be taken into account as "excluded asset". By doing so, one can avoid unjust results which occur under the present Manitoba approach in cases where the spouse with pre-existing debts unrelated to an excluded asset is able to pay these debts off during the marriage.

7. Does it Work in Practice?

The policies in both jurisdictions on which the marital property regime is based seem just. Regardless of the individual contributions of the spouses, all property accumulated during the marriage is equally shareable, because it is assumed that these assets were acquired through the effort of both spouses. Although this idea seems to serve the interest of equality, in fact it

operates to the disadvantage of women.[297] Even if more and more women are working outside the home today,[298] their earning capacity after divorce is lower than their ex-husbands because women usually miss career chances while married. In Canada there is a disadvantage for women as a group upon marriage breakdown. This is especially true for single parent custodial females[299] who are among all divorced people the ones with the lowest post-divorce income.[300] In Germany the results caused by the property division upon divorce are anything but satisfactory as well. The equalisation payment does not adequately compensate the economically disadvantaged spouse,[301] so that in many cases divorce is not possible because of the economic consequences created by it.[302]

The question arises as to how the current marital property regimes can be improved to avoid such economic hardship. Weitzman, in her pathbreaking study on economic consequences of divorce, suggests for example the inclusion of new forms of property, such

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[297]) C. Rogerson, "Women, Money And Equality: The Background Issues" in K. Busby, L. Fainstein and M. Penner (eds.), *Equality Issues in Family Law: Consideration for Test Case Litigation* (Winnipeg: Legal Research Institute of the University of Manitoba, 1990) 97 at 99.

[298]) For a statistical overview of the increased labour participation of women, see M. Eichler, *Families in Canada Today* (Toronto: Gage, 1983) at 43.

[299]) D.G. Stewart and L.E. McFadyen, "Women and Economic Consequences of Divorce in Manitoba: An Empirical Study" (1992) 21 Man.L.J. 80 at 98.

[300]) F. Steel and D.G. Stewart, *The Economic Consequences of Divorce on Families Owning a Marital Home: Final Report* (Ottawa: Canada Mortgage and Housing Cooperative, 1990) at 65.

[301]) *Supra*, note 59 at 169.

[302]) W. Müller - Freienfels, Review Essay of *The New Family and the New Property*, by M.A. Glendon (1985) 33 A.J.C.L. 733 at 744.

as education and professional training[303] in the property division.[304] These assets are at least as valuable and as tangible as real estate. However, her suggestion has been criticised as unsatisfactory, because it would not change the economic conditions women live in after divorce, if their ex-husbands have only a modest income.[305]

In fact the inflexible accounting under both the *Marital Property Act* and the German *Civil Code* does not provide for an equal sharing of assets because they focus too much on traditional forms of property. Therefore, reforms which improve the economic consequences upon divorce especially for disadvantaged women are necessary. Even if some suggestions are not the most perfect solution (e.g., logically, career assets cannot be divided or taken into consideration where they are not available) they would at least be a beginning.

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[303]) For a detailed discussion of the so called "career assets," see below p. 100.

[304]) L. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985) at 381.

[305]) M. Eichler, "The Limits of Family Law Reform or the Privatisation of Female and Child Poverty" (1990) 7 C.F.L.Q. 59 at 80.

Part III: Consideration and Valuation of Special Assets

1. General Valuation Problems

Apart from the controversial question of which assets should be shareable upon marriage breakdown, there is a second problem: how to value them? In both jurisdictions there are difficulties in valuing property. Besides the valuation of certain assets, this chapter deals with problems arising from the increase or decrease in the value of assets during the marriage, and between separation and trial. As in the previous chapter, the chosen legal problems are not all-embracing.

While there is an explicit rule dealing with the definition of "value" in Manitoba,[306] the German *Civil Code* states only that assets have to be valued.[307] In most cases in Manitoba the fair market value of the asset is crucial,[308] defined as "the amount that the asset might reasonably be expected to realise if sold in the open market by a willing seller to a willing buyer."[309] The "fair market value approach" is often criticised because it does not lead to just results in individual cases. "Fair" modifies the word "market" not the word "value".[310] A "fair value" by contrast

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[306]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 15(2).

[307]) Para. 1376 BGB.

[308]) For assets without a marketable value see *Marital Property Act*, R.S.M., 1987, c. M45, s. 15(3).

[309]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 15(2).

[310]) S.R. Cole and A.J. Freedman, "Recent Financial Issues in Family Law - Fair Market Value and Contingent Income Tax Liability" (1990) 6 C.F.L.Q. 101 at 104.

describes what is just and equitable in the circumstances of this case for this particular family, which can be very different from what is just in the open market.[311] Therefore not the "fair market value" but the "fair value" should be considered to be crucial;[312] the definition of the latter is much broader and more discretionary.[313] Moreover under the "fair value approach" all important circumstances of the case can be taken into account.[314] Apart from Manitoba, Saskatchewan is the only other common law province which follows the "fair market value approach",[315] and there the inflexibility of this rule is criticised as well.[316] All other provinces either have no standard of value at all[317] or just

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[311]) A.J. Freedman, "Black v. Black and the Quest for fair value" (1989) 5 C.F.L.Q. at 323.

[312]) *Supra*, note 310.

[313]) "Fair value" might be for example:
1. fair market value
2. market value
3. market price
4. value to the owner
5. intrinsic value
6. investment value
7. liquidation value
8. any of the above with or without the special purchase premium
9. any of the above with or without a minority discount or premium

See *supra*, note 310 at 105. It is not hard to tell that there can be a large difference between these values, especially between the value to the owner and the liquidation value.

[314]) For a more detailed list of the advantages of the "fair value approach" see *supra*, note 310 at 107.

[315]) *Matrimonial Property Act*, S.S., 1979, c. M-6.1, s. 2(1).

[316]) J. Kary, "Farmland, Free Markets and Marital Breakdown" (1992) 11 C.F.L.Q. 41 at 55.

[317]) This includes Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Alberta and British Columbia.

consider the "value" of the assets.[318] As there is also no provision in the German *Civil Code* which defines "value",[319] a large number of decisions have developed at least which "values" should **not** be taken into account, in particular the collector's value and the rateable value for real estate.[320] Only the "real value" of the assets should be considered,[321] which will depend on the nature of the individual asset.[322] A more flexible provision would be desirable in Manitoba too. The circumstances of the particular family, not the conditions of the market, should be the crucial factor in valuing property.[323]

Another controversial issue in valuation is the consideration of tax liabilities and costs of disposition. There is no uniform

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[318]) This is the standard of value in Ontario.

[319]) There is only one rule dealing with the valuation of agricultural and forestry assets, which states that the "value of their produce" shall be appraised. See para. 1376 Abs. 3 BGB.

[320]) *Supra,* note 162, at 111.

[321]) BGH FamRZ 1986, 37 at 39.

[322]) There is an immense number of cases dealing with problems of valuation. For an overview of valuation problems of individual assets such as works of art, shares in a community of heirs and copyrights see *supra*, note 162 at 125-133.

One of the most difficult valuation problems is the valuation of shares. Generally the middle current rate of exchange is considered to be the right guide. See *supra*, note 247 para. 1376 Rdnr. 13. However, it was criticised as useless because "interested circles can effortlessly influence the current rate of exchange." See R. Nirk, "Die Bewertung von Aktien bei Pflichtteilsansprüchen" (1962) NJW 2185 at 2188.

There are special provisions for valuing real estate in the valuation regulations (Wertermittlungsverordnung). Three different approaches are available under these regulations: the comparative approach (para. 4-7 WertV), which considers comparable transactions; the profit approach (para. 8-14 WertV) which takes the profit of the real estate in consideration; and the intrinsic value approach (para. 15-20) which takes the value of the soil into account. The order of these approaches corresponds to their importance. The comparative approach is the most reliable one. See *supra*, note 182 at 100.

[323]) Especially when valuing business assets the "fair market value approach" can lead to unjust results. For more details about the then rising problem of special purchasers see below p. 94.

treatment of these kinds of liabilities in Canada. For example, in *Kelly* v. *Kelly*[324] and *Heon* v. *Heon*[325] there were allowances of costs of sale, income tax on capital gain and income tax on recaptured capital under the *Income Tax Act*. By contrast in *Dibbley* v. *Dibbley*[326] and *Danish* v. *Danish*[327] such reductions were not allowed. In some cases a reduction in value on account of national income tax was allowed but a deduction of disposition costs was not.[328] In another Manitoba case[329] where the problem of costs of sale did not occur, a 1/3 reduction was made on account of future tax liability.[330] However, in Germany tax liabilities and costs of sale are only taken into consideration if they have already been incurred, even if they are not yet due.[331]

The disadvantage of a deduction of this kind of liabilities and costs is obvious. On one hand there are different cost bases, varying tax exposures and different tax rates for each property-owning spouse.[332] Moreover, the valuation depends on so many other

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[324]) (1986), 50 R.F.L. (2d) 360 (Ont.H.C.).

[325]) (1989), 22 R.F.L. (3d) 273 (Ont.H.C.). The approach adopted in this case was called "after-tax and disposition cost (ATDC)."

[326]) (1986), 5 R.F.L. (3d) 381 (Ont.H.C.).

[327]) (1981), 33 B.C.L.R. 176 (C.A.).

[328]) See for example *Stokes* v. *Stokes* (1983), 37 R.F.L. (2d) 186 (B.C.C.A.) and *Nykiforuk* v. *Daviduik* (1982), 20 Man.R. (2d) 16 (Q.B.).

[329]) *Gutheil* v. *Gutheil* (1983), 34 R.F.L. (2d) 50 at 59 (Man.Q.B.).

[330]) There was a B.C. case where a 25% reduction was allowed, see *Verdant* v. *Verdant* (1985), 46 R.F.L. (2d) 385 (B.C.C.A.).

[331]) *Supra*, note 213, para. 1375 Rdnr. 4.

[332]) G.B. Leonard, "Family Law Valuation: Practical Concept of 'Value' and 'Fair Market Value'" (1993) 8 Money & Fam.L. 93 at 96.

factors[333] that it is just impossible for a judge to make any reasonable allowance of such taxes[334] and costs.[335] On the other hand, taking these liabilities into consideration when valuing the spouse's property seems just, because the property-owning spouse obtains a deduction for costs of sale and tax liabilities which would already have been paid had the asset been sold before the valuation date. The unjust result, where the property-owning spouse would be in a worse position had the asset not been sold before the valuation date, can be avoided.[336] But the property-owning spouse would be advantaged if he or she decided to keep the property. If in this case fictitious costs of disposition and tax liabilities are taken into consideration the property-owning spouse would be unjustly enriched. Moreover, this approach gains the owning spouse a benefit of the full amount of liabilities and costs that would have been incurred if the disposition had occurred at the valuation date. But any disposition that will really occur, will happen at some point in the future. Therefore the property-owning spouse might gain credit for an amount exceeding the present value of the

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[333]) For example the following factors are relevant:
1. When is the sale likely to take place?
2. What is the present value of the dollar when the sale takes place.
3. What is the tax rate to be likely in the future?
4. What tax planning might take place?
See *supra*, note 326 at 396.

[334]) *Supra*, note 326, at 396.

[335]) *Ibid.*, at 391.

[336]) *Supra*, note 310 at 112.

liabilities and costs.[337]

A compromise between these two extreme positions seems appropriate. Tax liabilities and costs of sale should only be taken into account if the property-owning spouse can satisfy the court that they will actually occur. They should then be treated as an element of the value of the property on the valuation date. This approach was adopted by the Ontario High Court in *McPherson* v. *McPherson*.[338] The Ontario solution is better than the German one where only already incurred tax liabilities and costs of sale are taken into account even if they are not yet due, because the property-owning spouse might be disadvantaged if there are definite plans to sell the property but the transaction takes place after the valuation date. It seems that Manitoba law is still in flux.[339] However, the complete exclusion of such liabilities and costs would be unjust. The absence of an acceptable method for coping with the uncertainties of costs and taxes is no reason to disadvantage the property-owning spouse.[340]

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[337]) E. Hovious and T.G. Youdan, *The Law of Family Property* (Scarborough, Ont.: Carswell, 1991) at 304-305.

[338]) (1988), 63 O.R. (2d) 641 (Ont.H.C.).

[339]) The Manitoba courts vary in their decisions: while they allowed a reduction of taxes but no reduction of notional costs of disposition in *Nykiforuk* v. *Daviduik*, *supra*, note 327 at 207, they did not want to consider a deduction of taxes in *George* v. *George* (1983) 5 W.W.R. 606 at 618 (Man.C.A.). In a third case they allowed a deduction of taxes where the problem of costs of disposition did not occur; see *supra*, note 329.

[340]) S.R. Cole, "Comments on *Dibbley* v. *Dibbley*, *Postma* v. *Postma* and *Menange* v. *Hedges* from an Account's Perspective" (1988) 3 C.F.L.Q. 105 at 123.

2. Inflation

The consideration of inflation is a difficult topic. Firstly it is unclear whether inflationary increases in the value of assets should be shareable. Secondly, if they are not shareable, it is hard to find an appropriate method to eliminate them from the accounting.

Neither the German nor the Manitoba law has an explicit provision dealing with inflation, although the legislatures in both jurisdictions were aware of the problem when drafting the property division rules.[341] While there was a development in German law regarding this problem, Manitoba courts even today do not deal with inflationary appreciation in value at all. The German Supreme Court introduced a calculation method to avoid the sharing of appreciation in value of assets which occurred because of a decrease in the value of money and not because of a real increase in actual value of the asset. In order to avoid inflationary profits in the equalisation payment the value of the initial assets has to be converted to the level of the value of the final assets.[342] The cost of living index is used as a guide.[343] It has to be noted that there is no conversion if the value of the initial assets was zero.[344] The value of the initial assets is converted as

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[341]) For Manitoban law see *supra*, note 210 at 70. For German law see *supra*, note 182 at 103.

[342]) BGHZ 61, 385 at 393.

[343]) See Appendix A, p. 168.

[344]) *Supra*, note 168 at 1117.

follows:[345]

$$\frac{\text{value of the initial assets} \times \text{index on end of the marriage}}{\text{index at the beginning of the property regime}} = \text{adjusted value of the initial assets.}$$

There is the same conversion of the value of assets which are excluded from sharing, i.e., inherited property, and which were acquired during the marriage. In this case the index of the year of acquisition is used instead of the index at the beginning of the property regime.[346] This also applies to cases where the value of the initial assets was negative and during the marriage excluded assets were acquired and used to balance the deficit.[347] The lack of similar practice in Manitoba has been criticised several times. Using the cost of living index to eliminate inflationary appreciations in value[348] has been suggested because it is not just to share an inflationary increase in value of pre-acquired assets.[349] This profit cannot be attributed to the joint effort of the spouses.[350] Especially after long-term marriages the non-consideration of the impact of inflation can lead to unjust

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[345]) *Supra*, note 342.

[346]) *Supra*, note 162 at 134.

[347]) *Supra*, note 168 at 1117. For the problem of a negative value of the initial assets where the acquisition of excluded assets during the marriage are used to balance the deficit see *supra*, note 295 and accompanying text.

[348]) D. Gibson and K. Hanley, "Memorandum of separate opinion regarding inflation and deflation" in *supra*, note 210 at 71.

[349]) There is no sharing at all of any increase in value of excluded assets under section 7 of the *Marital Property Act*. See *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(3). As pre-acquired assets do not fall under section 7 of the act the problem of sharing of any inflationary increase can only occur to them.

[350]) J.G. McLeod, *Annotion*, (1984) 39 R.F.L. (2d) 2 at 2-3.

results.[351] However, the German solution is not optimal either. The cost of living index is not an appropriate guide in adjusting the value of shares, gold, pictures and antiques; especially if these assets are abroad.[352] Moreover, the cost of living index meets the situation of an average family and does not consider fixed assets.[353] This index may not be proper when adjusting money which one spouse acquired before the marriage, because it would lead to a disadvantage of the money-owning spouse. This spouse would be treated as if he or she had used the money to acquire more stable assets.[354]

The approach of the German Supreme Court is fair. Although

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[351]) For example Mrs. and Mr. Schmidt from Berlin married in 1961. At this time Mr. Schmidt had assets worth DM 20,000 and Mrs. Schmidt had DM 5,000. Neither of them was indebted. Thirty years later at the end of their marriage Mr. Schmidt is worth DM 200,000 and Mrs. Schmidt had assets worth DM 50,000. There were no debts at the end of the marriage. If there was no consideration of the inflation during this 30-year-marriage the valuation would be as follows:

	Mr. Schmidt	Mrs. Schmidt
Initial assets:	DM 20,000	DM 5,000
Final assets:	DM 200,000	DM 50,000
Surplus:	200,000 - 20,000 = 180,000	50,000 - 5,000 = 45,000
Difference:	200,000 - 45,000 = 135,000 : 2 = 67,500 DM	

Mr. Schmidt had to make an equalisation payment of DM 67,500.
If, on the other hand the impact of inflation is taken into consideration the accounting would be:

	Mr. Schmidt	Mrs. Schmidt
Initial assets:	DM 20,000	DM 5,000
Adjusted value of the initial assets :	$\frac{20,000 \times 110,5}{40,7}$ = 54299,75	$\frac{5,000 \times 110,5}{40,7}$ = 13574,94
Final assets:	200,000	50,000
Surplus:	200,000 - 54299,75 = 145700,25	50,000 - 13574,94 = 36425,60

Difference: 145700,25 - 36425,06 = 109275,19 : 2 = 54637,60 DM.
Here the husband has to pay only DM 54637,60. Due to the elimination of the increase in value of the assets, the equalisation payment is DM 12862,40 less than without the consideration of inflation.

[352]) F.A. Mann, "Geldentwertung und Recht" (1974) NJW 1297 at 1300.

[353]) *Supra*, note 296 at 513.

[354]) *Supra*, note 247, para. 1373 Rdnr. 8.

criticism of the usage of the cost of living index is reasonable, there is no alternative to this guide. Until we have invented a better approach we can only accept this index.[355] An additional consideration of unjust results due to inflation under the provisions dealing with unequal division[356] of assets was rejected by the Supreme Court of Germany, because it is not a problem of the **individual** case but occurs in all equalisation payment claims.[357] However, the inaccuracies caused by usage of the cost of living index are not as unjust as the complete ignoring of this problem under Manitoba law.

3. Appreciation and Depreciation in the Value of Assets During the Marriage

Appreciation and depreciation in the value of assets is at least as important as consideration of the assets themselves. While there are explicit rules for dealing with this problem in Manitoba,[358] there is no provision in the German *Civil Code*. Because of the inflexible calculation method under the *Civil Code*, all non-inflationary appreciations and depreciations of all assets, regardless of whether they were excluded or not and regardless of when they were acquired, are included in the accounting.[359] By

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[355]) R. Kohler, "Das Geld als Wertmaßstab beim Erb- und Zugewinnausgleich" (1963) NJW 225 at 226.

[356]) Para. 1381 BGB.

[357]) *Supra*, note 342 at 389.

[358]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(3) and s. 7(4).

[359]) *Supra*, note 78 at 891.

contrast the statutory provisions in Manitoba are a bit more complicated. Appreciation and depreciation of certain kinds of assets are excluded. This includes changes in the value of inherited property and of gifts from third persons, unless it can be shown that it was the intention of the donor that any appreciation or depreciation in value of those assets should be shareable.[360] On the other hand all appreciations and depreciations in the value of other excluded assets, especially of these acquired before marriage, are included in the accounting.[361]

Neither the German nor the Manitoba law is optimal. While the Manitoba approach is in detail very complex, the German solution leads to unjust results. One of the most controversial problems in Manitoba was the treatment of appreciation and depreciation of assets acquired before marriage or of those inherited. In *Dixon* v. *Dixon*[362] the court had to decide whether appreciation in value of pre-acquired inherited assets were shareable.[363] The court held that they have to be taken into account. However, one has to bear in mind that this decision was made prior to the introduction of section 4(3) of the *Marital Property Act*, which excludes appreciations and depreciations in value of inherited property and

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[360]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 7(4).

[361]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(3).

[362]) *Supra*, note 205.

[363]) For the same problem see also the Ontario case of *Black* v. *Black* (1988), 18 R.F.L. (3d) 303 (Ont.H.C.). The amount of the equalisation payment to the wife was - as the increase in value was considered to be shareable even if it was a pre-acquired inherited asset - $ 2.3 million higher than without the inclusion of the increase in value of this asset.

gifts, whether pre-acquired or not, making the *Dixon* decision no longer appropriate.[364] Section 4(3) of the act makes perfect sense, because if appreciation in the value of inherited property or gifts were shareable, the excluded-property-owning spouse might be disadvantaged by being forced to sell these excluded assets to make the equalisation payment. Moreover these appreciations are not the result of the joint effort of both spouses.[365] If the non-owning spouse can share these appreciations, as in German law, he or she is unjustly advantaged at the expense of the other spouse. Therefore the Manitoba approach regarding the exclusion of appreciation and depreciation in the value of inherited assets and gifts is better than the German solution.

The same problem is caused by any appreciation and depreciation in the value of excluded assets, others than gifts and inherited assets. In both jurisdictions these changes in value are shareable. This is illogical. For example, if one spouse inherits a Picasso during the marriage, the Picasso is not shareable, neither in Manitoba[366] nor in Germany.[367] If the Picasso increases in value during the marriage the appreciation is excluded from sharing in Manitoba.[368] If on the other hand the spouse bought the

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[364]) F. Steel, "Recent Family Law Developments in Manitoba" (1983) 13 Man.L.J. 323 at 333.

[365]) *Supra*, note 337 at 348.

[366]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 7(3).

[367]) Para. 1374 Abs. 2 BGB.

[368]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 7(4).

Picasso before the marriage, and not in contemplation of it, the Picasso again is excluded in both jurisdictions[369] but the appreciation in value becomes included. This does not make sense and it definitely does not reflect the idea of marriage as an economic partnership.[370] There is no connection whatsoever between the Picasso and the marriage in both examples. Moreover the results produced by the laws are contrary to a sense of justice. The layman might say: "I've already owned the Picasso, so it's mine. I don't have to share any part of it."[371] The inclusion of appreciations in value is also inconsistent with the tracing rules,[372] because there the *Marital Property Act* looks at the **asset**; if the excluded asset is converted into a family asset it becomes shareable.[373] Here the act looks at the **value** and even if the asset remains the same, the change in **value** becomes shareable. The same criticism applies to depreciation in value of pre-acquired assets which are included in the accounting in both jurisdictions.[374] In Germany even depreciations in the value of excluded assets acquired by gift or inheritance during the marriage are shareable.[375]

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[369]) For German law see para. 1374 Abs. 2 BGB. For Manitoba law see *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(1).

[370]) For the opposite opinion see F. Steel, *supra*, note 48 at 145.

[371]) For the same example regarding a lake cottage, see Manitoba Law Reform Commission, *Working Paper on Family Law* (Winnipeg: The Commission, 1975) at 49.

[372]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 6(5).

[373]) For more details about this problem, see *supra* p. 58.

[374]) For Manitoba, see *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(3)(b). For Germany, see supra, *note 78* at 891.

[375]) *Supra*, note 78 at 891.

However, the complete exclusion of all changes in the value of excluded assets whenever they are acquired causes problems as well. It would be easy to misuse this system. For example, one spouse could minimise the value of his or her shareable assets by maximizing the value of excluded assets. If the husband inherits a house which is not used as the marital home, he could spend a lot of money to improve it and increase its value. At the end of the marriage he has few shareable assets but an expensive house which is excluded from sharing.[376] The avoidance of this problem is the only advantage of an inclusion of all appreciations in the value of excluded assets.[377]

Even if the complete exclusion of all appreciations in the value of excluded assets whenever acquired causes this problem, it is more appropriate than the current law in both jurisdictions. Where one spouse spent many of his or her shareable assets to increase the value of an excluded asset, the appreciation in value should be added to this spouse's inventory, similar to the adding of excessive gifts or wasted assets.[378] The inclusion of

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[376]) This problem for example occurred in *Waters* v. *Waters*, supra, *note 222*, where the Manitoba Court of Appeal had to decide whether appreciations in value of a gift were shareable if they were caused by the work of one spouse. Normally the increase in value of the gift (i.e., shares) is not shareable pursuant to section 7(4) of the *Marital Property Act*. In order to avoid unjust results the court stated: "it is not appreciation, however, where the recipient himself adds something to the gift which increases the value." See *supra*, note 222 at 293. The increase in value beyond that attributable to their original worth should be treated as a commercial asset. See *supra*, note 222 at 293.

This very technical solution seems just. However, it can cause a number of additional problems. For example, how can the increase which occurred due to the effort of one spouse be completely separated from the "ordinary" increase in value? Where to draw exactly the line between these two kinds of appreciation?

[377]) *Supra*, note 288 at 295.

[378]) *Supra*, p. 60.

appreciations in the value of all excluded assets in Germany, and of assets acquired before marriage (excluding the appreciation and depreciation of assets acquired by gift or inheritance) in Manitoba is unjust. It disadvantages the spouse who owns excluded assets, especially in cases where the actual asset never changes; for example, works of arts, pictures or antiques that the marriage has nothing to do with it.

4. Appreciation and Depreciation between the Valuation Date and Trial

The value of one spouse's assets can also increase or decrease between valuation date and trial. Manitoba has more occurrences than Germany because in Manitoba the valuation date[379] is usually the last day of cohabitation, i.e., the whole period of separation is excluded from the accounting. By contrast in Germany the valuation date is the day when the petition for divorce is served,[380] so the period of separation is included in the accounting. Therefore changes in the value of assets during separation are more likely in Manitoba.[381] There are two problems when dealing with post-separation changes in value. First, should the non-owning spouse share appreciations and depreciations in the

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[379]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 16.

[380]) *Supra*, note 163.

[381]) The periods of separation are quite the same in both jurisdictions. In Germany there is a one year separation period if both spouses consent to the divorce, otherwise the separation period is three years. See para. 1566 BGB. In Canada there is usually a one year separation period. If marital breakdown can be proven by adultery or cruelty, there is no statutorily required separation period at all. See Divorce Act, R.S.C., 1985, c. 3, s. 8.

value of assets owned by the other spouse after the valuation date; and if so, what is the right kind of compensation?

The Supreme Court of Canada was faced with this problem in *Rawluk* v. *Rawluk*,[382] where a couple divorced after 29 years of marriage. The wife had raised three children and participated actively in the farming operation and machinery business of her husband. Between separation and trial the value of properties owned by Mr. Rawluk increased dramatically. Mrs. Rawluk claimed a one-half interest in the increases in value of these two properties, (the "home farm") and a ten acre parcel referred to as the "Sharon" property, using a remedial constructive trust to prevent an unjust enrichment of her husband.[383]

In *Rawluk* the Supreme Court had to decide two main issues: did the doctrine of constructive trust[384] survive the enactment of the

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[382]) (1990), 23 R.F.L. (3d) 352 (S.C.C). By then there was no precedent case about this issue. The Supreme Court of Canada in *Leatherdale* v. *Leatherdale* (1982), 142 D.L.R. (3d) 193 did not take its chance and discuss the interrelationship of the law of trust and the former Ontario *Family Law Reform Act*, R.S.O., 1980, which was often criticised. See for example D. Nadeau, "Leatherdale v. Leatherdale: Unrealised expectations?" (1983) 21 U.W.O.L.Rev. 317 at 331.

[383]) There are other cases there the doctrine of constructive trust is important even after the enactment of the *Marital Property Act*: for example, where spouses separated before 6 May 1966. For more examples see *supra*, note 34 at 45.

[384]) This development of the doctrine of constructive trust is closely connected to common-law-relationships. It has only minor importance for married couples. Only in cases where the *Marital Property Act* does not provide for an appropriate remedy, especially in cases of appreciation in the value of excluded assets and appreciation in value of included assets between separation and trial due to the contributions of the non-owning spouse, will the doctrine of constructive trust can be applied. The situation is different for common-law-relationships. In such partnerships the "wife" often stays at home and looks after the children while her partner works outside the home. At the end of such a relationship the "wife" usually has neither a job nor any interest in the property acquired with her help by her "husband" during the relationship. Before enactment of the *Marital Property Act* and corresponding acts in other common-law provinces, the same problem occurred to married couples when separation of property was the main marital property regime. In order to get an interest in the

property owned by the other spouse it was necessary to prove that there was a common intention of the parties. This intent to share any interest in property was presumed if there was a direct financial contribution to the property in question. M. Welsted, "Domestic Contributions and Constructive Trust: The Canadian Perspective" (1987) Denning L.J. 151 at 152. See also, *supra, Murdoch* v. *Murdoch,* note 118. After a long marriage and substantial contribution by the wife in the form of labour to her husband's farm, the Supreme Court of Canada did not give her an interest in the farm property of her husband. The majority of the court refused to accept that there was a common intention between the parties to share the farm property. Therefore no resulting trust was established in Mrs. Murdoch's favour. Laskin in his dissenting judgment pointed out that she had made substantial contributions to the maintenance of the farm property that the husband claimed as his own. See *supra,* note 118 at 382. It would be very unfair to give her nothing. Therefore he stated at p. 388: "The appropriate mechanism to give relief to a wife who cannot prove a common intention or to a wife whose contributions to the acquisition of property is physical labour rather than purchase money is the constructive trust which does not depend on evidence of intention. Perhaps the resulting trust should be as readily available in the case of a financial contribution, but the historical roots of the inference that is raised in the latter case do not exist in the former. It is unnecessary to bend or adapt them to the desired end because the constructive trust more easily serves the purpose."

Like Laskin's dissent in *Murdoch,* the Alberta Court of Appeal gave the wife in *Trueman* v. *Trueman* (1971), 5 R.F.L. 54 an interest in the property owned by her husband. In this case the wife as well made a substantial but indirect, i.e., non-financial, contribution to the homestead. Unlike the Supreme Court of Canada, the Alberta Court of Appeal realised that there can be no difference whether one spouse makes direct financial contributions to the other spouse's property or makes indirect contributions in the form of labour which helps the property-owning spouse to save money because nobody else must be hired and paid to do this work.

Five years after *Murdoch* in a case with similar facts, *Rathwell* v. *Rathwell* (1978), 83 D.L.R. (3d) 289, the Supreme Court of Canada declared a resulting trust in Mrs. Rathwell's favour. However, the slight but important difference between *Murdoch* and *Rathwell* was that Mrs. Rathwell made, apart from her contributions to the property in dispute in form of labour, a small financial contribution as well. Therefore the Supreme Court was willing to accept that there was a common intention to share the beneficial interest in the property and thus declared the trust. However, Dickson in *Rathwell* stated that, as there is seldom an implied agreement, the doctrine of a resulting trust is much too inflexible to do justice in such cases, because it cannot be applied to them; thus a constructive trust based on unjust enrichment would be much more appropriate: *Rathwell* v. *Rathwell* at 305. In order to declare the trust three requirements must be fulfilled: 1. there must be an unjust enrichment, 2. there must be a corresponding deprivation and 3. there must be an absence of a juristic reason: *Rathwell* v. *Rathwell* at 306. In addition there has to be a causal connection between the disputed asset and the unjust enrichment, which Dickson found was available in the case in front of him: *Rathwell* v. *Rathwell* at 311.

The next step in adopting the doctrine of constructive trust as an accepted remedy for an unjust enrichment of one spouse was the case of *Pettkus* v. *Becker* (1980), 19 R.F.L. (2d) 165 (S.C.C.). In this case the couple was not married but lived together for 20 years. The "wife" supported the couple during the first years of their relationship. Mr. Pettkus could therefore save his earnings. He bought a farm and a bee-keeping business. Mrs. Becker worked hard for 14 years in this enterprise and received no monetary remuneration. Here the Supreme Court of Canada in a majority decision applied the doctrine of constructive trust as an appropriate remedy to prevent unjust enrichment of Mr. Pettkus and gave Mrs. Becker a one-half interest in the property. After finding that there was an unjust enrichment of Mr. Pettkus and a corresponding deprivation, as well as no

juristic reason for the enrichment, Dickson writing for the majority stated at p. 183 : "For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contributions of money and the direct contributions of labour is clearly linked to the acquisition of property...Was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realised upon sale of the...property and to an interest in the ... property and the bee-keeping business?" The court stated that it was. By then this decision was called "the most extreme" application of the doctrine of constructive trust as an appropriate remedy to prevent unjust enrichment in cases where, due to a lack of proof of a common intention a resulting trust could not be established. See A. Bissett-Johnson, "Recent Developments in Family Law" (1980) 3 F.L.R. 244 at 258. The major disadvantage of the application of the doctrine of constructive trust in cases like this is the unlimited discretion of the courts. However, the same discretion also exists where courts have to interpret facts to find a "common intention" when establishing a resulting trust. Therefore there is no more uncertainty caused by judicial discretion when used before the doctrine of constructive trust was considered to be an appropriate remedy for unjust enrichment. See J. Rose, "Pettkus v. Becker" (1981) 5 Can. Community Property J. 130 at 138.

The last but one step in this development was the case of *Sochoran* v. *Sochoran* (1985) 2 R.F.L. (3d) 225 (S.C.C.). Unlike the previous cases there was one important difference in the case of *Sochoran* v. *Sochoran*: the property in dispute was acquired by the "husband" before the relationship started. Here the common-law-wife worked on her partner's farm for 42 years and raised six children! The Supreme Court of Canada found that there was an unjust enrichment of Mr. Sochoran produced by the labour of Mrs. Sochoran. However, the crucial problem was whether the establishment of a constructive trust, i.e., a proprietary remedy rather than only a monetary relief, was appropriate because there was no causal connection between Mrs. Sochoran's labour and the **acquisition** of the farm. But due to the extreme circumstances of the case the Supreme Court of Canada held at 239: " In the present case, Mary Sochoran worked on the farm for 42 years. Her labour directly and substantially contributed to the maintenance and preservation of the farm, preventing asset deterioration or divestment. There is, therefore, a 'clear link' between the contribution and the disputed asset." The court awarded Mrs. Sochoran both a 1/3 interest in the property and monetary relief.

This decision was often criticised for not articulating why it chose this remedy, because proprietary remedies are the exception not the general rule. See R.E. Scane, "Relationships 'tantamount to spousal', Unjust Enrichment and Constructive Trust" (1991) 70 C. Bar Rev. 260 at 287. Moreover, it creates a great deal of uncertainty because it is not clear which contributions of a de facto wife can be regarded as requiring proprietary remedies. Prior to this decision the " causal connection" requirement placed more predictable limits on the availability of proprietary remedies. See *supra*, note 112 at 265.

The last case in the development of the application of the doctrine of constructive trust in family law was *Peter* v. *Beblow* (1993), 101 D.L.R. (4th) 624 (S.C.C.). Here again the common law spouses lived together for 12 years. During this period the "wife" worked some months per year part-time and did substantial work for the "husband's" property, which he owned before he met her. As in *Sochoran* v. *Sochoran*, the Supreme Court of Canada held that there is no need that the contributions of the common-law-wife must lead to the acquisition of the asset in question: *Peter* v. *Beblow* at 638. The constructive trust was considered to be an appropriate remedy where there is an unjust enrichment and a clear proprietary link between the contribution of the spouse and the asset in dispute. A proprietary remedy is of special importance where monetary damages are inadequate. In this case the Supreme Court of Canada stated that a monetary judgment would be impractical and unrealistic. It therefore awarded the **whole**

Family Law Act;[385] and if so, is the constructive trust an appropriate remedy? Even the first question remains controversial. It was argued that by the time the *Family Law Act* was enacted the legislature knew the importance of the doctrine of constructive trust in family law. The act neither by direct reference nor by implication prohibits the application of the doctrine of constructive trust, and so it survives the act.[386] Moreover, it would be illogical if one spouse cannot share the increase in value between the valuation date and trial but, supposing the requirements for the declaration of the constructive trust are fulfilled,[387] such appreciations would be shareable between spouses of a common-law-relationship.[388] Therefore there is no restriction in the application of the doctrine of constructive trust even after the enactment of the marital property laws.[389]

Opposing authority[390] states that this doctrine was replaced by the *Family Law Act*. McLachlin in her dissenting judgment in

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property to the "wife". See *Peter* v. *Beblow* at 642.

[385]) *Rawluk* v. *Rawluk* was a case under the Ontario *Family Law Act*, S.O., 1986, but the same problem occurs under Manitoba law because there is a valuation date prior to separation as well. By contrast most other provinces give courts discretion to vary the valuation date to achieve fair results: M. Bailey and N. Bala, "Canada: Abortion, Divorce and Poverty and Recognition of Non-Traditional Families" (1992) 30 J.Fam.L. 279 at 285.

[386]) *Supra*, note 382 at 369.

[387]) *Supra*, note 384.

[388]) A. Bisset-Johnson, "Family Law - Property - Constructive Trust: *Sochoran* v. *Sochoran*" (1987) 66 C. Bar Rev. 399 at 401.

[389]) This was the opinion of the majority in *Rawluk* v. *Rawluk*. See *supra*, note 382 at 369.

[390]) *Benke* v. *Benke* (1986), 4 R.F.L. (3d) 58 (Ont.Dist.Ct.).

Rawluk[391] comes to the same result, with a different reasoning about the remedial nature of the doctrine of constructive trust.[392]

A third approach is to consider the statutory equalisation payment as the general rule. In cases where the equalisation payment leads to unjust results, and the court in its discretion concludes that the granting of a constructive trust would be equitable, then that trust should be established.[393]

A fourth approach would be to order an unequal division of assets under section 14 of the *Marital Property Act*. The application of the corresponding rule in the Ontario *Family Law Act*[394] was rejected by the Supreme Court of Canada in *Rawluk*.[395] It is even harder to establish an unequal division of assets under the *Marital Property Act*[396] since it requires that the increase in value after separation be "grossly unfair", "unconscionable" or

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[391]) *Supra*, note 382.

[392]) "As I see the problem, the issue in this case is not whether the *Family Law Act, 1986,* ousts the remedy of constructive trust. I agree with Cory J. that it does not. In my view, the real question which must be answered is whether the doctrine of constructive trust, as it has been developed by this court, finds application where a statute already provides a remedy for unjust enrichment complained of." See *supra*, note 382 at 371. She then summarises her conclusions as follows:

1. "The doctrine of constructive trust, as it has developed in Canada, is not a property right but a proprietary remedy for unjust enrichment; as such, the availability of other remedies for the unjust enrichment must be considered before declaring a constructive trust."
2. "The doctrine of constructive trust should not be applied in this case because the *Family Law Act, 1986,* provides a remedy for the unjust enrichment of the husband to the detriment of the wife." See *supra*, note 382 at 371.

[393]) A.F. Sheppard, "Rawluk v. Rawluk: What Are the Limits of the Remedial Constructive Trust?" (1990) 9 C.J.F.L. 152 at 162.

[394]) *Family Law Act*, S.O., 1986, s. 5(6).

[395]) *Supra*, note 382 at 366.

[396]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14.

"clearly inequitable."

None of these approaches is perfect. The argument that the *Family Law Act* does not explicitly prohibit the application of the doctrine of constructive trust does not hold water. It is not in dispute that statutory changes to the law that are inconsistent with common law have priority over the latter. It is not necessary that a new statute explicitly abolishes an older common law doctrine. Comparing the situation for common-law-spouses is not appropriate either since they are excluded from legislation.[397] No alternative to the doctrine of constructive trust is available for cohabitees.[398] On the other hand the application of the doctrine of constructive trust to married couples might lead to more just results in particular cases than an accounting under the *Marital Property Act*.[399] In cases where one spouse contributes substantially to the maintenance and improvement of assets owned by the other spouse, the appreciation in value of these assets might occur after separation, caused by changes in the market, and should be shareable. One can also argue that the *Marital Property Act* only provides for a division of property **until** the valuation date. What happens after this date is not covered by the act and therefore does not conflict with the doctrine of constructive trust in cases where one spouse wants to share appreciations in the value of

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[397]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 2.

[398]) See *supra*, note 384 and the cases mentioned there.

[399]) J.G. McLeod, "Annotion to *Benke* v. *Benke*" (1986), 4 R.F.L. 58 at 60.

assets owned by the other spouse which occur post-separation.[400] Therefore the doctrine of constructive trust and the statutory provisions can be harmonised.[401]

Although the doctrine of constructive trust survived enactment of the *Marital Property Act*, it is still questionable when the constructive trust is an appropriate remedy. This remedy is important because the constructive trust gives an interest in property while the *Marital Property Act* only provides for monetary compensation.[402] The declaration of a constructive trust in connection with the equalisation payment might be considered unjust

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[400]) Of course this argument does not work in cases where one spouse claims an interest in appreciation in the value of property owned by the other spouse which is excluded from the accounting.

[401]) See also B. Ziff, "Recent Developments in Canadian Family Law: Marriage and Divorce" (1990) 22 Ottawa L. Rev. 139 at 234. There was also a Manitoba case where the same question arose, *Maruda* v. *Maruda* (1981), 24 R.F.L. (2d) 389 (Man. Q.B.). In this case the wife claimed an interest in the appreciation in value of an excluded, inherited asset of her husband. As the *Marital Property Act* does not cover appreciation in inherited property (see *Marital Property Act*, R.S.M., 1987, c. M45, s. 7(4)) she argued that the asset was subject to a constructive trust in her favour because of her efforts in relation to it. Her claim failed as she could not prove the unjust enrichment of her husband. However, in regard to the relationship between the *Marital Property Act* and the doctrine of constructive trust the court stated at p. 398:

"By this decision I do not mean to say that there will never be a situation in which assets owned by one spouse and falling outside the operation of the *Marital Property Act* will be subject to constructive trust. I am simply saying that on the facts of this case, there is nothing to entitle the applicant to the declaration which she seeks."

[402]) For example in *Saifer* v. *Koulak* (1987), 47 Man.R. (2d) 52 (Q.B.). In this case a couple separated after a three year marriage. Between the marriage and the separation the value of the home, which was an excluded asset in this case owned by the husband, increased by $ 35,500. During the marriage Miss Saifer contributed directly to this home by making mortgage payments. She claimed for equitable relief under the principle of constructive trust to share the increase in the value. Although here the appreciation occurred to an excluded asset during the marriage the problem is the same as if it had occurred to an asset included in the accounting between separation and trial. In this case the court held that where the *Marital Property Act* does not provide for an appropriate remedy to Miss Saifer the doctrine of constructive trust is an appropriate remedy. However, due to the circumstances of the case (no intention of Mr. Koulak to allow his wife to acquire any interest in the home and the short duration of the marriage) the court found that a monetary compensation rather than an interest in the property was appropriate.

because the spouse in whose favour the trust is established gets a proprietary interest in the asset **and** the equalisation payment. Unjust results can be avoided if the asset subject to the trust is excluded from the accounting under the *Marital Property Act*. Pursuant to section 10 of the *Marital Property Act*, assets are not shareable if they have already been shared.[403] If an asset is subject to a constructive trust one can argue that this asset has already been shared and is therefore excluded from the accounting. This makes sense because the constructive trust arises when the unjust enrichment occurs and not when the court declares the trust.[404] Consequently the interest existed before the accounting under the *Marital Property Act*.

The same problem occurs when there is depreciation in the value of one spouse's assets between the valuation date and trial.[405] If a constructive trust was established the result would be an anomaly because the equitable remedy of the constructive trust is applied **against** the wishes of the party who was found not to be unfairly treated.[406] In order to avoid this result it was suggested that the non-owning spouse should have a right of election between the constructive trust and the equalisation

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[403]) For example, *Laufer* v. *Laufer* (1987), 8 R.F.L. (3d) 171 (Man. Q.B.).

[404]) J.G. McLeod, "Annotion to *Rawluk* v. *Rawluk*" (1990) 23 R.F.L. (3d) 338 at 346.

[405]) See for example, *McDonald* v. *McDonald* (1988), 11 R.F.L. (3d) 321 (Ont.H.C.).

[406]) *Supra*, note 382 at 380.

payment.[407] But if there was such a right of election for the non-owning spouse the other spouse would be disadvantaged, because in cases where there is a depreciation in the value of assets between the valuation date and the trial the non-owning spouse would always chose the equalisation payment.

The best solution for a clear use of the constructive trust is an amendment to the *Marital Property Act*. Meanwhile the equalisation payment and the doctrine of constructive trust should be harmonised as far as possible.[408] Basically, the *Marital Property Act* provides for an appropriate remedy to prevent unjust enrichment of one spouse created by contributions of the other. A constructive trust should only be established where the *Marital Property Act* does not apply. Cases of appreciation in value of one spouse's assets between separation and trial and, as in *Saifer* v. *Koulak*,[409] where there is an appreciation in value of excluded assets due to the other spouse's contributions. In order to avoid "double-dipping", the asset which is subject to the trust must be excluded from the accounting under the *Marital Property Act* pursuant to section 10 of the act, if it was otherwise included in

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[407]) *Supra*, note 393 at 167. Because of section 10 of the *Marital Property Act* in Manitoba this would mean a right of election between the application of the doctrine of constructive trust and the inclusion of the asset in question in the accounting under the *Marital Property Act*. See *supra*, note 387 and accompanying text.

[408]) *Supra*, note 393 at 164.

[409]) *Supra*, note 402.

the accounting,[410] as in *Rawluk* v. *Rawluk*.[411]

In Germany, by contrast the problem of appreciation and depreciation in value between the valuation date and the trial is not as controversial as in Manitoba. The German Supreme Court[412] rejects a recourse to the general rules dealing with unjust enrichment in the *Civil Code*,[413] just as in cases of interspousal gifts.[414] Ironically it justifies its statement by indicating that if there is no application of the unjust enrichment provisions in cases of interspousal gifts exceeding the amount which had to be paid in the equalisation payment, it would be even more unjust to allow an application of these provisions to appreciations in value of one spouse's assets after the valuation date.[415] Here again the courts emphasises that everything acquired during the marriage should be equally shareable according to the property division rules in the *Civil Code*. These were created to avoid unjust enrichment of one spouse and to compensate the wife working in the household.[416] An additional consideration of appreciation in value

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[410]) Section 10 of the *Marital Property Act* is not applicable if the constructive trust is declared to an asset which is excluded because when "double-dipping" can consequently not occur. See *Saifer* v. *Koulak*, *supra*, note 402.

[411]) *Supra*, note 382.

[412]) BGH NJW 1976, 328.

[413]) Para. 812-822 BGB, see Appendix B, p. 178-180. Like the equalisation payment these rules only provide for a monetary compensation.

[414]) *Supra*, p. 46.

[415]) *Supra*, note 412.

[416]) *Ibid*.

for one spouse's assets after the valuation date would be against the principle of lex specialis. The only exception in extreme circumstances to prevent unjust results is the consideration of the rule dealing with unequal division of assets, which also blocks an application of general unjust enrichment provisions.[417] However, one has to bear in mind that due to the shorter period between valuation date and trial this problem rarely arises in Germany.

5. Valuation of Business Assets

The valuation of "ordinary" assets, i.e., cars, cottages or houses, is difficult. But the valuation of so called business assets such as companies, interests in companies and professional practices is even more complicated. There is by now no generally accepted method or formula for valuing these assets.[418] Business assets are often disputed because they are extremely valuable and involve third parties; for example, business associates.

There are different valuation approaches and problems which occur in the valuation of business assets in both jurisdictions. This overview of a very complex problem will show that the valuation of such assets is extremely difficult and consequently can easily lead to inappropriate results when valuing spousal assets under both the *Marital Property Act* and the *Civil Code*.

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[417]) *Supra*, note 412 at 329.

[418]) *Supra*, note 162 at 117.

a) General Problems Concerning Business Valuation

In both jurisdictions there are no special rules dealing with valuation of business assets. They are to be valued just as any other assets.[419] In Manitoba the court has to consider their "fair market value" pursuant to section 15(2) of the *Marital Property Act*.[420] In Germany business assets have to be "valued".[421] Apart from the already mentioned shortcomings of the "fair market value approach" in Manitoba,[422] there is an additional problem when valuing business assets: how to deal with special purchasers?[423] If the *Marital Property Act* in Manitoba is taken as a starting point, prices paid by a special purchaser cannot be considered because they do not reflect the "fair market value" of the asset. This could easily disadvantage the other, non-business-asset-owning spouse. For example a business asset owned by the husband has a fair market value of $ 100,000, but a special purchaser might pay $ 120,000. If the value of this asset is taken into account as $ 100,000 the owning spouse is advantaged by $ 10,000 at the expense

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[419]) *Supra*, p. 68.

[420]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 15(2).

[421]) Para. 1376 BGB.

[422]) *Supra*, p. 68.

[423]) A special purchaser is someone who has a special interest to purchase this particular business and would therefore pay a higher price, i.e., a price above the "fair market value" of the business asset in question: W.P. Albo and N.V. Murrant, "Fair Market Value and Special Purchasers: A Problem Area in Matrimonial Valuation" (1988) 3 C.F.L.Q. at 23. This situation might occur in cases where the business asset is sold to a former competitor who has more advantage of the fusion than an ordinary purchaser of the business asset alone and would therefore pay a higher price.

of the other spouse. This problem occurred in *Verdun* v. *Verdun*,[424] where the husband had a business which published two newspapers. The valuator of this business stated that, as it was experiencing significant losses, its fair market value was zero. However, a competing publisher was prepared to pay $ 50,000 for it and the judge accepted this amount, as what might have been paid by this special purchaser. But it has to be pointed out that in cases where there is only one special purchaser the premium he might pay is small in comparison to the fair market value, because no market exists which forces him to bid above the fair market value.[425] On the other hand a special purchaser market is formed if a business of some size is merged, because in these cases ordinary purchasers are no longer relevant because the business asset is likely sold to a special purchaser.[426]

The problem of special purchasers has not been explicitly dealt with by the German Supreme Court. It prefers to look at the particular circumstances of the individual case and then decide how to value the business asset in question. Therefore one could argue that the German Supreme Court does not really follow its own statement that the "real value" of all assets owned by the spouses has to be considered;[427] it instead looks at what a potential buyer

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[424]) (22 September 1994), Doc. 2079/93 (Ont.Ct. of Just.Gen.Div.).

[425]) S.Z. Ranot, "What's It Worth?" (1995) 10 Money & Fam.L. 17 at 18.

[426]) *Supra*, note 423 at 28.

[427]) *Supra*, note 321.

of this particular asset would pay for it.[428] Consequently the Court indirectly considers a special purchaser price where it is available.

The consideration of a special purchaser price is of importance in cases where, as in *Verdun* v. *Verdun*,[429] the price differs significantly from the fair market value of the asset in question.[430] Indirectly the German Supreme Court looks at the circumstances of each particular case, so the "fair market value approach" adopted by the *Marital Property Act* is again too narrow. Therefore not the "fair market value" but the "fair value"[431] of a business asset should be considered as mentioned above,[432] because the broader definition of the latter would allow consideration of special purchaser prices in cases where they occur.

b) Valuation Approaches

In an Ontario case[433] the husband had a large number of business assets in different companies. Experts valued these assets and the value ranged from $ 8,950,000 to $ 34,000,000. As Chief Justice Monnin of the Manitoba Court of Appeal summarised in *Waters* v. *Waters* (1986) regarding the impossibility of adequately valuing

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[428]) BGH, NJW 1982, 2441.

[429]) *Supra*, note 424.

[430]) *Supra*, note 423 at 32.

[431]) *Supra*, note 313.

[432]) *Supra*, p. 68.

[433]) *Black* v. *Black*, *supra*, note 363.

business assets:

" It would take a Philadelphia lawyer or a genius of an accountant to put an accurate value on these shares and it would be even more difficult to accurately assess whatever appreciation occurred between 1976 and 1983, the year of separation."[434]

These two examples demonstrate that the valuation of business assets is extremely difficult. In both Manitoba and Germany it causes immense problems for spouses claiming the value of such assets. Both jurisdictions consider three different valuation approaches as proper regarding the valuation of companies and interests in companies:

1. the reproduction cost method, i.e., the sum of all individual assets of the business according to their replacement price;

2. the valuation of a business as an ongoing concern, where the value of the sum of all future profits is usually based on the profit of the last three to five years; or,

3. the liquidation value of the business, i.e., the value of the sum of all individual assets after selling them and deducting the outstanding debts.[435]

The nature of the business dictates which approach is used, usually a combination of the first and the second.[436] German courts in

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[434]) *Supra*, note 222 at 289.

[435]) *Supra*, note 184 Rdnr. 339.

[436]) *Supra*, note 195, para. 1376 Rdnr. 14.

particular decline to follow only one method.[437] In addition there are rules of thumb which are often used to support these approaches. They also play an important role when valuing professional practices.[438] There are three different methods concerning the valuation of a professional practice:

1. the gross revenue method, i.e., where the gross revenue fee is capitalised at a selected multiplier;

2. the excess earning method: the value of a practice is established by deducting from the earnings, before remuneration of an arms-length practitioner, an amount reflecting a fair salary that would be required to have an arms-length practitioner running the business, i.e., the resulting "excess earnings" are then capitalised to determine the total value of the business, usually with a capitalization multiplier between two and four; or,

3. the replacement cost method, i.e., the consideration of the opportunity cost of developing a client base and putting in place an organisation to serve clients.[439]

These different theoretical approaches lead, of course, to different results which, in their practical application, can end up

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[437]) M. Rid, "Nochmals: Unternehmensbewertung beim Zugewinnausgleich nach Scheidung" (1986) NJW 1317 at 1318. The opinions among academics differ. While some prefer a combination of these approaches (see for example H. Coing, "Zur Auslegung des para. 2314 BGB" (1983) NJW 1298 at 1299), others favour the second method. See D.J. Piltz and E. Wissmann, "Unternehmensbewertung beim Zugewinnausgleich nach Scheidung" (1985) NJW 2673 at 2674.

[438]) P.R. Kingston and P.E. McQuillan, *Valuation of Businesses* (Don Mills, Ont.: CCH Canadian Limited, 1986) at 29.

[439]) G.B. Leonard, "Business Valuation: Valuing a Professional Business" (1993) 8 Money & Fam.L. 31 at 33-34.

with valuation figures that differ by millions,[440] as in the case mentioned above.[441]

Valuation of goodwill also causes a lot of uncertainty.[442] Goodwill is the value of a business asset which exceeds the value of its tangible assets, based on the business's reputation, its client list and its recognition.[443] When valuing business assets a German court always considers the possibility of taking into account a certain value, above the value of the tangible assets, for goodwill.[444] Manitoba courts differ in their approach[445] since goodwill is not always considered.[446] In both jurisdictions most cases deal with the valuation of goodwill regarding a professional practice, usually a legal or medical practice.[447] The value of the practice including the goodwill is established by using the excess

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[440]) G. Eiselt, "Buchwertabfindung in Personengesellschaften und Pflichtteil" (1981) NJW 2447 at 2449.

[441]) *Supra*, note 433.

[442]) There is a distinction between personal and commercial goodwill. Only the latter is included in the fair market value of a business because it is related to the business and transferable. Personal goodwill by contrast relates to the individual(s) and is not transferable upon sale of the business: *supra*, note 438 at 92.

[443]) *Supra*, note 162 at 123. For a long list of factors considered when valuing goodwill see *supra*, note 439 at 32.

[444]) See for example BGH NJW 1980, 229 at 230 and BGH FamRZ 1978, 332 regarding a family bakery.

[445]) Goodwill was considered, for example in *Nasser* v. *Nasser* (1984), 30 Man.R. (2d) 193 (Q.B.).

[446]) *Supra*, note 270.

[447]) For Germany see *supra*, note 162 at 123. For Manitoba see R. Joyce and R. Dawkins, " Medical Assets - What's Your Practice Worth?" (1995) 10 Money & Fam.L. 65 at 66. For a detailed explanation of how to value the goodwill of a legal practice see G.S. Blackmann and A. Grossmann, "The Art of Valuing a Legal Practice" (1995) 10 Money & Fam.L. 85 at 85-87.

earning approach[448] and, unfortunately, rules of thumb.[449]

The valuation problems of business assets are hard to avoid. Even the most advanced valuation approach is only a starting point. As long as there is no reliable method for how adequately to value business assets, including goodwill, courts cannot really put into practice the intention of the legislature, i.e., equal sharing of business assets, because no one knows what the business asset is really worth or how relevant the legislature's intent remains.

6. Consideration and Valuation of Career Assets[450]

a) Introduction

In a study done in the mid-1980s in the United States, the average divorcing couple can earn within one year more than the total value of their assets.[451] A good earning capacity therefore seems to be much more valuable than any other tangible asset such as a house, a car or a cottage. But if the earning capacity is the most valuable asset of the spouses, it consequently should be shareable upon marriage breakdown, if it was "acquired" or even

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[448]) *Supra*, note 439.

[449]) For both jurisdictions see *supra*, note 447.

[450]) There is no exact definition of "career assets". Some authors have a wide definition and included all tangible and intangible assets of either spouse that are acquired as part of his or her career or career potential, for example pensions and retirement benefits, licenses to practise, a profession or trade as well as academic degrees and even the goodwill of a business: *supra*, note 304 at 110. As I dealt with some of these issues in the previous chapters, I discuss here "career assets" only in a narrower sense, i.e. academic degrees and licenses to practise.

[451]) *Supra*, note 304 at 60.

improved during the marriage. Otherwise if the most valuable asset is excluded from sharing, the purpose of the deferred community property regime, i.e., the equal sharing of all assets acquired during the marriage, has not occurred. One can attain a better earning capacity through a better education, or a license to practise a profession, for example law or medicine.[452] Therefore, many young couples invest in the education and the related improved earning capacity of one spouse in expectation of a better standard of living after this spouse has completed his or her studies. This situation occurs in cases where the wife worked and enabled her husband to attend law school[453] or medical school.[454] If the marriage breaks down shortly after the husband reaches his goal, how should the wife be adequately compensated for her contributions to her husband's degree or license to practise? By helping their husbands to improve their career chances wives usually suffer losses in four respects:

1. the loss of the husband's foregone earnings during the period of investment;

2. the money she provides to enable her husband to forego these earnings;

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[452]) Of course, there is a difference between a law degree and the license to practise law. As the former is usually a pre-requirement for the latter and both lead to a higher earning capacity, I use these terms interchangeably. The distinction between them is in this context less important. However, for a discussion about it see M.F. McGovern, "Licenses v. Degrees: Is There a Difference?" (1986) 2 Fam. Advo. 14.

[453]) *Corless* v. *Corless* (1987), 5 R.F.L. (3d) 256 (Ont.H.C.).

[454]) *Caratun* v. *Caratun* (1992), 10 O.R. (3d) 385 (Ont.C.A.) which was the appeal from a trial decision, below, note 459.

3. the lack of her own career development during this period; and,

4. a return on her investments by a better lifestyle fails when the marriage breaks down.[455]

The lack of consideration of this common situation under both the *Marital Property Act* and the *German Civil Code* has been often criticised.[456] It is uncertain how to deal properly with this problem without any statutory starting point.

Some questions for consideration focus on career assets as "marital property", the difficulties related with this approach, alternative solutions and the valuation of these assets.

b) Degrees and Licenses to Practise as "Marital Property"

At first glance the most just and simple solution for the consideration of career assets seems to be to take them into account when valuing each spouse's assets under both the *Marital Property Act* and the German *Civil Code*, just as any other asset. This solution can rarely be found in Canada[457] and never in

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[455]) J.M. Krauskopf, "Recompense for financing spouse's education: legal protection for the marital investor in human capital" (1979-80) 28 U.Kan.L.Rev. 379 at 380.

[456]) For Manitoba and other Canadian common-law provinces see *supra*, note 148 at 552. For Germany J. Schwenzer, "Medical Student Syndrome - Ausgleich von Karrierechancen nach Ehescheidung" (1988) FamRZ at 1114.

[457]) The recognition of degree as property started in the United States where some courts stated that a degree or license to practice is property. For example in *O'Brien* v. *O'Brien* (1985), 452 N.Y.S. (2d) 801, the New York State Court of Appeal held that the husband's licence to practice medicine is shareable under New York law. The value was considered to be $ 188,800 and the wife was awarded 40% of it. In *Woodworth* v. *Woodworth* (1983), 37 N.W.(2d) 332 (Mich.C.A.) the husband's law degree was considered to be property. See also *Inman* v. *Inman* (1982), 648 S.W. (2d) 847 (Ky. App.).

Germany.[458] In an Ontario case[459] the judge stated that the right to practise dentistry is property and shareable under the *Family Law Act*.[460] However, this view was not shared by the Ontario Court of Appeal.[461] In another trial decision,[462] the law degree of the husband and his licence to practise law was considered to be property which is shareable under the Ontario *Family Law Act*.

In Manitoba the question arises whether a degree or a licence to practise is a "right" under section 9(1) of the *Marital Property Act* or an asset pursuant to section 3 of the act and consequently shareable. The act defines "assets" in section 1 as any real or personal property or interest therein. On one hand, as it explicitly mentions "rights" under section 9, it seems that "asset" under section 3 as defined in section 1 means only tangible assets. On the other hand it is unclear whether "rights" under section 9 of the act can include a degree or a licence to practise. The only "right" conferred on the holder of a licence to practise is to work in a particular profession.[463] This is not a "right" in its classical sense, such as the right of a shareholder to receive dividends. The legislature did not seem to intend to include a degree or licence to practise under section 9, because this

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[458]) For example BGH FamRZ 1987, 909 at 910.

[459]) *Caratun* v. *Caratun* (1987), 9 R.F.L. (2d) 337 (Ont.H.C.).

[460]) *Family Law Act*, S.O., 1986.

[461]) *Supra*, note 454.

[462]) *Supra*, note 453. See also *Berghofer* v. *Berghofer* (1988), 15 R.F.L. (3d) 199 (Alta.Q.B.).

[463]) *Supra*, note 454 at 390.

provision states that a "right" should not be included in the accounting if it is reasonably possible that this "right" will be realised.[464] A degree or a license to practise cannot be "realised". Obviously, the legislature only wanted to include "traditional" rights under section 9 of the act. Therefore it is questionable whether a career asset can be an "asset" under section 3 of the *Marital Property Act*.[465] The same question arises in other jurisdictions where marital property legislation deals with "property" instead of "asset" of the spouses which is shareable upon marriage breakdown.[466]

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[464]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 9.

[465]) I could not find a Manitoba case which explicitly dealt with this problem. However, in *Neffgen* v. *Neffgen* (1983), 35 R.F.L. (2d) 393 (Man.Q.B.) the wife worked in low-paid jobs to enable her husband to go to university and complete a B.A., a M.Sc. and a M.D. By the time of the trial she earned $ 9,000 a year while her husband had an annual income of $ 61,000. The Manitoba Court of Queen's Bench did not discuss whether the degrees of the husband were "property" and instead awarded the wife substantial spousal support for her contributions and lost expectations of a better lifestyle. In *Monks* v. *Monks* (1993), 84 Man.R (2d) 268 (Q.B.) the parties moved from Victoria to Vancouver to enable the husband to complete a Ph.D. degree at the University of British Columbia and moved then to Winnipeg, where the husband was offered a job at the University of Manitoba. The wife suffered economic disadvantage because she lost career chances. She was working for an airline and the move from Vancouver to Winnipeg did not allow her to advance her career, as there were more opportunities available, for her in Vancouver. Here again the court did not discuss whether the husbands degree was a shareable asset under the *Marital Property Act*, because the wife in this case did not suffer economic loss due to direct financial contributions to the acquisition to her husband's degree but due to lost chances to advance her own career. The court awarded a lump sum of $ 8,000 in spousal support to compensate her for this economic disadvantage. This decision was affirmed by the Manitoba Court of Appeal: *Monks* v. *Monks* (1993), 88 Man.R. (2d) 149 (Man.C.A.), also *King* v. *King* (1986), 40 Man.R. (2d) 43 (Q.B). Most of the cases occurred either in Ontario (see *supra*, note 454 and 453 and *Keast* v. *Keast* (1986), 1 R.F.L. (3d) 401 (Ont.Dist.Ct.) and *Linton* v. *Linton* (1988), 11 R.F.L. (3d) 444 (Ont.H.C.)) or in British Columbia (see *Jirik* v. *Jirik* (1983), 37 R.F.L. (2d) 385 (B.C.S.C.) and *Whitehead (Burrell)* v. *Burrell* (1983), 35 R.F.L. (2d) 440 (B.C.S.C.)) or in the United States. For an overview of the decisions of U.S. courts, see S.E. Willoughby, "Professional Licenses as Marital Property: Responses to Some of *O'Brien's* Unanswered Questions" (1987-88) 73 Cornell L.Rev. 133 and L.S. Mullenix, "The Valuation of an Educational Degree at Divorce" (1983) 16 Loyola L.A.L.Rev. 227.

[466]) See for example *Family Law Act*, S.O., 1986, c. 4, s. 4(1).

It could be argued that career assets should not be considered "assets" under section 3 of the *Marital Property Act* because it is extremely difficult to value them,[467] as they only represent an opportunity to earn money in the future and are not freely marketable.[468] Moreover, a degree cannot be reached purely by financial contributions to the studying spouse. It is the result of an intellectual ability and hard work and it is personal to its holder.[469] It also is not inheritable and ceases to exist upon death of its holder.[470] There is also a danger in broadening the definition of "property" or "assets" too much. Finally everything, even frequent flyer points,[471] become shareable under marital property legislation.[472] Consequently career assets should not be taken into account when valuing either spouse's assets and should not be shareable.

This solution does not consider the alternative arguments. Firstly, the fact that something is hard to value is no reason to omit it as an "asset". Other areas of law allow valuation of personal injuries. They are speculative too but no one would suggest abolishing personal injury awards because it is hard to put

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[467]) A. Bissett-Johnson and S. Newell, "Professional Degrees in Marital Property: Canadian developments" (1988) 15 Community Prop. J. 63 at 64.

[468]) For details about the valuation of career assets, see below p. 130.

[469]) *Re Marriage of Graham* (1978), 574 P. (2d) 75 at 77 (Col. S.C.)

[470]) *Ibid.*

[471]) See *supra Berghofer* v. *Berghofer*, note 462.

[472]) B. Ziff, *supra*, note 401 at 228.

a value on them. Especially in cases of wrongful death the court has indirectly to consider what this person might have earned in the future.[473] Secondly, if a career asset is an asset under section 3 of the *Marital Property Act*, the other spouse would be adequately compensated, in particular in cases where other forms of compensation, e.g., support, are too feeble.[474] Thirdly, a narrow definition of "asset" under section 3, i.e., only tangible assets can be assets under the *Marital Property Act*, was considered to be out of date. More and more intangible assets such as pensions and the goodwill of a business, were taken into account when valuing a spouse's assets. There is no reason why career assets should not be a further step in this development.[475]

The argument that these assets are not inheritable and cease to exist upon their holders death is not sound since survivability has not been an earmark of property in the past and should not be now.[476] Moreover, the Supreme Court of Canada also rejected transferability as a criterion for deciding whether something can be property for the purpose of division.[477] Fourthly, the reasons given by the courts as to why a career asset cannot be an asset

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[473]) M.M. Moore, "Should a Professional Degree Be Considered a Marital Assert upon Divorce?" (1981-82) 15 Akron L.Rev. 543 at 547.

[474]) D.J. Dochylo, "Perspectives on Increased Earning Potential: Should It Be Considered 'Property' upon Divorce?" (1991) 3 W.R.L.S.I. 125 at 131.

[475]) C. Welch, "Apportioning Degrees Earned during Marriage: An Equitable Justification" (1987) 45 U.T.Fac.L.Rev. 272 at 276.

[476]) T.D. Schaefer, "Wife Works so Husband Can Go to Law School: Should She Be Taken in as a "partner" When "esq." Is Followed by Divorce?" (1975) 2 Community Prop. J. 85 at 90.

[477]) *Clarke* v. *Clarke* (1990), 28 R.F.L. (3d) 113 (S.C.C.).

under the *Marital Property Act* are inconsistent. For example in *Caratun* v. *Caratun*, McKinlay J., stated that the difference between a license to practise and any other right to work is its exclusivity.[478] But this exclusivity is the main feature of property. The essence of property is to exclude others from access. For instance the statement "this is my pen" is meaningless if there is no one else in the world. "This is my pen" does not describe my relationship to the pen but to other people who might want to have that pen.[479] The same principle must apply to degrees or licenses to practise, because they enable their holders to have access to an otherwise impossible profession. If only tangible assets and very few intangible assets such as pensions and business goodwill were considered under the *Marital Property Act*, one would not take into account that in our complex world wealth can have many forms, including education.[480] It does not make sense to consider goodwill as part of the business assets of either spouse and not the career assets, because it makes no difference whether both spouses are working together building up a practice with goodwill or acquiring an academic degree through their combined efforts.[481] The argument that the spouse who got the degree would be unfairly restricted in his or her personal freedom, when forced to continue in a certain

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[478]) *Supra*, note 454 at 390.

[479]) M.E. McCallum, "*Caratun* v. *Caratun*: It Seems That We Are Not All Realists Yet" (1994) 7 C.J.W.L. 197 at 205.

[480]) *Supra*, note 473 at 546.

[481]) *Supra*, L.S. Mullenix, note 465 at 257.

profession in order to compensate the other spouse for contributions to the career asset,[482] is not valid because even if the degree is not an asset under section 3 of the *Marital Property Act*, no dispute exists that there has to be some kind of compensation.[483] Whatever kind of compensation one prefers, e.g., support rather than an inclusion of the degree as an asset, it will always restrict the personal freedom of this spouse more or less, because he or she is forced to make some financial compensation to the former spouse. In this respect the kind of compensation is only of secondary importance. All in all the arguments which support the theory that a career asset cannot be a marital asset, shareable under marital property legislation, do not bear close scrutiny. Therefore career assets should be treated as any other asset. If it was acquired during the marriage through the combined effort of both spouses, it must be valued and included in the accounting under the *Marital Property Act*.[484]

In Germany dealing with career assets does not seem as complex and controversial as in Manitoba. In fact it is difficult, but obviously German courts have not yet grasped the problem in its far-reaching consequences. Over and over again courts emphasise that future income from a job is not an asset which can be included

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[482]) *DeWitt* v. *DeWitt* (1980), 296 N.W. (2d) 761 at 768 (Wisc.C.A.).

[483]) B. Ziff, *supra*, note 401 at 229.

[484]) For the same opinion see *supra*, note 467 at 69.

in the valuation of either spouse's final assets.[485] It is completely unclear how an investing spouse should be adequately compensated for his or her investments in the human capital of the other spouse. While some Courts of Appeal did not allow the maintenance settlement procedure[486] in these cases,[487] the Supreme Court of Germany prefers a solution by dealing with this problem under support issues.[488] There is not one single case in Germany where career assets have been considered to be "property " under provisions of the *Civil Code* and shareable upon marriage breakdown. Therefore the investing spouse usually has no right whatsoever to claim any kind of compensation under the rules dealing with division of property upon divorce.[489] It goes without saying that this implementation does not come close to a fair solution to the problem. It is illogical that the court includes compensation for lost future income in cases of personal injury awards[490] on the one hand but does not consider future income from a job as an asset on the other. While personal injury awards, i.e., compensation for personal harm which have nothing to do with the marriage, are

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[485]) *Supra*, note 458 and BGH FamRZ 1983, 881 at 882 and BGH FamRZ 1981, 239 at 240.

[486]) *Supra*, p. 36.

[487]) OLG Celle FamRZ 1979, 595 and OLG Hamm FamRZ 1986, 72.

[488]) BGH FamRZ 1985, 782. For a detailed discussion about it see below p. 118.

[489]) *Supra*, note 59 at 169.

[490]) BGH NJW 1982, 279.

included in the accounting,[491] career assets acquired through the combined efforts of both spouses are not taken into consideration! The recourse of the Supreme Court to the support provisions is not reasonable either.[492] In dealing with career assets German law is completely behind the times. Apart from very few exceptions,[493] this dilemma has also been ignored by academics.

c) Alternative Solutions

aa) Constructive Trust

If career assets are considered property the question arises, whether they should be shareable under the *Marital Property Act* or subject to a constructive trust.[494] The latter was declared in *Caratun* v. *Caratun*.[495] However, the Ontario Court of Appeal rejected this solution;[496] but the court explicitly stated that if it had consider a license to practise property, the career asset could be subject to a constructive trust.[497] The court did not discuss whether in this context the doctrine of constructive trust

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[491]) *Supra*, p. 39.

[492]) For a detailed discussion about this see below p. 118.

[493]) I. Schwenzer, *supra*, note 456.

[494]) *Supra*, note 384.

[495]) *Supra*, note 459.

[496]) *Supra*, note 454.

[497]) "I agree that if the license to practise constituted 'property' then there is no reason why, in a proper case, that property could not be subject to a constructive trust. However, if the license does not constitute property, then there is nothing to which the constructive trust could attach." *Ibid.*, at 394.

survived enactment of the *Family Law Act*.[498] Some authors draw a parallel between *Caratun* v. *Caratun*[499] and *Pettkus* v. *Becker*[500] and allow the application of the doctrine of constructive trust in cases where investment in the human capital of one spouse has to be compensated.[501] Others do not want to sidestep the application of the act.[502]

Although the doctrine of constructive trust has some advantages in comparison to provisions of the *Marital Property Act*, for example it provides for more flexibility,[503] it should not be applied in cases like *Caratun* v. *Caratun*.[504] The situation in this case is very different from *Pettkus* v. *Becker*,[505] where the doctrine of constructive trust was applied to prevent unjust enrichment in cases where marital property legislation is not applicable. The same problem arose in cases where the value of assets of either spouse increased between valuation date and trial.[506] There again, the doctrine of constructive trust was

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[498]) *Family Law Act*, S.O., 1986. For a detailed discussion about the relationship between the doctrine of constructive trust and the *Family Law Act* see *supra*, note 385 and accompanying text.

[499]) *Supra*, note 454.

[500]) *Supra*, note 384.

[501]) C. Welch, *supra*, note 475 at 285.

[502]) B. Ziff, *supra*, note 401 at 230.

[503]) J.E. Hatch, "The Division of Professional Degrees and Licenses upon Marriage Breakdown" (1993) 2 Dalhousie J.L.S. 245 at 248.

[504]) *Supra*, note 459.

[505]) *Supra*, note 384.

[506]) *Rawluk* v. *Rawluk*, *supra*, note 382 and accompanying text.

applied because under the marital property legislation no adequate remedy is available. But in cases dealing with career assets the situation is different. If a degree or license to practise is an asset shareable under the *Marital Property Act,* there is no reason for recourse to the doctrine of constructive trust, because in this case the *Marital Property Act* with its equalisation payment provides for an adequate remedy. Therefore cases involving career assets have to be distinguished from cases like *Pettkus* v. *Becker*[507] and *Rawluk* v. *Rawluk*[508] where the application of the doctrine of constructive trust is adequate.

bb) Quantum Meruit

A third approach to compensate one spouse for investments in the human capital of the other is to allow a quantum meruit claim, which would provide the supporting spouse with reimbursement for his or her contributions to the acquisition of the degree or license.[509] However, in *Caratun* v. *Caratun*[510] this approach was rejected. It is unworkable for three reasons. First, it might produce unjust results because it only reimburses direct financial costs and fails to reflect non-financial contributions.[511] Second,

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[507]) *Supra*, note 384.

[508]) *Supra*, note 382.

[509]) C. Davies. "Degrees and Licences to Practise: Problems of Characterization, Compensation and Valuation" (1990) 6 C.F.L.Q. 1 at 12.

[510]) *Supra*, note 459 at 353.

[511]) N. Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licenses and other Career Assets: Towards Compensatory Support" (1989) 8 C.J.F.L. 23 at 42.

it might easily over- or under-compensate the supporting spouse.[512] And third, it does not give any compensation for the lost career chances of the investing spouse.[513] For these reasons the allowance of a quantum meruit claim has been usually rejected.[514]

In Germany, one could consider the provisions dealing with unjust enrichment[515] or the rules relating to the "fundamental change of circumstances underlying a contract."[516] Both solutions are theoretically useful but unlikely to be applied in practice.

A recourse to the provisions dealing with unjust enrichment would fail because of the German Supreme Court's opinion that the

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[512]) *Ibid*, at 43.

[513]) *Ibid*.

[514]) *Supra*, note 459 at 353.

[515]) Para. 812-822 BGB.

[516]) These rules are for the German understanding of the law quite strange because they are not codified. They are based on para. 242 BGB - the principle of good faith - and were introduced after World War I when the inflation made the adjustment of many contracts necessary (see H. Brox, *Allgemeines Schuldrecht* (München: C.H. Beck, 1992) at 56). The idea of the rules relating to the fundamental change in the circumstances underlying a contract is that the parties had certain expectations and assumptions when entering the contract. These were of fundamental importance for the contract but so obvious that they were not mentioned. The rules relating to the fundamental change in the circumstances underlying a contract become applicable if one or both parties erred in those expectations and assumptions, because of an unpredictable change in external circumstances: see D. Schwab, *Einführung in das Zivilrecht* (Heidelberg: C.F. Müller Verlag, 1991) at 276. The classical example is the so called "Brandy Case" where A buys brandy from B. Meanwhile the tax for brandy increases dramatically. A would not be able to pay even the tax from the price agreed. In such a case the price has to be adjusted to the new unexpected rise in taxes for brandy (see H. Brox, *supra*). However, only extraordinary circumstances allow a recourse to the rules relating to the fundamental change in circumstances underlying a contract. It is not possible to adjust a contract due to changes in circumstances which lay entirely in the sphere of risk to one party (BGH NJW 1978, 2390 and BGH BB 1981, 1119). When applying these rules the primary remedy is the adjustment of the contract. Only in a very few cases of extreme circumstances is an annulment of the contract taken into consideration (W. Fiktenscher, *Schuldrecht* (Berlin, New York: Walter de Guyter, 1992) at 148.

provisions dealing with property division after divorce are lex specialis and displace any general rules. The court rejected an application of the unjust enrichment provisions both, in cases of interspousal gifts exceeding the amount payable as an equalisation payment, had the divorce occurred when the gift was made,[517] and in cases of increased value of either spouse's assets between valuation date and trial.[518] Consequently it is likely that the court would reject a recourse to general unjust enrichment provisions in cases where one spouse invested in the human capital of the other.[519]

Some authors suggest applying the rules relating to the fundamental change in circumstances underlying a contract.[520] However, it seems that this solution also fails because of the legal hurdles erected by the German Supreme Court.[521] Applying these rules causes two problems. Firstly, can these general rules be applied when the *Civil Code* already provides for a remedy, i.e., the equalisation payment?[522] And secondly, for what kind of contributions to the acquisition of the degree or license should

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[517]) *Supra*, p. 46.

[518]) *Supra*, note 412 and accompanying text.

[519]) It seems that German courts never dealt explicitly with this problem, as they either try to solve it by not allowing the maintenance settlement procedure (see *supra*, note 487) or by dealing with it under support issues (see below p. 118).

[520]) I. Schwenzer, *supra*, note 456 at 1120.

[521]) BGH FamRZ 1972, 201.

[522]) In this respect the same problem arises as in Manitoba, regarding the application of the doctrine of constructive trust in relation to the *Marital Property Act*.

the other spouse be compensated?

The German Supreme Court applies the rules relating to the "fundamental change in circumstances underlying a contract" only in very few family law cases, mainly if one spouse purchases the marital home in his or her name while the other spouse pays for it.[523] Whether this approach can easily be adopted for degrees and licenses is doubtful. The argument that it makes no difference whether one spouse pays for a house registered in the name of the other or pays for the other spouse's education,[524] is reasonable; but it seems unlikely that the German Supreme Court would be willing to adopt this approach in cases where one spouse pays for the education of the other. In the vast majority of cases the court rejected a recourse to general rules and **only** in the mentioned cases, where the marital home was purchased by one spouse and registered in the name of the other, did it allow an application of general rules to avoid unfair results.[525]

Even if one adopted this approach there is the second problem: what contributions of the investing spouse should be considered? I. Schwenzer suggested that only direct financial costs should be compensated, because if the investing spouse participated in the professional success of his or her ex-spouse over years, it would be contrary to the modern divorce law.[526] This solution testifies

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[523]) See for example BGH FamRZ 1988, 482 and BGH FamRZ 1982, 910.

[524]) I. Schwenzer, *supra*, note 456 at 1120.

[525]) *Supra*, note 412 and accompanying texts.

[526]) *Supra*, note 456 at 1121.

to some short-sightedness because it does not consider that the economic loss of the investing spouse is not limited to the direct financial contributions he or she made. It includes many factors,[527] such as lost advancement of his or her own career, which can be of much greater economic importance than direct costs. In Germany the application of the rules relating to the "fundamental change in circumstances underlying a contract" leads to unfair results and useless solutions comparable to the allowance of a quantum meruit claim in Manitoba and should therefore not be considered to be an adequate kind of compensation for the investment in the other spouse's career.

cc) Unequal Division of Other Assets

Another approach is to divide other assets in a way which would advantage the investing spouse and compensate him or her by giving this spouse more assets, when dividing all other spousal property under both the *Marital Property Act* and the German *Civil Code*. However, as in the quantum meruit claim, this solution is useless and was usually rejected by the courts.[528] In order to get an unequal division in Manitoba the investing spouse has to show that an equal division would be "grossly unfair" or

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[527]) *Supra*, note 455.

[528]) *Caratun* v. *Caratun*, *supra*, note 454 at 394 and *Magee* v. *Magee* (1987), 6 R.F.L. (3d) 453 at 461 (Ont.U.F.C.). But see *Jirik* v. *Jirik*, *supra*, note 465 at 388-389. In Germany it was not even considered as an approach to avoid unfair results for the investing spouse; see I. Schwenzer *supra*, note 456 at 1118.

"unconscionable"[529] or, regarding business assets, "clearly inequitable."[530] In Germany the equal division of other assets has to be "grossly inequitable."[531] Considering the reluctance of the courts in both jurisdictions to allow an unequal division,[532] it seems unlikely that one spouse who invested in the career of the other could convince the courts that an equal division of assets is "grossly unfair" or "grossly inequitable" since this situation is not at all extraordinary. Moreover, an unequal division of other assets would usually not help the investing spouse because in many cases the divorce occurs shortly after the degree or license was acquired and the couple does not have other assets. For this reason an unequal division of other assets was explicitly rejected by the Ontario Court of Appeal in *Caratun* v. *Caratun*.[533] One author summed up the difficulty as follows: "Even 100 % of nothing is still nothing."[534] Therefore an unequal division of other assets is usually not an appropriate method for compensating one spouse for investments in the other spouse's career.

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[529]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(1).

[530]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(2).

[531]) Para. 1381 BGB.

[532]) For a detailed discussion about it see below p. 142.

[533]) *Supra*, note 454 at 394.

[534]) L.H. Wolfson, B.S. Corbin and D.S. Melamed, "Victor, Victoria (Apologies to Robert Preston & Julie Andrews)" (1992) 7 Money & Fam.L. 89 at 91.

dd) Support

In both jurisdictions authorities who do not consider degrees or licenses to practise a shareable assets under the *Marital Property Act* and the German *Civil Code* try to compensate the investing spouse by applying support provisions.[535] While this might lead to fair results in Manitoba, that approach is completely unsuccessful under German law.

The current German support provisions were introduced by the *First Marriage Amendment Act*[536] and have been subject to increasing criticism since then.[537] In order to be entitled to support in Germany three requirements must be fulfilled: first, there must be a ground for support;[538] second, the spouse claiming support must be needy;[539] and third, the other spouse must have sufficient means to pay support.[540] The grounds for support are repeatedly criticised as too wide[541] because they undermine the principle of

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[535]) For Manitoba, see E.S. McKenna Kay, "Career Assets: Spousal Interest in Professional Degrees" (1987) 6 C.F.L.Q. 154 at 161. For Germany see BGH FamRZ 1988, 148.

[536]) *Supra*, note 103.

[537]) U. Diederichsen, "Ehegattenunterhalt im Anschluß an die Ehescheidung nach dem 1. EheRG" (1977) NJW 353 and G. Christl, "Quotenunterhalt und Bedarfskontrolle" (1982) NJW 961.

[538]) There are six grounds on which support can be granted: Support for caring for a child (para. 1570 BGB), support for an aged spouse (para. 1571 BGB), support for sickness and infirmity (para. 1572 BGB), support until appropriate employment is found (para. 1573 BGB), support for education, further education or retraining (para. 1575 BGB) and support on the ground of equity (para. 1376 BGB).

[539]) Para. 1569 BGB.

[540]) Para. 1581 BGB.

[541]) U. Diederichsen, *supra*, note 537 at 353.

self-sufficiency.[542] They were considered to be out of date by the time they were introduced.[543] However, upon closer examination it becomes clear that none of the statutory grounds for support is appropriate to compensate one spouse for investments in the human capital of the other. The following example might demonstrate this.

Mr.and Mrs. Schmidt from Berlin married when they were both 25 years of age. By the time of the marriage Mrs. Schmidt worked as a travel agent. Mr. Schmidt had already completed undergraduate business studies and worked for a bank. As he did not enjoy his job he decided to complete a Ph.D. degree, which took him two years and improved his chances for finding a better job. While he was studying Mrs. Schmidt was a travel agent and provided for the living expenses of the family, because Mr. Schmidt was completely occupied by his studies. Shortly after he completed his degree the couple moved to a small Bavarian village near Münich where Mr. Schmidt was offered a well-paid job with a computer company. Mrs. Schmidt could not find employment as a travel agent in Münich and began working for a local newspaper in the village, which meant less income for her than her travel agent's job in Berlin. Three months after their move Mr. Schmidt petitioned for divorce. Here

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[542]) The principle of self-sufficiency is the leading aspect under German support law; see para. 1569 BGB. Only in cases explicitly mentioned in the *Civil Code* can one spouse claim support from the other: W. Köhler, *Handbuch des Unterhaltsrechts* (München: C.H. Beck, 1987) at 114. In Manitoba by contrast self sufficiency is only one but not the paramount aspect when granting support. For support orders under the *Divorce Act*, see *Divorce Act*, R.S.C., 1985, c. 3, s. 15(7). For support orders under the *Family Maintenance Act*, see *Family Maintenance Act*, R.S.M., 1987, c. F20, s. 7.

[543]) U. Diederichsen, "Geschiedenenunterhalt - Überforderung nachehelicher Solidarität?" (1993) NJW 2265 at 2275.

the question arises whether according to German support provisions Mrs. Schmidt can claim compensation a) for the direct financial contributions to Mr. Schmidt's Ph.D. degree and b) for the economic disadvantages to her own career caused by the move from Berlin to Bavaria.

There are three grounds for support which might be applicable in such a case: first, support until appropriate employment is found,[544] if one argues that the job at the local newspaper is not appropriate; second, support for education;[545] and third, support on the ground of equity.[546]

Whether employment is appropriate for a spouse primarily depends on his or her education and abilities[547] as well as on the career plans of both spouses made during the marriage.[548] A job change from a travel agent to a local newspaper would probably not be considered inappropriate because it is a job at a comparative level regarding required skills, payment and so on. Consequently Mrs. Schmidt would not fulfil this ground for support.

Support on the ground of education[549] also could not be granted because Mrs. Schmidt did not interrupt or refuse to

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[544]) Para. 1573 BGB.

[545]) Para. 1575 BGB.

[546]) Para. 1576 BGB.

[547]) Para. 1574 BGB and *supra*, note 173 at 602.

[548]) O. Jauernig, P. Schlechtriem, R. Stürner, A. Teichmann and A. Vollkommer, *Bürgerliches Gesetzbuch* (München: C.H. Beck, 1994) at 1467.

[549]) Para. 1575 BGB.

continue **her** education in contemplation of the marriage,[550] but had helped Mr. Schmidt to advance **his** career. The requirements for support for education are usually not fulfilled by spouses who help their husbands or wives to update their skills, because the investing spouse often has already finished his or her professional training or first degree. Moreover, this provision is quite useless, because it might produce harsh results by punishing the investing spouse, forcing him or her to finance his or her ex-spouse's education even after divorce![551] In this case the recourse to support provisions demonstrates the absurdity of this approach, because the spouse who should be compensated is even more disadvantaged.

Finally even support on the ground of equity would not be

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[550]) This provision is as unclear as the rule regarding the acquisition of assets "in contemplation of the marriage" under Manitoba law. See *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(1)(b). It can be extremely difficult to prove that a formal education was interrupted "in contemplation of the marriage". For further criticism see U. Diederichsen, *supra*, note 537 at 356.

[551]) See BGH NJW 1980, 393. In this case the wife was forced to finance the husband's studies in psychology which he started before marriage. During the marriage he interrupted his studies due to serious illness. After divorce, however, he continued studying psychology. The wife had to pay until he finished, because he was able to convince the court that he would do so within a reasonable period of time.

In another case (BGH NJW 1985, 1695) the parties married while the husband was a student of medicine and the wife was a nurse. It was a mutual plan that the wife would also study medicine after the husband had established himself as a doctor. Meanwhile the parties separated and the wife applied for an interim support order on the ground of completing her further education, i.e., to study medicine. The court rejected this because as a nurse she worked in an established profession and had not interrupted her own career while married (on the contrary, the court reproached her for having updated her skills during the marriage!) and added that it was too uncertain that she was really able to successfully complete her studies.

This case might demonstrate that the German Supreme Court is not willing to agree that investment in the human capital of the other spouse disadvantages the supporting spouse. Instead of compensating the wife for her contributions to her husband's medical degree, the court punished her for supporting her husband and updating her own skills during the marriage. Unfortunately this is still the law in Germany.

applicable in Mrs. Schmidt's case. This ground for support is considered to be a very narrow exception which should not include all cases where granting support would seem fair.[552] Only in a few cases, with extreme circumstances where one spouse makes extraordinary sacrifices for the other, will this provision for awarding support be applied.[553] Moreover, the non-allowance of support has to be "grossly inequitable"[554] and in order to get support on the ground of equity the claiming spouse has to be needy,[555] which the investing spouse mostly is not. In the example Mrs. Schmidt would be able to support herself; she is self-sufficient. It goes without saying that the high test used by German courts to award spousal support on the ground of equity is rarely met.

In the example Mrs. Schmidt is not entitled to any kind of support whatsoever, neither because of her direct financial contributions to her husband's degree nor due to the economic disadvantage she suffered, because no provision dealing with grounds for support is applicable in her case. The German support

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[552]) *Supra*, note 548 at 1470.

[553]) This provision was, for example, applied in cases where one spouse cared for an adopted child (see BGH NJW 1984, 1538). However, it was explicitly rejected when one spouse wanted to update his or her skills, because para. 1575 BGB is lex specialis, i.e., if this provision cannot be applied for whatsoever reason no recourse to the general rule of para. 1576 BGB is allowed (see OLG Düsseldorf FamRZ 1980, 585).

[554]) *Supra*, note 168 at 641.

[555]) *Supra*, note 548 at 1470.

rules which have the reputation of being much too wide[556] completely fail in situations as described in this example.[557] It has to be pointed out that German support law is not at all based on a principle of compensation; in cases where the investing spouse is not needy, no support whatsoever will be granted. It is obvious that this concept of support disadvantages spouses who helped their ex-spouses to advance their career. The paramount principle of self-sufficiency is remote from reality and should be replaced by a much more open approach, which considers for example the economic disadvantages suffered by the investing spouse. For these reasons the application of support provisions to compensate the investing spouse remains completely inappropriate under German law.

In Manitoba the situation is different. There is no list of

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[556]) For a harsh criticism see *supra*, note 195, para. 1575 Rdnr. 2: "With this as completely new described provision the legislature carried things too far...The divorced spouse is partly put in a position as if he or she never married...and is granted an education he or she had never completed had the marriage not broken down. The divorced spouse now has a ground for support after divorce he or she did not have during the marriage...This provision is contrary to the principle of self-sufficiency... Moreover the intention to encourage spouses to continue with their education for which no public funding is possible, is mistaken because the spouse most economically affected by the divorce is now 'tapped' for even more money."

It goes without saying that this old-fashioned opinion was expressed by a conservative male. The author obviously did not want to recognise the economic disadvantage suffered by the home-making spouse or that this caused her absence from the work force, creating a bigger economic loss for her than for her spouse, even if the latter has to make a substantial equalisation payment.

[557]) Even if one of the grounds for support is fulfilled, the investing spouse might be disadvantaged because the quantum of the support depends on the lifestyle the spouses enjoyed at the time of the divorce (not at the time of separation). See H.-U. Graba, "Unterhalt nach den ehelichen Lebensverhältnissen" (1989) NJW at 2786 and BGH NJW 1980, 2083. If the divorce occurred shortly after the acquisition of the degree or license, the standard of living enjoyed by the spouses is usually quite modest. The standard of living often improves after divorce. According to the German Supreme Court this higher lifestyle can only be considered when awarding support, if it was at the time of divorce very likely that the spouses would have enjoyed it if the marriage had not broken down. See BGH FamRZ 1986, 793 and P. Friederici, *Aktuelles Unterhaltsrecht* (München: C.H. Beck, 1991) at 143.

grounds on which a support order can be made. On application of either spouse, the court can make an order under both the *Family Maintenance Act*[558] and the *Divorce Act*.[559] In order to do so the court has to consider many factors,[560] of which the principle of self-sufficiency is only one.

The mid 1980s marked a trend in Canada toward the principle of self-sufficiency as the paramount aspect[561] when awarding support under the *Divorce Act*.[562] However, in *Moge* v. *Moge*[563] the Supreme Court of Canada rejected this approach and stated that the

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[558]) *Family Maintenance Act*, R.S.M., 1987, C. F20, s. 4.

[559]) *Divorce Act*, R.S.C., 1985, c. 3, s. 15(2).

[560]) *Family Maintenance Act*, R.S.M., 1987, c. F20, s. 7 and *Divorce Act*, R.S.C., 1985, c. 3, s. 15(5)-(7).

[561]) See the trilogy of *Pelech* v. *Pelech* (1987), 7 R.F.L. (3d) 225, *Caron* v. *Caron* (1987), 7 R.F.L. (3d) 274 and *Richardson* v. *Richardson* (1987), 7 R.F.L. (3d) 304 where the Supreme Court of Canada primarily dealt with the impact of spousal agreements on support and emphasised the principle of self-sufficiency. Whether, and if so, to what extent the trilogy is also applicable in cases where no spousal agreement exists has been in dispute since it was decided. See for example, K.R. Halorson, "Causal Connection and Spousal Support" (1989) 5 C.F.L.Q. 195 and R.E. Salhany, "Is There a New Test for Spousal Support?" (1989) 5 C.F.L.Q. 151 and J. L'Heureux-Dube in *Moge* v. *Moge* (1992), 43 R.F.L. (3d) 345 at 362 and J.G. McLeod "Annotion to the Trilogy" (1987) 7 R.F.L. (3d) 225 at 232. However in the context of compensation for investments in the human capital of the other spouse, this question need not to be discussed here because the investing spouse is usually self-sufficient.

Other pre-*Moge* decisions also reflected the idea that self-sufficiency, and not just any kind of compensation, is the underlying principle for support orders granted under the *Divorce Act*. A wife who was self-sufficient could not be awarded any support, even if she made substantial contributions to her husband's career potential. See for example *Johnson* v. *Johnson* (1988), 16 R.F.L. (3d) 113 (B.C.C.A.) and *Baker* v. *Baker* (1989), 32 R.F.L. (3d) 346 (Ont.U.F.C.).

[562]) *Divorce Act*, R.S.C., 1985 c. 3, s. 15(7).

[563]) (1992), 43 R.F.L. (3d) 345. Another case where the compensatory support model was adopted in order to compensate a wife who had made substantial contributions to her husband's degree as a doctor, was *Keast* v. *Keast*, *supra*, note 465. The wife was awarded $ 1,000 per month for ten years as pure compensation for her contributions, apart from "ordinary" support. See also *Kierans* v. *Kierans* (1984), 38 R.F.L. (2d) 445 (Ont.H.C.), where the wife was awarded $ 20,000 lump sum support as compensation for her contributions to her husband's increased career potential and $ 1,250 spousal support.

principle of self-sufficiency should be only one factor out of four which has to be considered[564] and that awarding support can be an appropriate method to compensate one spouse for economic disadvantages suffered due to the marriage; for example, because of investments in the other spouse's career potential.[565] In this decision the Supreme Court of Canada explicitly indicated that due to the usual allocation of roles in today's families, the spouse who stays at home and cares for the children, or who is only a secondary source of income, suffers significant economic loss in comparison to the main breadwinner of the family who can advance his career by on-going training, getting senior status and so on. This economic reality has to be borne in mind when awarding spousal support.[566] Unfortunately the German Supreme Court did not, or rather did not want to, recognise this social development in its full consequences.

The *Moge* decision was given a positive reception among academics because of its wide consideration of economic consequences upon marriage breakdown,[567] in particular of disadvantages suffered by wives. This new model of support was an "important step in the elimination of post-divorce gender

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[564]) *Ibid.*, at 376.

[565]) *Ibid.*, at 390.

[566]) *Ibid.*, at 388.

[567]) C. Davies, "Compensatory Support: New Beginnings or a Return to the Past?" (1994) 11 C.F.L.Q. 129 at 141.

inequality."[568] In fact, it is better than the former approach, where the principle of self-sufficiency was overvalued.[569] Consequently it was considered to be the best solution to compensate spouses who invested in the other spouse's career potential.[570]

Although the position of the Supreme Court of Canada is quite liberal in comparison with the dated view of the German Supreme Court, a recourse to support provisions when dealing with compensation for investments in career assets is not without its problems. It is true that support provisions are much more flexible than the inclusion of career assets in the accounting under the *Marital Property Act*, which is "once and for all".[571] At the same time this flexibility is the main disadvantage in a consideration of investments in the career potential under support provisions. If there is a fundamental change in circumstances regarding the support-paying spouse, the court might vary the support. This problem is closely connected with the above mentioned argument that if a degree or license was considered property, the degree-holder would be forced to remain in his or her profession.[572] For example, if one spouse contributes directly to the acquisition of the

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[568]) S. Engel, "Compensatory Support in *Moge* v. *Moge* and the Individual Model of Responsibility: Are We Ahead in the Right Direction?" (1993) 57 Sask.L.Rev. 397 at 412.

[569]) *Supra*, note 561.

[570]) E.S. McKennay Kay, *supra*, note 535 at 161.

[571]) J.G. McLeod and A.A. Mamo, *supra*, note 181 at I113.

[572]) *Supra*, note 482.

degree, e.g., by paying the tuition fees, this spouse cannot be worse off than a third party, where the studying spouse borrowed the money from this third party, for example from a bank. If a degree is not property but has to be taken into consideration when making a support order, it is likely that a court would vary support when the degree-holder is no longer able to work in this high-income profession; for example, because of an accident. If the degree-holder had borrowed the money from a bank, he would have to repay regardless of which profession he or she qualified for. The degree-holder would be advantaged simply by choosing the ex-spouse to finance his or her studies, rather than borrowing the money from a bank. Moreover, the court has to consider a wide range of circumstances when awarding support, for example the economic advantages and disadvantages arising from the marriage and its breakdown,[573] as well as the duration of the marriage.[574] As cases involving education usually deal with short-term marriages, spousal support might not be granted or only to a lesser extent. The court also considers the outcome of the division of other property and then awards a spouse who already has obtained significant assets, less support.[575] If, by contrast a degree or license is property it is valued and shared equally no matter how many other assets the spouses own. When, as in *Caratun* v. *Caratun*,[576] the divorce

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[573]) *Divorce Act*, R.S.C., 1985, c. 3, s. 15(7)(a).

[574]) *Divorce Act*, R.S.C., 1985, c. 3, s. 15(5)(a).

[575]) *Supra*, note 567 at 142.

[576]) *Supra*, note 454.

occurred shortly after the acquisition of the degree or license, it might be unclear how much the degree-holder really can earn. Therefore the support might be awarded on the present income of the degree-holder, which is considerably less than his or her real earning potential.[577] This problem can be avoided by considering degrees and licenses property, to be valued and shared equally. By doing so the real increased earning potential is shared. Moreover, support is rarely requested because it is rarely granted.[578] Compensatory support is highly discretionary. According to the Supreme Court of Canada compensatory support is inadequate as a substitute to share an asset (in this case a pension), accumulated during the marriage through the combined efforts of both spouses.[579] The nature of the asset should not determine whether compensatory support should be a substitute, sharing the asset under the *Marital Property Act* especially because pensions and degrees or licenses are comparable, i.e., all were acquired in the past, before divorce but continue to bear fruit in the future, i.e., after divorce. The argument that a career asset cannot be an asset shareable under the *Marital Property Act* because the

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[577]) *Supra*, note 476 at 88.

[578]) For example, in 1989 women earned only 68% of men's earning for equivalent jobs. A study done by the Department of Justice found that support was requested in only 16% of the studied court files and granted in only 6%. See *supra*, note 474 at 130. These figures, of course, do not encourage women to claim for support once they know their chances.

[579]) "Discretionary support payments are a wholly inadequate and unacceptable substitute for an entitlement to share in the assets accumulated during the marriage as a result of the combined efforts of the spouses." See *supra*, note 477 at 131.

provision dealing with property division are backward-looking,[580] is not valid. Pensions are similar to career assets, as "future assets" but no one would ever suggest to exclude them from sharing because of their nature.[581]

For all of these reasons career assets should be considered property and shareable under the *Marital Property Act*. In Manitoba a recourse to the support provisions[582] is fairer than the situation under German law, because of the liberal support rules; but an inclusion of career assets in the pool of shareable assets under both the *Marital Property Act* and the German *Civil Code* would provide for more certainty[583] and would guarantee that the investing spouse is adequately compensated.

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[580]) *Supra*, note 297 at 109.

[581]) For a similar comparison when a spouse invests in the business of the other instead of the other's career, see B. Ziff, *supra*, note 401 at 231.

[582]) *Moge* (*supra*, note 563) makes it clear that the application of support provisions to compensate the investing spouse, is a way of doing justice which is accepted by the Supreme Court of Canada.

[583]) Because of the difficulties in valuing a career asset, some authors think that the certainty offered by the consideration of career assets as property is "more illusory than real". See *supra*, note 511 at 59. However, it is unclear how judicial discretion can be more certain than valuing and sharing these assets!

d) Valuation of Career Assets

aa) General Valuation Problems

Regardless of whether a degree or license is considered property or taken into account when awarding support, it has to be valued.[584] Some authors think it is impossible to value career assets in monetary terms, because this is too speculative[585] and there is no evidence for the real value of a career asset.[586] Consequently they believe that the valuation of career assets must lead to unfair results. Others have adopted more or less cleverly devised methods to put an accurate value on degrees and licenses.[587]

The simplest way to avoid valuation problems, is to deny that career assets can have a present value[588] or any value at all.[589] It is obvious that this does not reflect reality. Although it is true that degrees and licenses are not marketable, it does not mean that they cannot have a value. If a career asset had no value whatsoever, it would be very uneconomic to invest in it. Yet many

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[584]) *Supra*, note 467 at 66.

[585]) L.S. Mullenix, *supra*, note 465 at 260.

[586]) T. Oldham, "Property Division in *O'Brien*: Good Intentions Gone Astray" (1986) 2 Fam. Advo. 11 at 12.

[587]) *Supra*, note 304 at 131. See also the overview of valuation approaches in J.L. Hovarth, "Valuing Professional Degrees and Licenses" (1988) 3 C.F.L.Q. 7-20, and *supra*, note 475 at 288-292, as well as *supra*, note 455 at 382-384 and *supra*, note 476 at 93-97. See also S.E. Willboughby, *supra*, note 465 at 138-139.

[588]) J.G. McLeod and A.A. Mamo, *supra*, note 186 at I114.

[589]) *Corless* v. *Corless*, *supra*, note 453 at 278.

people invest a lot of money in career assets. In *Corless* v. *Corless*,[590] Judge Steinberg stated that the husband's law degree and the license to practise law, do not have a value, although they were considered to be property. But in *Eliott* v. *Eliott*,[591] the same judge decided that a loss in the career advancement has a (negative) value. This results in a career asset being worthless if acquired, but the lack of an updated education has a (negative) value. This inconsistency is not plausible. The majority of courts and academics acknowledge that career assets must have a value, however it is defined.[592]

Apart from the valuation difficulties there is a second problem when dealing with career assets: how to divide them? If a degree or license is considered to be property, just as any other asset, it would be 50/50 shareable under both the *Marital Property Act* and the German *Civil Code*. This seems just, if both spouses contributed to the degree in a substantial way; for example, if the non-degree-holder spouse contributed financially and did most of the housework, so the other spouse was free to study. In cases where the non-studying spouse made no contributions whatsoever to the acquisition of the career asset, one could argue that a 50/50 split of the value of the degree or license would be unfair.[593]

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[590]) *Ibid.*

[591]) (1992), 42 R.F.L. (3d) 7 (Ont.U.F.C.).

[592]) See, for example, C.S. Nelson, L.K. Ferrier and H. Elston, "The Professional Degree and Practice as Property: A Comment on *Corless* v. *Corless* and Other Recent Decisions" (1987) 2 C.F.L.Q 269 at 275.

[593]) *Supra*, note 297 at 108.

However, this argument is inconsistent with the policies behind both, the *Marital Property Act* and the German *Civil Code,* because in both jurisdictions there is a presumption that all assets acquired during the marriage were accumulated through the combined efforts of the spouses. The individual contributions to the assets do not matter. This is particularly useful in a long-term marriage, where it might be impossible to document, who paid for what after years of acquisition and use of the asset in dispute. If, for example, the husband acquired a car during the marriage, for which he alone paid, and the car was used for family purposes, it is shareable under the *Marital Property Act* and the German *Civil Code.* No one would suggest that the car not be shared because it was paid for only by the husband. If, the husband acquired a degree instead of a car, should one look at the particular contributions of the non-studying spouse to the acquisition of that degree? This would undermine the policy of equal sharing in the marital property legislation. If a degree or license to practise is property, it has to be treated as any other asset. Consequently it does not matter which contributions the non-studying spouse really made to the acquisition of the degree or license, because he or she was at least indirectly affected, for example, by not enjoying a better standard of living during the period of study and by a delay in his or her own career.

Some authors think the valuation and division of a career asset causes a lot of problems if the spouse in question marries more than once. This might unfairly affect the degree-holder, if

the first spouse gets one half of the value of the career asset and subsequent spouses are entitled to an equitable distribution of that which the degree or license has increased in value during the succeeding marriage;[594] but the degree then is a pre-acquired asset for subsequent marriages. It has nothing to do with the marriage and is excluded from sharing.[595] The degree does not increase but decrease in value over the years, because its influence is gradually replaced by work experience and after about six years in the work force, it does not have a paramount importance.[596] Therefore the valuation of career assets does not become more complicated if the degree-holder marries more than once.

bb) Valuation Approaches

The valuation of career assets can be very difficult. There is no generally excepted method which takes all factors into consideration and values a career asset adequately.[597] It is controversial as to whether it should be valued,[598] and according to which formula it should be valued[599] and which aspects should be

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[594]) *Supra*, note 509 at 7.

[595]) For German law see, para. 1373, 1374 Abs. 1, 1378 Abs. 1. For Manitoba law see, *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(2).

[596]) *Supra*, note 452 at 20. For a table showing the relative influence of professional education versus experience on earnings growth in early years of professional career, see appendix A p. 175-176.

[597]) The same problem exists when valuing business assets, see *supra*, p. 96.

[598]) For example, should the future income stream be valued, as a result of the degree or should the degree be valued?

[599]) Should there be a "deduction" in the value of the degree because the influence of it is replaced by working experience after some years?

taken into account when valuing a career asset.[600] There are four main valuation approaches and these are sometimes modified resulting in an immense variety of methods. This chapter only deals with the main approaches and possible modifications.

Direct Cost Approach or Reimbursement Method. Under this approach the investing spouse is only compensated for direct costs incurred in earning the degree or license.[601] This method avoids any unfairness to the studying spouse in having to pay an award, based on projected future income, which may never occur.[602] As the direct financial contributions of the investing spouse are usually smaller than the future income stream of the educated spouse, the payment of the awards is not a problem. Therefore, a permanent debt relationship between people who are trying to dissolve their relationship and go on with their lives can be avoided.[603]

This approach is not very sophisticated. It is unrealistic to believe that the contributions of the investing spouse do not go

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[600]) Some factors which might be considered when valuing a degree are:
1. Direct costs, such as tuition fee, textbooks and other academic charges.
2. Incremental travel, living and comminuting costs which exceed normal expenses.
3. Foregone salary of the student spouse.
4. Nonstudent-spouse service contributions that are greater than student-spouse service contributions.
For a list of factors taken into account when valuing a career asset, *supra*, note 452 at 21.

[601]) This approach was used, for example, by the Kentucky Court of Appeal in *Inman* v. *Inman*, *supra*, note 457.

[602]) S.E. Willbourghby, *supra*, note 465 at 138.

[603]) K.K. Baker, "Contracting for Security: Paying Married Women What They've Really Earned" (1988) 55 U.Chicago L.Rev. 1193 at 1197.

beyond direct financial help.[604] For example, one of the main contributions of the supporting spouse is to set the other spouse free of any housework obligations. Secondly, this approach does not recognise that the economic loss for the investing spouse is the delay in his or her own career advancement. This loss is much bigger than the direct financial contributions to the other spouse.[605] Consequently the Direct Cost Approach is too one-sided and unsatisfactory to compensate the investing spouse.

Opportunity Cost Approach. This method is a further development from the Direct Cost Approach, but still it is not a sophisticated valuation method. It is sometimes referred to as the "Schaefer Approach"[606] and it does not only consider the direct costs of the education, but also the "lost opportunity costs," i.e., the money the student-spouse would have earned during the education period by being employed at the most likely available position. Some writers also take the loss of education and employment opportunities for the investing spouse into consideration.[607] Consequently the compensation for the supporting spouse would be greater than under the first approach.[608]

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[604]) L.S Mullenix, *supra*, note 465 at 93.

[605]) J.L. Hovarth, *supra*, note 587 at 10.

[606]) The name comes from T.D. Schaefer who was one of the first authors who suggested this approach. See, *supra*, note 476 at 93.

[607]) S.E. Willbourghby, *supra*, note 465 at 139.

[608]) Under the *Direct Cost Approach* the formula to value the degree or license would be: Value of the Degree = Cost of Education = Direct Financial Costs. Under the *Opportunity Cost Approach* the value would be: Value of the Degree = Direct Financial Costs + Lost Opportunity Costs.

However, even this method must be rejected as too short-sighted. Although the *Opportunity Cost Approach* avoids any speculation about the future income of the educated spouse, it does not consider that the increased earning capacity of the studying spouse is much more valuable than the direct financial contributions of the supporting spouse.[609] This approach might compensate some wives or husbands adequately, for example in cases where it is possible to figure out the exact damage for the loss of the career advancement for the investing spouse. But a wife who was only a housewife cannot be compensated by this method, because the compensation for "lost opportunity" would be limited to the foregone earnings of the educated spouse.[610] In such a case the compensation award would depend on the profession of the supporting spouse.

Some writers think that the inclusion of the "lost opportunity costs" could overcompensate the non-studying spouse because he or she might have received economic benefits during the marriage, e.g., by enjoying a higher standard of living.[611] However, in the majority of cases dealing with career assets, this is not relevant because the marriages are usually of short duration with separation occurring shortly after the acquisition of the degree or license. Therefore there is no danger of overcompensating but of undercompensating the investing spouse under the *Opportunity Cost*

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[609]) *Supra*, note 475 at 291.

[610]) *Supra*, note 153 at 555.

[611]) *Supra*, note 155 at 104.

Approach.

Labour Theory of Value. Under this approach the value of a degree or license is the value of labour necessary to get the career asset. For example, it takes four years to go to law school and pass the bar admission exams. The value of the law degree and the license to practise law is the value of four years of labour, which the student-spouse owes to the investing spouse because, had the student-spouse not attend law school, he or she would have contributed to the family.[612] The investing spouse should therefore be entitled to 50 % of the student spouse's income for the same period of time, which the student spouse needed in order to acquire the degree or license.[613] This is a very simple method of calculation which avoids valuation problems.[614] But this approach does not lead to the fair results its creator promises.[615]

Avoiding valuation problems does not mean solving them. As with the *Direct Cost Approach* the *Labour Theory* looks primarily at the costs of the education but not at the improved earning capacity of the degree-holder. There is no reason to equate a year's post-degree income with a year's cost of acquiring the degree.[616] Every oversimplification of this kind tends to be unjust. For example,

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[612]) L.S. Mullenix, *supra*, note 465 at 278.

[613]) *Ibid.*, at 279.

[614]) D.R. Mitchell, "Family Law: Professional Degrees in 1986 - Family Sacrifices Equals Family Asset" (1985) 25 Washburn L.Rev. 276 at 289.

[615]) L.S. Mullenix, *supra*, note 465 at 280.

[616]) *Supra*, note 475 at 290.

the degree-holder might earn surprisingly more or comparatively less during his or her early years in the professional career, depending on many factors such as the competition in the labour market. In this case the investing spouse would either be advantaged or undercompensated. This approach also fails to recognise that only the degree or license was acquired during the marriage, not the whole education of the studying spouse. If the income of the degree-holder is divided after divorce the pre-marriage earning capacity of the student-spouse is not taken into account at all.[617] Like the other approaches discussed above, the *Labour Theory of Value* does not provide for an adequate compensation for the investing spouse.

Increased Earning Approach. The method most often used to value a career asset is the increased earning approach. It is probably the most reliable approach in valuing a career asset. Under the *Increased Earning Method* the value of a career asset is the difference between the student's most likely future earnings based on the increased earning capacity and the student's-spouse most likely earnings based on the education and qualifications acquired before the marriage.[618] Although not perfect the *Increased Earning Approach* seems to avoid many of the shortcomings of the other suggested approaches.

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[617]) For example, if one spouse completes a B.A. in psychology before marriage and a Ph.D. in psychology during the marriage, this approach would give the investing spouse one half of the Ph.D.-holder's income. It does not recognise that someone with a B.A. in psychology has a certain earning capacity as well. Consequently the investing spouse might easily be overcompensated.

[618]) *Supra*, note 455 at 382-384. See also J.L. Hovarth, *supra*, note 587, at 11.

One of the main advantages of this approach is that it determines the actual value of the career asset to its holder and awards the supporting spouse a fair share, rather than merely returning the supporting spouse's investments in the educated spouse's degree or license.[619] Moreover, it recognises that the earning capacity of the student-spouse is not built up by the degree but only increased by it.[620] However, even this more sophisticated approach[621] has its shortcomings. For example, the criticism that it is unlikely that the income stream will be constant[622] is legitimate. But similar to the problem of using the

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[619]) S.E. Willbourghby, *supra*, note 465 at 139.

[620]) For an example, see *supra*, note 617 and accompanying text.

[621]) The formula for the valuation of the career asset would be:

$$\sum_{t=1,n} \frac{EAt - EBt}{(1+i)^t}$$

EAt: The student's-spouse most likely earnings in the period "t", based on the increased earning capacity due to the degree or license.
EBt: The student's-spouse most likely earnings in the period "t", is based on the level of education and qualifications acquired before the marriage without considering the increased earning capacity due to the higher education.
t: The period of time.
n: The number of years between the valuation date and the student's -spouse estimated last productive working time period,i.e. the retirement.
i: The period discount rate. This considers a number of factors, such as the field of employment, the level of risk associated with the student's-spouse achieving the projected future earning levels, the degree of competition in the field of employment or practice and prospective and existing economic conditions. For a full list of aspects taken into account under "i" see L.J. Horvath, *supra*, note 587 at 14-15.

[622]) A.M. Parkman, "The Recognition of Human Capital as Property in Divorce Settlements" (1986-87) 40 Ark.L.Rev. 439 at 451.

It seems odd that this approach was criticised because it "misunderstands the concept of human capital." *Ibid.* On the other hand, when compensating a housewife for her lost career advancement, Parkman uses just this "misunderstood concept" to compensate her, i.e., the compensation should be based on the difference between the income that she can now expect to earn in comparison with the income she could potentially be earning if she had not left the workforce. *Ibid.*, at 456. The concept is exactly the same, as under the *Increased Earning Approach*, the only difference is that Parkman emphasises the lost career advancement of the investing spouse instead of looking at the increased earning capacity of the student-spouse. However, it is just the idea, that if a career asset is considered to be property, and its value, which is primarily defined as the increased earning capacity of the student-spouse, is divided it **does**

cost of living index when eliminating the impact of inflation,[623] it is the best method available today, and the only one which should be used, at least until a better valuation approach has been invented. The *Increased Earning Approach* has even been developed further. By multiplying the original formula[624] with a so called sliding fraction,[625] the fact that the degree or license loses its impact over the years and is more and more replaced by the working experience is taken into consideration.[626]

This approach is suitable for valuing career assets. In fact, it might produce fairer results than some of the valuation methods used in valuing business assets.[627] No one now suggests that business assets are not to be shared because it is difficult to value them. But because career assets are intangible and do not fit neatly in the traditional picture of "property", it is easy to exclude them from sharing by stating that it is impossible to value them. Some of the arguments expressed, against the inclusion of career assets in the accounting under the marital property

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compensate the supporting spouse for the investments in the other spouse's education and for the loss of advancement in his or her own career.

[623]) *Supra*, p. 74.

[624]) *Supra*, note 621.

[625]) Consequently the formula to value the degree would be:

$$\sum_{t = 1,n} \frac{EAt - EBt}{(1 + i)^t} \times \frac{a}{b + t}$$

a: The number of years of professional education.
b: The number of years between the commencement of the professional education and the valuation date.
All other variables have the same meaning as in the original formula. See *supra*, note 621.

[626]) T.D. Schaefer, *supra*, note 476 at 97 and appendix A, p. 170.

[627]) For a detailed discussion about it, see *supra* p. 96.

legislation, also apply to a wide range of other areas of law. The difficulties often expressed when valuing and sharing career assets are in fact old problems in a new light. When awarding damages for the wrongful death of one spouse, the future income of this spouse is considered. Valuation problems arise because the increased earning will occur in the future, and also arise when other "future assets", e.g., pensions, have to be valued. It is not a problem to value and share career assets: the real problem is the reluctance of some people to realise that the traditional concept of property must include career assets in order to reflect modern society, where wealth can have many faces, including education.

Part IV: Unequal Division of Assets

1. Introduction

Both the *Marital Property Act* and the German *Civil Code* provide for an equal sharing of assets acquired during the marriage. The inflexible application of this principle may lead to unjust results; for example, if there was a high degree of violence between the spouses[628] or if major family assets were primarily acquired through the financial resources of one spouse and the marriage was of comparatively short duration.[629] Marital property legislation in both jurisdictions allows an appropriate remedy: the so called unequal division of assets.[630]

The rules differ in Manitoba and Germany, both in theoretical and conceptual respects. Only one paragraph in the *Civil Code* deals with the unequal division of all kinds of assets,[631] and there are two different rules in the *Marital Property Act*, distinguishing between the unequal division of family[632] and commercial assets.[633] The standards are higher when applying for an unequal division of

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[628]) See for example OLG Karlsruhe, FamRZ 1987, 823. In this case one spouse killed the other. As there is also an equalisation payment upon the death of one spouse under German law (para. 1371 BGB), the court rejected granting any equalisation payment due to the extraordinary circumstances of this case.

[629]) *Hrynchuk* v. *Hrynchuk, supra*, note 266.

[630]) For Manitoba law see *Marital Property Act*, R.S.M., 1987, c. M45, s. 14. For German law see para. 1381 BGB.

[631]) Para. 1381 BGB.

[632]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(1).

[633]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(2).

family assets. The theoretical difference is in the method of the granting of an unequal division. In Germany the *Civil Code* only provides a plea for the spouse who has to make the equalisation payment,[634] i.e., only **one** spouse can apply for it. By contrast, in Manitoba **both** spouses may apply for an unequal division, whether or not the assets in dispute are family or commercial.[635] The structure of the legislation is also different. While there is a list of factors in the *Marital Property Act* which the court should consider when deciding whether an unequal division of commercial assets [636] is fair,[637] there is no list for the court to consider under the German *Civil Code*. German law only gives an example in which cases an unequal division of assets seems appropriate.[638]

However, in both jurisdictions there is reluctance in the courts to apply rules dealing with the unequal division of assets. The reason may be the legitimate presumption that the frequent application of such rules can undermine the underlying concept of both the *Marital Property Act* and the German *Civil Code*: the equal sharing of assets acquired through the combined efforts of the spouses during the marriage. Too many court ordered unequal

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[634]) *Supra*, note 247, para. 1381 Rdnr. 6.

[635]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14.

[636]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(2).

[637]) This structure led to a two-stage process adopted by the courts. First there must be evidence that one of the factors enumerated in section 13(2) of the *Marital Property Act* is present when deciding whether an unequal division of commercial assets is appropriate. Second, this factor must result in inequity if the courts were to order an equal division of commercial assets. See D.A. Klein, *Family Awards in Canada*, (Toronto: Butterworths, 1987) at 141.

[638]) Para. 1381 Abs. 2 BGB.

divisions would be slippery slide to highly discretionary family law, where the outcome of property disputes depends mainly on the values of the individual judge. Further, a loss of certainty in the law, provided by the current deferred community property regimes,[639] seems to be an undesirable development in both jurisdictions. Frequent application of the rules dealing with the unequal division of assets would probably lead to uncertainty and unpredictability in the law.

Another criticism of these rules is that they are often used as "stopgaps" where the legislation leads to illogical results or does not deal with a certain problem at all. Unequal division has been suggested to eliminate purely inflationary appreciations in the value of assets[640] or to compensate one spouse for investments in the human capital of the other, by granting him or her a higher share in other assets owned by the couple.[641] This obviously is an unsatisfactory method which cannot produce fair results, as shown in previous chapters.[642]

The unequal division of assets has two aspects: economic and personal. An unequal division due to economic reasons would occur where one spouse does not adequately provide for financial support

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[639]) N. Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5 C.J.F.L. 15 at 39.

[640]) *Supra*, note 356 and accompanying text.

[641]) *Supra*, p. 116.

[642]) *Ibid.* and *supra*, note 356 and accompanying text.

of the other during the marriage.[643] An unequal division for personal reasons would occur, for example, where one spouse has had an intimate relationship to somebody else over a longer period of time.[644] These cases remain controversial because application of the rules dealing with the unequal division of assets can indirectly introduce out-dated concepts, where personal misbehaviour has led to economic consequences upon divorce.[645] In this chapter I want to discuss the different requirements for granting an unequal division of assets and the difficulties related to the application of these rules.

2. Unequal Division of Assets Due to Economic Reasons

In both jurisdictions it is extremely difficult to persuade the courts that an unequal division of assets is appropriate. In Germany it is necessary to prove that the equal division would be "grossly inequitable."[646] In Manitoba it depends on the nature of the assets, if family assets are in dispute the equal division has to be "grossly unfair" or "unconscionable".[647] For commercial assets an unequal division is only granted if an equal split would be "clearly inequitable".[648] Of course, very few cases meet these

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[643]) *Supra*, note 247, para. 1381 Rdnr. 13.

[644]) OLG Hamm, FamRZ 1976, 633.

[645]) *Supra*, note 100 and accompanying text.

[646]) Para. 1381 BGB.

[647]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(1).

[648]) *Marital Property Act*, R.S.M., c. M45, s. 14 (2).

standards.

In Manitoba the two leading cases dealing with the unequal division of assets for economic reasons are *Brodoway* v. *Brodoway*[649] and *Hrynchuk* v. *Hrynchuk*.[650] In the first, Mrs. Brodoway saved $ 24,720 within a six year period prior to separation. She deposited this amount in a separate bank account in her own name. During her marriage Mrs. Brodoway updated her skills, while her husband did nothing to advance his career and temporarily suffered from alcoholism. Consequently Mrs. Brodoway earned between twice and four times as much as her husband. However, the money she saved she wanted to use for her own needs after separation, as she already found that the marriage was not going to work. The Manitoba Court of Queen's Bench did not grant an unequal division of this bank account because the circumstances of this case were ordinary. There are many marriages where one spouse contributes more financial support to the family than the other. If one looked at the individual financial contributions one would "re-introduce the principle of separate property and the consideration of measuring the value of the contributions of each party to the marriage and the division of family assets on that basis."[651] In the *Hrynchuk*[652]

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[649]) (1982), 28 R.F.L. (2d) 54 (Man.Q.B.).

[650]) *Supra*, note 266.

[651]) *Supra*, note 649 at 59. The Supreme Court of Canada in *Farr* v. *Farr* (1984), 39 R.F.L. (2d) 1 also rejected any unequal division of assets due to different economic contributions of the spouses. In this case the husband was applying for an unequal division of family assets because he had pre-acquired assets, which in his opinion formed the "capital basis" of any other assets the couple could acquired during the marriage. This so called "capital base theory" was considered to be "wholly incompatible with the statutory presumption of equal distribution" and therefore unanimously rejected. See *Farr* v. *Farr*, *supra*, at 14.

case, by contrast the court granted an unequal division of assets of 75% - 25% in favour of the husband. In this case Mr. Hrynchuk converted former commercial assets of significant value, which were excluded from sharing by spousal agreement, into family assets, i.e. into a home and a cottage, which consequently became shareable.[653]

At first sight the different outcomes of these cases seem fair and just. While in the *Brodoway*[654] case the marriage lasted 22 years, the *Hrynchuk*[655] marriage was of comparatively short duration, only 16 months. Mrs. Brodoway saved "only" $ 24,720 **during** the marriage while Mr. Hrynchuk already had assets worth $ 350,000 **prior** to the marriage. However, it seems difficult to draw the line between these two cases. Of course, there cannot be a fixed rule about the duration of marriages or the certain amount of money, acquired solely by one spouse, to make an equal division "grossly unfair", "unconscionable" or in case of commercial assets "clearly inequitable". All relevant circumstances have to be considered. Therefore it is doubtful whether the court in the *Brodoway*[656] case really took all aspects into consideration. The court did mention that it was not extraordinary that one spouse

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[652]) *Supra*, note 266.

[653]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 6(5)(a).

[654]) *Supra*, note 649.

[655]) *Supra*, note 266.

[656]) *Supra*, note 649.

earned and saved more money during the marriage than the other.[657] But was it "ordinary" for one spouse to start saving six years prior to separation for the period after separation? Section 4(b) of the *Marital Property Act* provides for a sharing of pre-acquired assets accumulated in contemplation of marriage. If the act regulates assets acquired in contemplation of marriage, i.e., assets accumulated for a specific purpose, should the court draw a parallel to money saved in anticipation of marriage breakdown? The special purpose for which the money was saved was not taken into consideration at all. However, there is no need to decide here whether the outcome of the *Brodoway*[658] case would have been different had the court seen this point; but even when reviewing *Brodoway* in the *Hrynchuk*[659] decision, the court was satisfied with a comparison of pure facts and figures[660] without looking at the background of the case.

German law in this area is also unsatisfactory. Over the years courts and legal writers tried to define certain criteria which would make an equal division of assets "grossly inequitable". The *Civil Code* gives an example when it considers an equal division to be "grossly inequitable": in cases where one spouse failed to carry out economic obligations which are inherent in marital

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[657]) *Ibid.*, at 59.

[658]) *Supra*, note 649.

[659]) *Supra*, note 266.

[660]) *Ibid.*, at 105.

relations.[661] For instance, one German Court of Appeal rejected an equalisation payment claim of a husband who failed to provide any financial support for his family[662] for years and who suffered from alcoholism. His wife who was a housekeeper, but then opened up her own shop which was successful and had assets worth DM 80,000 at the end of the marriage. The Court of Appeal of Düsseldorf granted an unequal division of 100% - zero in favour of the wife.[663] The facts of this case were to some extent comparable with the *Brodoway* case.[664] In both cases the husband drank while the wife earned and saved money for herself. But while the German court granted the husband no equalisation payment because that would be "grossly inequitable", the Manitoba Court of Queen's Bench found that the wife had to share her savings, declaring that the equal division was neither "grossly unfair" nor "unconscionable". This comparison demonstrates how unspecific and interchangeable expressions like "grossly unfair", "unconscionable" and "grossly inequitable" can be and how much uncertainty they can introduce, had the courts not refused to apply the unequal division of assets only in a limited number of cases.

In German law a number of details are still controversial when dealing with an unequal division of assets, but these cannot be fully discussed here. For example, it is unclear whether economic

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[661]) Para. 1381 Abs. 2 BGB. For full text see Appendix B, p. 184.

[662]) For the obligation to support the family, see para. 1360 BGB.

[663]) OLG Düsseldorf FamRZ 1987, 821.

[664]) *Supra*, note 649.

misbehaviour has to last a certain period of time[665] or whether one single action, causing immense trouble, is sufficient to make the equal sharing "grossly inequitable".[666] It does not make a lot of sense to distinguish between long-term economic misbehaviour and single actions when the financial loss can be the same. When dealing with the unequal division of assets for economic reasons, it seems more appropriate to look at the economic result instead of judging the behaviour of the spouse. Personal behaviour which has economic consequences is a different problem and a highly controversial one as well.

3. Unequal Division of Assets Due to Personal Behaviour

Here the same rules apply as in cases where an unequal division of assets is granted due to economic reasons: in Germany it is required that an equal division of assets would be "grossly inequitable"; in Manitoba, depending on the nature of the asset in question, the equal division has to be either "grossly unfair", "unconscionable" or " clearly inequitable".[667] Unlike financial reasons justifying an unequal division of assets, personal grounds such as mental[668] or physical[669] illness or the classical example

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[665]) W. Thiele in Staudinger, *Kommentar zum BGB mit Einführungsgesetz und Nebengesetze, Familienrecht* (Berlin, New York: Walter de Guyter, 1985) para. 1381 Rdnr. 14.

[666]) *Supra*, note 213, para. 1381 Rdnr. 10.

[667]) *Supra*, note 631-633.

[668]) *Bordun* v. *Bordun* (1986), 41 Man.R. (2d) 48 (Q.B.).

[669]) *Schnerch* v. *Schnerch* (1982), 13 Man.R. (2d) 277 (Q.B.).

of adultery,[670] are highly emotional.

The *Marital Property Act* in Manitoba explicitly says that application of the rules dealing with the unequal division of assets is not limited to economic reasons.[671] The leading and most controversial case in this area is *Marks* v. *Marks*,[672] where the Manitoba Court of Appeal granted an unequal division of a commercial asset of 75% - 25% in favour of the husband. In this case the marriage of the couple appeared doomed from the beginning. It was the second marriage for the husband and the third for the wife. Most of the time their relationship was cool and distant and after eight years they separated. The asset in dispute in this case was the increase in the value of their farm, which was a pre-acquired asset of the husband and therefore excluded from sharing.[673] The majority of the Court of Appeal allowed the 75% - 25% split because Mrs. Marks did not make any contributions to the operation of the farm and performed her other marital responsibilities and obligations not very well.[674] Moreover, she was suffering from pre-existing mental disorders. She took a large amount of drugs, especially sleeping pills.

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[670]) *Kozak* v. *Kozak* and *Later* (1981), 4 W.W.R. 447 (Man.Q.B.).

[671]) Regarding family assets the *Marital Property Act* says in section 14(1): "... having regard to *any financial or other circumstances* of the spouses" (Emphasis added). As far as commercial assets are concerned the act is less strict and takes "...any circumstances the courts deems relevant, including..." into consideration. See *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(2).

[672]) (1983), 22 Man.R. (2d) 300 (C.A.).

[673]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 4(1).

[674]) *Supra*, note 672 at 301.

The decision of the Court of Appeal was short-sighted and one-sided, both as to consideration of the facts and regarding the application of section 14(2) of the *Marital Property Act*. The majority kept emphasising that Mrs. Marks performed her household duties in an unsatisfactory way without adequately considering that she was not able to do better because of her mental problems. However, the fact that she was beaten and abused by her husband was silently swept under the carpet, although Mr. Marks admitted this in a letter to his son-in-law.[675] If the court had looked at the personal misbehaviour of the spouses to justify an unequal division of assets, it should have looked at the whole picture by taking the violence of the husband into account, and at the reasons for the wife's incapacity to perform certain household duties, rather than focusing only on the fact of the wife's badly performed household obligations. The logical consequence of this decision is that the unsatisfactory performance of marital responsibilities can make an equal division of a commercial asset "clearly inequitable"; but if you beat and abuse your wife, that does not have any negative consequences for you![676]

The application of section 14(2) of the *Marital Property Act* was in this case difficult to comprehend. The majority held the unequal division of the asset was justified by the unequal

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[675]) *Ibid.*, at 304.

[676]) "I figured out that I had enough of it so I slapped her and she fell on the floor *herself*...Also that kick to the seat of her pants was not very hard with the slide of my foot, *which I intended*,..." (Emphasis added). *Supra*, note 672 at 304.

contributions to the asset by the spouses. The *Marital Property Act* explicitly rejects this connection with its presumption of equal sharing of marital assets, regardless of the individual contributions of the spouses to them. This decision undermined the presumption of the *Marital Property Act* and resulted in the regime of separation of property being introduced.[677] It was also difficult for the court to weigh the contributions of each spouse.[678] For these reasons the *Marks* decision was not fair and neither the 75% - 25% split decided by the majority[679] nor the 55% - 45% split suggested by the dissenting judge[680] seems appropriate. The commercial asset in dispute should have been shared equally. Consequently, this decision was often criticised. For example, Philip Knight summarised the dilemma of this case: "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."[681]

In a similar case,[682] two years earlier than *Marks*,[683] a

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[677]) For the same opinion regarding the unequal division of assets due to economic factors; see *supra*, note 651 and accompanying text.

[678]) So Philip (dissenting) in *Marks*, *supra*, note 672 at 307.

[679]) *Supra*, note 672 at 301.

[680]) *Ibid.*, at 304.

[681]) P. Knight, "Of Lines and Lawns: The Erosion of the Presumption of Equal Sharing under the *Marital Property Act*" (1983) 13 Man.L.J. 407 at 416.

[682]) *Sawchuk* v. *Sawchuk* (1981), 24 R.F.L. (2d) 250 (Man.Co.Ct.).

[683]) *Supra*, note 672.

Manitoba County Court held an equal division of family and commercial assets was equitable. In this case Mrs. Sawchuk was suffering from mental and physical diseases and did not contribute financially to her family. Unlike the Manitoba Court of Appeal in *Marks*[684] this County Court correctly interpreted the *Marital Property Act* and stated: "...to penalize a spouse through an unequal division of assets because she had been ill and unable to contribute equally to the relationship, would be grossly unfair."[685] The Manitoba Court of Appeal by contrast in *Marks*[686] only took the non-contributions of the wife into account, without adequately considering her pre-existing mental illness.

There is a third case with comparable circumstances which makes the injustice of the *Marks*[687] decision even clearer. In *Bordun* v. *Bordun*[688] the wife was suffering from numerous nervous breakdowns during the marriage and made only marginal contributions to commercial assets owned by her husband, but she looked after the children and the house. Her situation was similar to that of Mrs. Marks: both made no or only minor contributions to the asset in dispute, both tried to perform household duties to the best of

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[684]) *Ibid.*

[685]) *Supra*, note 682 at 251.

[686]) *Supra*, note 672.

[687]) *Ibid.*

[688]) *Supra*, note 668.

their ability,[689] and while Mrs. Bordun had a drinking problem, Mrs. Marks took too many drugs. In *Bordun*, however, the Manitoba Court of Queen's Bench did not follow *Marks*[690] and rejected an unequal division of the commercial asset, because Mrs. Bordun did make contributions to the relationship, even if they were different from the contributions of her husband, e.g., by looking after the children and the house. The Manitoba Court of Queen's Bench explicitly said that the unequal contributions to the asset in dispute did not automatically allow an unequal division of these assets.[691]

The courts in Manitoba may be moving away from the majority decision in *Marks*.[692] *Bordun*[693] can be considered a first step

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[689]) Even Mr. Marks had to admit that his wife did look after the house:
Q: "And she did inside work during your marriage? You will give her that; won't you?"
A: "Yes. She did inside --- part of the inside work."
Q: "She did the meals; didn't she?"
A: "She got the meals."
Q: "And she did the housework inside?"
A: "To the best of her ability."
Q: "Yes. And she did the washing?"
A: "Yes, she did."
Q: "And she did that initially for Chris and yourself, and then later for yourself after Chris left?"
A: "After?"
Q: "Yes. Is that correct?"
A: "I guess that is correct." *Supra*, note 672 at 304.

[690]) *Supra*, note 668 at 51. The Court of Queen's Bench justified this with the assertion that *Marks* and *Bordun* had to be distinguished: "I am satisfied that the two cases can be easily distinguished and that *Marks*, while it does indicate a circumstance or circumstances where an unequal division of commercial assets was granted, it is not on all squares with the present case. I find it is not applicable here." *Ibid.*

[691]) *Supra*, note 668 at 52.

[692]) *Supra*, note 672.

[693]) *Supra*, note 668.

because, although the facts of both cases are similar, the Manitoba Court of Queen's Bench held against an unequal division of the asset in question and against the majority in *Marks*.[694] Consequently one cannot justify an unequal division of assets by the unequal contributions of the spouses to them, because this would be contrary to the *Marital Property Act*, which provides for a presumption of equal sharing regardless of the individual contributions of the spouses to the marriage.[695] Therefore, if one considers an unequal division of assets one has to review carefully whether or not the personal misbehaviour of one or both spouses really makes an equal sharing "grossly unfair", "unconscionable" or "clearly inequitable".

In Germany mental and physical illness are only of minor importance when dealing with the unequal division of assets. In fact, I have not been able to find one case where an unequal division of assets was granted because of the lack of contributions due to illness. The major cases in Germany dealing with an unequal division of assets for personal reasons are cases where one spouse has an intimate relationship with a third party.

In the past it was controversial whether personal behaviour justified the granting of an unequal division of assets. The *Civil Code* example, stating when an unequal division might be

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[694]) *Ibid.*, at 51.

[695]) See the preamble of the *Marital Property Act*: "Whereas it is advisable to provide for a presumption, in the event of breakdown of the marriage...of equal sharing of the family and commercial assets of the parties to the marriage acquired by them during the marriage."

appropriate, only deals with economic reasons.[696] Therefore one could argue that the legislature did not intend to consider personal behaviour at all.[697] However, even today an unequal division of assets is still granted in cases where one spouse commits adultery, making an equal division "grossly inequitable",[698] in particular if the personal behaviour had economic consequences.[699]

But it is still undecided whether, in cases where both spouses contributed equally to the marriage, and when the adulterous behaviour of one spouse had no effect on the financial situation, an unequal division should be granted. The Supreme Court of Germany dealt with a case[700] in which the wife had an intimate relationship with her husband's nephew, who was 14 years younger than she was. There were two children of this union, borne while the wife was still married. At the Court of Appeal level her equalisation payment claim of DM 20,800 was rejected because her adulterous behaviour was "very persistent, disloyal and reprehensive", which would make an equal division of assets "grossly inequitable".[701]

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[696]) Para. 1381 Abs. 2 BGB.

[697]) *Supra*, note 6 at 129.

[698]) For example in OLG Celle FamRZ 1979, 431 the equalisation payment claim of the wife was rejected because she had more than one intimate relationship to other men and four children of these unions. Her marriage lasted 20 years, her relationships to her lovers 15 years. Because of these unusual circumstances the court found that an equal division of assets would be "grossly inequitable".

[699]) *Supra*, note 78 at 891.

[700]) BGHZ 46, 343.

[701]) *Ibid.*, at 346.

The Supreme Court of Germany sent back the case to the Court of Appeal, stating that an unequal division of assets in cases of adultery committed by one spouse is only appropriate if the loyal spouse repeatedly asked the other to leave his or her lover,[702] which in fact the husband did in this case. However, in a marriage which worked well during most of its duration, an unequal division of assets and in particular a complete rejection of the equalisation payment is only fair in cases with extremely extraordinary circumstances.[703]

Some County Courts applied the unequal division rules generously. For example, in one case[704] the equalisation payment claim of a wife was rejected because she did not tell her husband that she had an intimate relationship to one of the husband's relatives **prior** to her marriage. Even some legal writers follow this opinion and favour a financial penalty for the adulterous spouse by allowing an unequal division of assets even if this misbehaviour did not have any economic impact on the other spouse. One author, for instance,[705] states that if one did not reject the equalisation payment claim of the adulterous spouse one would "award the break-out of the marriage". Not only is a secret intimate relationship immoral and reprehensible, it also needs to

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[702]) *Ibid.*, at 353.

[703]) *Ibid,*. However, the court did not give an example under which circumstances such an extraordinary case would appear.

[704]) AG Schweinfurt NJW 1973, 1506.

[705]) K. Roth-Stielow, "Der Prämierte Ausbruch aus der Ehe" (1981) NJW 1594 at 1595.

be legally penalised, i.e., have a financial disadvantage for the disloyal spouse upon property distribution after marriage breakdown.[706]

It is doubtful whether this opinion is any longer in accord with modern divorce law and the system of sharing marital assets under the *Civil Code*. If an unequal division of assets was granted only because of the adulterous behaviour of one spouse, without financial consequences, one would indirectly re-introduce the fault-based divorce law, replace the regime of deferred community of property by separation of property, and re-interpret an equity rule into a penalty norm. This cannot have been the intention of the legislature.[707] Therefore an unequal division of assets due to personal reasons should only be granted in exceptional cases, especially if the adulterous behaviour of one spouse really had any negative financial impact on the other. Not every adultery automatically causes economic consequences, e.g., because the adulterous spouse spends less time with his or her family or neglects household obligations.[708] In order to justify an unequal division of assets, concrete financial disadvantages must appear; for example, if the adulterous wife has a child by her lover and the husband, supposing it is his child, financially supports the upbringing of the child.[709] In cases where the personal

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[706]) *Ibid.*

[707]) OLG Düsseldorf, NJW 1981, 829.

[708]) *Supra*, note 162 at 178.

[709]) OLG Hamm, FamRZ 1976, 633.

misbehaviour does not have any economic consequences, an unequal division of assets should only be granted in extreme circumstances, e.g., where one spouse kills a relative of the other. Otherwise, if an unequal division of assets is granted, even if one spouse "only" committed adultery, one would apply a rule for unusual cases to an otherwise ordinary situation.

The leading case in Manitoba is *Kozak* v. *Kozak and Later*[710] where the wife left her husband to live with her employer in a ski resort. The three children of Mr. and Mrs. Kozak remained with their father who looked after them. Due to her job Mrs. Kozak spend a lot of time travelling across Canada and abroad. When her husband found that she had an intimate relationship with Mr. Later he asked her to quit her job and return to her family. However, Mrs. Kozak preferred to leave her family and move to the ski resort where she became pregnant by Mr. Later. The Manitoba Court of Queen's Bench stated that the pension of the husband, a commercial asset, was not shareable, because an equal sharing would be "clearly inequitable".

Although the Manitoba Court of Queen's Bench correctly considered the facts of the case, i.e., there were only minor contributions of Mrs. Kozak to the family due to her extensive travelling, and no contributions to her husband's pension, the court reproached her with these facts, even though the individual contributions of the spouses to the individual assets do not matter.[711] Instead of recognising that the adultery committed by

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[710]) *Supra*, note 670.

[711]) *Supra*, p. 153.

Mrs. Kozak led to the breakdown of the marriage, the court penalised her for neglecting marital responsibilities and stated that therefore an unequal division of assets would be "clearly inequitable".[712] Section 14(2) of the *Marital Property Act* lists some factors the court should consider when deciding whether an unequal division of a commercial asset should be granted. It does not say that the different contributions to the asset in dispute should be taken into account. Consequently the court could have justified its decision for example with the fact that the spouses did not cohabit with each other during comparatively long periods of their marriage.[713] Instead, it looked at the contributions Mrs. Kozak made to her husband's pension.

Even today personal misbehaviour of one spouse is moralised, stigmatised and condemned, which then can lead to an unequal

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[712]) "As I have mentioned earlier, I am satisfied that the wife did not carry her share of family responsibilities. 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 her family was minimal." See *supra,* note 670 at 452.

"I am satisfied that this case is a classical example of one in which the court should exercise its discretion and not divide a commercial asset between the spouses equally. As a matter 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 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." See *supra*, note 670 at 453.

[713]) *Marital Property Act*, R.S.M., 1987, c. M45, s. 14(2)(d).

division of assets to the disadvantage of the errant spouse. Although it is helpful that there are rules dealing with an unequal division of assets, in order to prevent any injustice caused by application of the community of deferred property regime, these should not be used to judge the personal behaviour of the spouses. However, it is necessary to consider all the relevant circumstances of a case, particularly if the misbehaviour relates to the ability to care for the children; but as long as one is dealing only with the financial aspects of divorce, importance should be given to economic consequences of the spouse's behaviour and not to the behaviour itself. The latter might be worth considering when deciding other aspects of a divorce, for example, who should get custody of the children, but not if the marital assets have to be distributed.

The legislature in Manitoba already put this idea in to practice by amending the *Marital Property Act*. In 1992 section 14(3) of the act was introduced which now states that the conduct on the part of a spouse should not be taken into account when deciding whether an unequal division of assets is appropriate. Unfortunately, in Germany a change in a rule like this still takes time.

Part V: Conclusions

The advantage of a comparative legal study is that it reveals drawbacks within the analysed areas of law which usually remain concealed. As this thesis indicates, neither the German nor the Manitoba law regarding the distribution of marital property after divorce is perfect; and the author does not feel free to comment on which law might be the "better" one, because of the ever-shifting standards by which one can measured law itself.

The following overview summarises the main shortcomings of the statutory matrimonial property regimes in both jurisdictions and makes some suggestions about how to improve the present law. However, this summary is not exhaustive.

German law could be improved regarding:

- **the separate division of household goods** under the *Household Goods Act*. It probably should be abolished because it undermines the whole system of equal sharing in cases where the couple does not have many other items apart from household goods.
- **personal injury awards.** They should not be shareable at all because they are compensation for physical and mental harm and have nothing to do with the marriage. An amendment to the *Civil Code* might be necessary to make this clear.
- **interspousal gifts.** They should be treated as any other asset because there is no reason to artificially complicate the accounting under the

Civil Code by treating them in certain cases as a premature equalisation payment.

- **appreciations and depreciations in the value of excluded assets** like gifts and inherited assets, even if the change in the value of these assets occurred during the marriage. These appreciations and depreciations in the value should not be shareable, because it does not make sense to exclude the asset from sharing but then include any change in its value.
- **the unequal division of assets** due to personal misbehaviour. As in Manitoba there should be a provision in the *Civil Code* stating that the conduct of the spouses, in particular an adulterous relationship to a third party, does not matter as long as it does not have any negative financial impact on the assets of the adulterous spouse.

Under Manitoba law the following points could be improved:

- **the indirect sharing of pre-existing debts** which are not related to an excluded asset should be avoided by deducting these debts from the value of the pre-acquired assets; otherwise there is an equal sharing of assets but an unequal sharing of debts.
- **the "tracing rules"** like section 6(5)(a) and 6(5)(b) of the *Marital Property Act* should be abolished because they produce unjust and illogical results.

Instead of looking at the individual asset one should look at its value and exclude the value from the accounting

- **there should be no sharing of inflationary appreciations** in the value of the assets of either spouse. The cost of living index can be used as a guide to eliminate such appreciations in the value and exclude them from sharing.
- the complex problem of **harmonising the application of the *Marital Property Act* and the common law doctrine of constructive trust** in cases where marital assets increase in their value between separation date and trial should be addressed by an amendment of the *Marital Property Act* stating in which cases the doctrine of constructive trust is still applicable.

Both jurisdictions do not adequately deal with:

- **appreciations and depreciations in the value of excluded assets others than gifts and inheritance,** acquired before marriage, even if the change in the value occurred during the marriage. It does not make sense to exclude these assets from sharing but to include any appreciations or depreciations in their value in the accounting.
- **new forms of property in particular career assets** like university degrees and licences to practise.

These assets should be considered property, valued and included in the accounting under both the *Marital Property Act* and the German *Civil Code*, because alternative solutions, especially support provisions, do not adequately compensate the spouse who invested in the human capital of his or her ex-spouse.

Even with the shortcomings mentioned above, the deferred community property regimes in both jurisdictions are an appropriate compromise between the complete separation of property and the community of property. Therefore they should remain in force, but they need to be improved in the coming years in order to avoid unjust and illogical results, which still occur under the application of both the *Marital Property Act* and the German *Civil Code*, particularly regarding the economical disadvantages to women after divorce.

APPENDIX A

German Cost-Of-Living Index[714]

1958	1959	1960	1961	1962
38.8	39.1	39.7	40.7	41.8
1963	**1964**	**1965**	**1966**	**1967**
43.1	44.1	45.6	47.2	47.9
1968	**1969**	**1970**	**1971**	**1972**
48.5	49.5	51.1	53.7	56.6
1973	**1974**	**1975**	**1976**	**1977**
60.4	64.5	68.4	71.5	73.9
1978	**1979**	**1980**	**1981**	**1982**
75.8	78.7	82.8	88.1	92.7
1983	**1984**	**1985**	**1986**	**1987**
95.8	98.0	100.0	99.8	99.9
1988	**1989**	**1990**	**1991**	**1992**
101.1	103.9	106.7	110.5	114.9
1993	**1994**			
119.3	122.8			

[714]) *Supra*, note 213, para. 1376 Rdnr. 13.

Calculation Examples for Interspousal Gifts under German Law

Example 1:[715] The husband had initial assets of DM 50,000 and those he owns at the end of the marriage are worth DM 80,000. During the marriage he made an interspousal gift to his wife of DM 10,000. The couple agreed that in case of divorce this gift should not be taken into consideration. The wife's assets at the beginning of the marriage were worth DM 5,000, and after marriage breakdown she owns assets worth DM 25,000.

Calculation according to Method A:

Initial assets of the husband:	DM	50,000
Final assets of the husband:	DM	80,000
Surplus of the husband:	DM	30,000

Initial assets of the wife (DM 5,000 + interspousal gift; para. 1374 Abs. 2):		
DM 5,000 + DM 10,000 =	DM	15,000
Final assets of the wife:	DM	25,000
Surplus of the wife:	DM	10,000

Surplus of the husband:	DM	30,000
Surplus of the wife:	DM	10,000
Difference:	DM	20,000

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[715]) *Supra*, note 168 at 1123.

Equalisation payment to the wife:	DM	10,000

Calculation according to Method B (adopted by the German Supreme Court):

Initial assets of the husband:	DM	50,000
Final assets of the husband:	DM	80,000
Surplus of the husband:	DM	30,000

Initial assets of the wife (without the application of para. 1374 Abs. 2 BGB):

DM 5,000 + 0	=	DM 5,000

Final assets of the wife (here the value of the interspousal gift is subtracted from the final assets):

DM 25,000 - DM 10,000	=	DM 15,000
Surplus of the wife:		DM 10,000

Surplus of the husband:	DM	30,000
Surplus of the wife:	DM	10,000
Difference:	DM	20,000
Equalisation payment to the wife:	DM	10,000

Example 2:[716] The value of the assets of the spouses are the same as in example 1, but the couple agreed that the interspousal gift should be taken into consideration upon divorce.

Calculation according to Method A:

Initial assets of the husband:		DM 50,000
Final assets of the husband:		DM 80,000
Surplus of the husband (DM 30,000 + interspousal gift; para. 1380 Abs. 2 S. 1 BGB):		
DM 30,000 + DM 10,000	=	DM 40,000

Initial assets of the wife (DM 5,000 + interspousal gift; para. 1374 Abs. 2 BGB):		
DM 5,000 + DM 10,000	=	DM 15,000
Final assets of the wife:		DM 25,000
Surplus of the wife:		DM 10,000

Surplus of the husband:		DM 40,000
Surplus of the wife:		DM 10,000
Difference:		DM 30,000
Consideration of the interspousal gift; para. 1380 Abs. 1 S. 1 BGB:		
DM 30,000 : 2 = DM 15,000 - DM 10,000 (gift):		
	=	DM 5,000

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[716]) *Ibid.*, at 1124.

Equalisation payment to the wife: DM 5,000

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Calculation according to Method B (adopted by the German Supreme Court):

Initial assets of the husband: DM 50,000

Final assets of the husband: DM 80,000

Surplus of the husband (DM 30,000 + interspousal gift; para. 1374 Abs. 2 BGB):

DM 30,000 + DM 10,000 = DM 40,000

Initial assets of the wife: DM 5,000

Final assets of the wife (here the value of the interspousal gift is subtracted from the final assets):

DM 25,000 - DM 10,000 = DM 15,000

Surplus of the wife: DM 10,000

Surplus of the husband: DM 40,000

Surplus of the wife: DM 10,000

Difference: DM 30,000

Consideration of the interspousal gift; para. 1380 Abs. 1 S. 1 BGB:

DM 30,000 : 2 = DM 15,000 - DM 10,000 (gift):

= DM 5,000

Equalisation payment to the wife: DM 5,000

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Example 3:[717] The husband had no initial assets, but his assets at the end of the marriage are worth DM 20,000. During the marriage he made a gift to his wife of DM 60,000. The wife had no initial assets either. Her assets at the end of the marriage are worth DM 60,000 (the gift).

Calculation according to Method A:

Initial assets of the husband:	DM	0
Final assets of the husband:	DM	20,000
Surplus of the husband:	DM	20,000

Initial assets of the wife (DM 0 + interspousal gift; para. 1374 Abs. 2 BGB):

DM 0 + DM 60,000 =	DM	60,000
Final assets of the wife:	DM	60,000
Surplus of the wife:	DM	0

Surplus of the husband:	DM	20,000
Surplus of the wife:	DM	0
Difference:	DM	20,000
Equalisation payment to the wife:	DM	10,000

[717]) *Ibid.*, at 1127.

Calculation according to Method B (adopted by the German Supreme Court):

Initial assets of the husband:	DM	0
Final assets of the husband:	DM	20,000
Surplus of the husband:	DM	20,000
Initial assets of the wife:	DM	0
Final assets of the wife:	DM	60,000
Surplus of the wife:	DM	60,000
Surplus of the husband:	DM	0
Surplus of the wife:	DM	60,000
Difference:	DM	60,000
Equalisation payment to the husband:	DM	30,000

Relative Influence of Professional Education versus Experience on Earnings Growth

Example:[718] Jim and Sally married after Jim graduate from college. During the marriage Sally was working full-time as a travel agent and did not advance her own career, so Jim could go to law school, take the bar exam and worked as a lawyer. Shortly after he got his degree their marriage broke down.

If one considers the law degree to be property and shareable under the *Marital Property Act*, one has to take into account the influence of the degree on the future earning capacity, which will decrease over the years and will be replaced by the work experience of the degree-holder. This has to be taken into consideration when valuing a career asset.

Figure 1 shows Jim's higher earning capacity due to his law degree in comparison to his earning capacity with a college degree and the decrease in its influence over the years.

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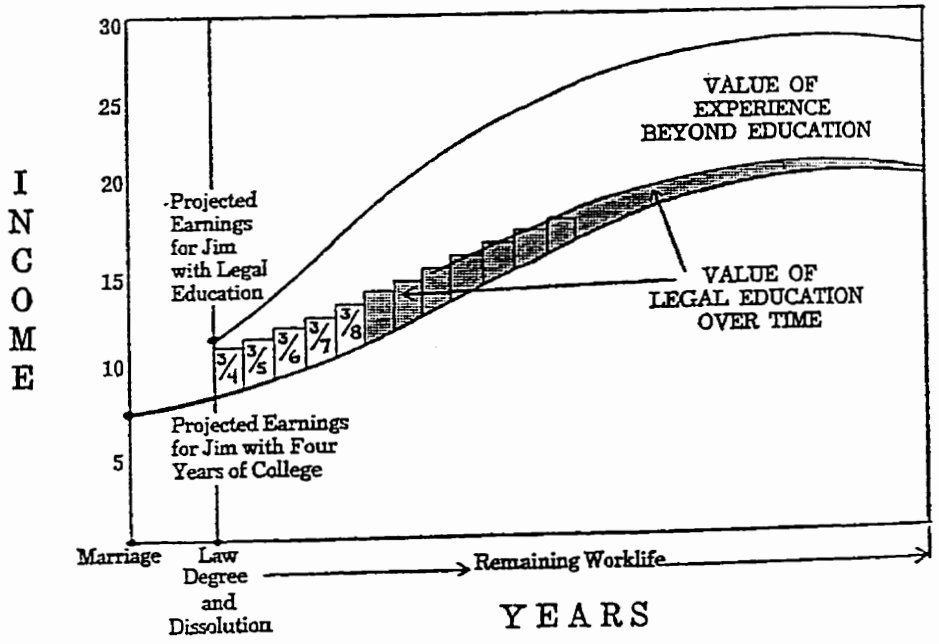
[718]) T.D. Schaefer, "Comments: The Interest of the Community in a Professional Education" (1973-74) 10 Calif. Western L.Rev. 590 at 610.

Figure 1[719]



[719]) *Ibid.*

APPENDIX B

Paragraphs of the German Civil Code[720]

§ 242. [Performance according to good faith] The Debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.

§ 812. [Principle]
(1) A person who, through an act performed by another, or in any other manner, acquires something at the expense of the latter without any legal ground, is bound to return it to him. This obligation subsists even if the legal ground subsequently disappears or the result intended to be produced by an act to be performed pursuant to the legal transaction is not produced.
(2) Recognition of the existence or non-existence of a debt, if made under a contract, is also deemed to be an act of performance.

§ 813. [Fulfilment despite defense]
(1) What was done with the object of fulfilling an obligation may be demanded back even if there was a defense to the claim thereby the enforcement of the claim was permanently barred. The provision of § 222(2) remains unaffected.
(2) If an obligation due on a certain date is fulfilled in advance, the right to demand return is barred; the discounting of interim interest may not be demanded.

§ 814. [Knowledge of debt not owed; moral duty and duty of common decency] What was done with an object of fulfilling an obligation may not be demanded back if the person performing knew that he was not bound to effect the performance, or if the performance was in compliance with a moral duty, or for the sake of common decency.

§ 815. [Non-occurrence of result] The right to demand return on the grounds of the non-occurrence of the result intended to be produced by what was done, is barred, if the production of the result was impossible from the beginning, and the person performing knew this, or if he has prevented the occurrence of the result in bad faith.

§ 816. [Disposition by person with title]
(1) If a person without title to an object makes a disposition of it which is binding upon the person having title he is bound to hand over the latter what he has obtained by the disposition. If the disposition is made gratuitously the same obligation is imposed upon the person who acquires the legal advantage directly through the disposition.
(2) If an act of performance is done for the benefit of a person not entitled thereto, the former is bound to hand over the latter the value of such performance.

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[720]) S.L. Goren, *The German Civil Code* (Littleton, Col.: F.B. Rothman & Co., 1994).

§ 817. [Violation of law or public policy] If the purpose of an act of performance was specified in such a manner that its acceptance by the recipient constitutes an infringement of a statutory prohibition or is contrary to public policy, the recipient is bound to make restitution. The claim for return is barred if the person performing has committed a similar infringement, unless the performance consisted in entering into an obligation; what has been giving for the performance of such an obligation may not be demanded back.

§ 818. [Extent of claim of enrichment]
(1) The obligation to return extends to emoluments derived, and to whatever the recipient acquires either by virtue of a right obtained by him, or as compensation for the destruction, damage or deprivation of the object obtained.
(2) If the return is impossible on account of the nature of the object obtained, or if the recipient for any other reason is not in a position to make the return, he shall make good the value.
(3) The obligation to return or to make good value is excluded where the recipient is no longer enriched.
(4) After the date an action is pending the recipient is liable under the general provisions.

§ 819. [Increased liability in case of bad faith and infringement of law or public policy]
(1) If the recipient knows of the absence of the legal ground at the time of the receipt, or if he subsequently learns of it, he is bound to return from the time of the receipt or of the acquisition of the knowledge as if an action on the claim for return were pending at that time.
(2) If the recipient, by the acceptance of an act of performance, infringes a statutory prohibition or acts contrary to public policy, he is bound in the same manner after the receipt of the performance.

§ 820. [Increased liability in cases of uncertainty of production of result]
(1) If a result was intended to be produced by an act of performance, and if the production of such a result was, according to the contents of the legal transaction, regarded as doubtful, the recipient is, where the result is not produced, bound to return in the same manner as if the action were pending on the right to demand return at the time of the receipt. The same applies if the performance was made on a legal ground whose disappearance was regarded as possible according to the contents of the legal transaction, and the legal ground disappears.
(2) The recipient is bound to pay interest only from the time at which he learns that the result has been produced, or that the legal ground disappeared; for the return of emoluments he is not bound insofar as he is no longer enriched at that time.

§ 821. [Claim of enrichment] A person who incurs an obligation without legal ground may refuse performance, even if the claim for release from the obligation has been barred by prescription.

§ 822. [Third party's duty to return] If the recipient transfers the thing acquired gratuitously to a third party, and if in consequence of this obligation of the recipient for return of the enrichment is excluded, the third party is bound to return the enrichment as if he had received it from the creditor without legal ground.

§ 847. [Money for pain]
(1) In the case of injury to the body or health, or in case of deprivation of liberty, the injured person may also demand fair compensation in money for damage which is not damage to property.
(2) A similar claim belongs to a woman, against whom an immoral crime or offense is committed, or who is induced by fraud, by threats or by abuse of a relationship or dependence to permit extra-marital cohabitation.

§ 1360. [Obligation to support the family] The spouses are mutually obliged adequately to support the family from their work and property. If the management of the household is entrusted to one of the spouses, his obligation to contribute to the support of the family from his work is as a rule fulfilled by managing the household.

§ 1363. [Community of accrued gains]
(1) The matrimonial property regime in which spouses live is one of community of accrued gains unless they agreed otherwise by marriage contract.
(2) The property of the husband and the property of the wife will not become joint property of the spouses; this also applies to property acquired by a spouse after entering the marriage. Gains made by the spouses during the marriage shall, however, be equalised if the community of accrued gains comes to an end.

§ 1364. [Independent management of property] Each spouse manages his property independently; he is, however, limited in the management of his property according to the dispositions of the following provisions.

§ 1365. [Limitation on right to disposal of property in its entirety]
(1) A spouse enter an obligation to dispose of his property in its entity only with the consent of the other spouse. If he entered such obligation without the consent of the other spouse he may fulfil such obligation if the other spouse gives his consent.
(2) If such a transaction conforms to the principle of regular management, the Guardianship Court may, upon application by one spouse, substitute the consent of the other spouse where the latter unreasonably refuses to give it, or by reason of sickness or

absence is prevented from making a declaration, and delay entails jeopardy.

§ 1366. [Ratification of contracts]
(1) A contract concluded by a spouse without the consent of the other spouse is effective if the latter ratifies it.
(2) A third party is entitled to revoke the contract up until ratification. If he knew that the husband or wife was married, he may revoke only if the husband or wife had untruthfully stated that the other spouse had consented; he may not revoke even in such a case, if at the time of concluding the contract it was known to him that the other spouse had not ratified.
(3) If a third party demands that a spouse produce the required ratification of the other spouse, only the latter may declare ratification to the third party; if he had already made the declaration to the other spouse prior to the demand, that declaration is ineffective. The ratification may be declared only within two weeks from the receipt of the demand; if not given, it is deemed refused. If the Guardianship Court orders a substitute ratification, its decision is valid only if the spouse notifies the third party thereof within two weeks time-limit; otherwise the ratification is deemed refused.
(4) If ratification is refused, the contract is ineffective.

§ 1369. [Disposition of household items]
(1) A spouse may only dispose of items in the conjugal household belonging to him, and may only undertake an obligation for such disposition, if the other spouse consents thereof.
(2) The Guardianship Court may, upon the application of one spouse, substitute the consent of the other spouse if the latter unreasonably refuses it, or by reason of sickness or absence is prevented from making a declaration.
(3) The provisions of §§ 1366 to 1368 apply *mutatis mutandis*.

§ 1371. [Equalisation of accrued gains on death]
(1) If the matrimonial regime is ended by reason of the death of one of the spouses, the equalisation of accrued gains is achieved by increasing the statutory share in the estate of the surviving spouse by one quarter of the estate; in this regard it is irrelevant whether the spouse made a gain in the individual case.
(2) if the surviving spouse is neither the heir nor the recipient of a legacy, then he is entitled to demand the equalisation of accrued gains according to the provisions of §§ 1373 to 1383. 1390; the compulsory portion of the surviving spouse or of another person entitled to a compulsory is in this case determined according to the statutory share in the estate of the spouse without taking into account the increase.
(3) if the surviving spouse disclaims the inheritance, he is entitled to demand, in addition to equalisation of gains, the compulsory portion even although to the provisions of succession law it would not be due to him; this does not apply when he has waived his right to his statutory share in the estate or his

compulsory portion by contract with his spouse.
(4) If the deceased spouse has descendants entitled to inherit, who are not descendants of the marriage which was dissolved by reason of the death of such spouse, or if there exist descendants entitled to substantial rights in the estate, the surviving spouse is obliged to grant these descendants the means for appropriate education, if and to the extent they are in need thereof, from the additional quarter granted under (1).

§ 1372. [Equalisation of accrued gains in other cases] If the matrimonial regime is terminated otherwise than by death of a spouse, the accrued gains shall be equalised according to the provisions of §§ 1373 to 1390.

§ 1373. [The concept of accrued gains] Accrued gains is the amount by which the final assets of a spouse exceed his initial assets.

§ 1374. [Initial assets]
(1) Initial assets are the assets belonging to a spouse, after deduction of his obligations, at the beginning of the matrimonial regime; obligations my be deducted only to the extent of the property.
(2) Assets which are acquired by a spouse after the beginning of the matrimonial regime, as a result of death or consideration of a prospective right to inheritance, through gift or as furnishings, shall be included in the initial assets, after deduction of obligations, insofar as the circumstances do not warrant their inclusion in the income.

§1375. [Final assets]
(1) Final assets are the assets belonging to a spouse, after deduction of obligations, at the time of termination of the matrimonial regime. obligations can be deducted if under the provisions of § 1390 there are claims against third parties, even to the extent that these exceed the amount of the assets.
(2) The final assets of a spouse include amounts by which such assets were diminished due to the fact that after the beginning of the matrimonial regime a spouse:
1. made gratuitous dispositions by which he did not comply with a moral obligation or one which arose from principle of common decency;
2. wasted assets; or
3. implemented transactions with intent to cause detriment to the other spouse.
(3) The amount of property diminution shall not be included in the final assets if it occurred at least ten years before the termination of the matrimonial regime or if the other spouse had consented to such gratuitous disposition or wasting of property.

§ 1376. [Valuation of initial and final assets]
(1) The value for the computation of initial assets shall be, at the beginning of the matrimonial property regime, the value of the assets existing at that time, and for assets to be included in the initial assets, the value at the time of acquisition.
(2) The value for the computation of final assets shall be, at the termination of the matrimonial regime, the value of the assets existing at that time, and for diminution in assets to be included in the computation of the final assets, the value at the time of such diminution.
(3) The foregoing provisions apply *mutatis mutandis* to the appraisal of obligations.
(4) Any agricultural or forestry asset which is to be taken into consideration for the computation of initial or of final assets shall be appraised at the value of its produce; the provision of § 2049(2) shall apply.

§ 1377. [Inventory of initial assets]
(1) If the spouses jointly established, in an inventory, the content and the value of the initial assets of one of the spouses and the items to be added to such assets, it will be presumed in the relationship of the spouses to each other that the inventory is accurate.
(2) Each spouse may demand the cooperation of the other spouse in the drawing up of the inventory. For the drawing up of the inventory the provisions of § 1035 concerning usufruct are applicable. Each spouse may employ at his expense an expert for establishing the value of the items of assets and of obligations.
(3) Insofar as no inventory was drawn up, it shall be presumed that the final assets of a spouse represent his accrued gains.

§ 1378. [Equalisation claim]
(1) If the accrued gains of one spouse exceed the accrued gains of the other, the other is entitled to half of the surplus as an equalisation claim.
(2) The amount of equalisation claim shall be limited to the value of the assets existing at the termination of the matrimonial regime, after deduction of the obligations.
(3) The equalisation claim arises upon the termination of the matrimonial regime and from this time on it is subject to inheritance and is transferable. An agreement made by the spouses during proceedings for the dissolution of their marriage is dissolved requires notarization; § 127 shall apply also to an agreement which is entered in the record of proceedings before a trial court in a matrimonial action, otherwise neither spouse may oblige himself to dispose of his equalisation claim prior to the termination of the matrimonial regime.
(4) The equalisation claim prescribes in three years; the period begins to run from the time when it becomes known to the spouse that the matrimonial regime is terminated. However, the claim prescribes at the latest thirty years after the termination of the matrimonial regime. If the matrimonial regime is terminated by

death of a spouse, in other respects the same provisions shall be applicable which are valid for the prescription of a claim of compulsory portion.

§ 1379. [Duty to give information upon termination of matrimonial regime]
(1) Upon the termination of the matrimonial regime, each spouse is obliged to furnish information on the content of his final assets to the other spouse. Each spouse may demand to be present at the drawing up of the inventory to which he is entitled under § 260, and that he be furnished with information regarding the value of the assets and obligations. He may also demand that the inventory be drawn up at his expense by the competent authorities or by a competent official or notary.
(2) If a spouse petitioned for divorce or filed a claim for the dissolution or annulment of marriage, (1) is applicable *mutatis mutandis*.

§ 1380. [Circumstances of equalisation claim]
(1) An equalisation claim of a spouse shall take into account what was received by him through a legal transaction *inter vivos* from the other spouse with an understanding that it should be taken into account in the equalisation claim. In case of doubt it shall be presumed that dispositions should be taken into account if their value exceeds the value of occasional gifts which are customary according to the living standards of the spouses.
(2) When the equalisation claim is calculated the value of the disposition shall be included in the accrued gains of the spouse who made such disposition. The value is established as of the date of the disposition.

§ 1381. [Refusal on grounds of gross inequity]
(1) The debtor may refuse to fulfil an equalisation claim to the extent that the equalisation of accrued gains would be grossly inequitable in the circumstances of the case.
(2) Gross inequity can exist particularly if the spouse who made trivial gains over a considerable period negligently failed to carry out economic obligations which are inherent in marital relations.

§ 1383. [Transfer of items of property]
(1) The Family Court may order, upon the application of the creditor, that the debtor transfer certain items of his property to the creditor, subject to taking the same into account in the equalization claim, if this is necessary to avoid a gross inequity to the creditor and if it can reasonably be expected of the debtor; the decision shall fix the amount to be taken into account for the equalization claim.
(2) The creditor must include in his application the description of the items of property he demands to be transferred.
(3) § 1382 (5) is applicable *mutatis mutandis*.

§ 1384. [Time of calculation in case of divorce] In case of divorce the date for calculating the amount of accrued gains will be the date of pendency of the application for divorce instead of the date of the termination of the matrimonial regime.

§ 1390. [Claims of a person entitled to equalisation against third parties]
(1) To the extent that a spouse is left without an equalisation claim under § 1378(2) as a result of the other spouse having made gratuitous dispositions to a third party with intent to cause detriment to the spouse, such third party is obliged to make restitution of property so obtained to the spouse pursuant to the provisions concerning the return of unjust enrichment, for the purpose of satisfying the unpaid equalisation claim. The third party may avoid the restitution by payment of the amount outstanding.
(2) The same provision apply for other legal transactions, if the third party had knowledge of the intent to cause detriment to the spouse.
(3) The claim prescribes three years after the termination of the matrimonial regime. If the matrimonial regimes terminates by the death of one of the spouses, the prescription will not be interrupted by reason of the fact that the claim can be forced only if the spouse has disclaimed the inheritance of a bequest.
(4) If the claim for premature equalisation payment of accrued gains or for a declaration of nullity, divorce or annulment of marriage is filed, a spouse may demand that the third party furnish security in respect of the claims arising under (1) and (2).

§ 1408. [Marriage contract; principle of freedom of contract]
(1) The spouses may regulate their property relationship through contract (marriage contract) and in particular may cancel or alter the matrimonial regime after concluding the marriage.
(2) The spouses may exclude in the marriage contract the equalisation of support. Such exclusion is ineffective when the application for divorce was entered within one year after the date of the contract.

§ 1409. [Limits of freedom of contract] The matrimonial regime may not be determined by reference to a law no longer in force or to a foreign one.

§ 1410. [Form of a marriage contract] The marriage contract must be concluded in the simultaneous presence of both parties and recorded by a notary.

§ 1412. [Effect as against third parties]
(1) If the spouses excluded or modified the statutory matrimonial regime, they may not invoke this to affect the validity of a legal transaction made between them and a third party unless the marriage contract was registered in the Register of Marital Property of the competent District Court or was known to the third party at the

time of carrying out the transaction; contesting an enforceable judgement, given in a case between one of the spouses and the third party, is permissible only if the marriage contract was registered or known to the third party at the time the action was pending.
(2) The same applies if the spouses by marriage contract eliminate or modify their marital property arrangements registered in the Register of Marital Property.

§ 1413. [Revocation of relinquishment of management of property] If a spouse relinquishes the management of his property to the other spouse, the right to revoke such relinquishment at any time may be excluded or limited only by marriage contract; a revocation based on a serious ground remains nevertheless permissible.

§ 1414. [Occurrence of separation of property] If the spouses exclude or eliminate the statutory matrimonial regime, separation of property occurs, except if their marriage contract otherwise provides. The same applies if the equalisation of accrued gains or the equalisation of support is excluded or the community of property is eliminated.

§ 1415. [Agreement by marriage contract] If the spouses agree by marriage contract to have community of property, the following provisions are applicable.

§1416. [Common property]
(1) The property of the husband and the property of the wife become through community of property the joint property of both spouses (common property). Property which comes into the ownership of husband or wife during the period of community of property also belongs to the common property.
(2) Individual items of property become joint property; there is no need to transfer them by legal transaction.
(3) If a right which is registered in the Land register or can be registered in the Land Register becomes a joint one, each spouse is entitled to demand from the other that he cooperate in correcting the Land Register. Analogous provisions apply when a right, which is registered in the ship register or in the ship-construction register, becomes common property.

§ 1417. [Special property]
(1) Special property is excluded from common property.
(2) Special property comprises items which cannot be transferred by legal transaction.
(3) Each spouse manages his special property independently. He manages it for the account of the common property.

§ 1418. [Separate property]
(1) Separate property is excluded from common property.
(2) Separate property comprises the items:
1. which have been declared by marriage contract as separate property of one spouse;

2. which a spouse receives *mortis causa* or which are gratuitously transferred to him by a third party, if the testator by testamentary disposition, or the third party upon making the transfer, specified that the acquisition be separate property;

3. which a spouse receives as the result of a right belonging to his separate property or as compensation for the destruction, damage, or deprivation of an item belonging to separate property, or obtains through a legal transaction which is related to separate property.

(3) Each spouse manages the separate property individually. He manages it for his own account.

(4) If items of property are included in separate property, this can be effectively pleaded against third persons only pursuant to § 1412.

§ 1419. [Joint ownership]

(1) A spouse may not dispose of his part of the common property nor of individual items which belong to common property; he is not entitled to demand division.

(2) A debtor may set off a claim belonging to the common property only by a claim, the discharge of which he is entitled to demand from the common property.

§ 1420. [Support of the family] For the support of the family, incoming originating from the common property is to be used before income originating from the separate property, and the capital of the common property is to be used before the capital of the separate property or of the special property.

§ 1421. [Management of common property] The spouses should determine in the marriage contract in which they agree to establish community of property, whether the common property will be managed by the husband or by the wife or by them jointly. If the marriage contract contains no such determination, then the spouses manage the common property jointly.

§ 1569. [Claim for maintenance] If after the divorce one of the spouses is unable to provide for his maintenance, he is entitled to claim maintenance from the other spouse in accordance with the following provisions.

§ 1570. [Maintenance for caring for a child] A divorced spouse may demand maintenance from the other as long and to the extent that he cannot be expected to pursue gainful employment by reason of having to care for or to educate a child common to both.

§ 1571. [Maintenance for aged spouse] A divorced spouse can claim maintenance from the other insofar as he cannot be gainfully employed on account of his age on the date of:

1. the divorce;

2. the contemplation of the care for the education of a common child; or

3. the cessation of the conditions for a maintenance claim pursuant to §§ 1572 to 1573.

§ 1572. [Maintenance for sickness or infirmity] A divorced spouse can demand maintenance from the other insofar and so long as he cannot be expected to be gainfully employed on account of a physical or mental sickness or other infirmity or weakness on the date of:

1. the divorce;
2. the contemplation of the care or education of a common child;
3. the contemplation of his education, continuing education or retraining;
4. the cessation of the conditions for a maintenance claim pursuant to § 1573.

§ 1573. [Maintenance until appropriate employment is found]

(1) So far as a divorced spouse is not entitled to claim maintenance under §§ 1570 to 1572, he can nevertheless demand maintenance, as long and to such extent as he is unable to secure suitable gainful employment after the divorce.

(2) If the income from suitable gainful is not sufficient for full support (§ 1578), he can, insofar as he is not already entitled to a maintenance claim under §§ 1570 to 1572, demand the difference between the income and the full maintenance.

(3) Subsection (1) and (2) are analogously applicable when maintenance was due under §§ 1570 to 1572 and 1575, but the conditions required by these provisions have ceased.

(4) The divorced spouse can also demand maintenance when the income from a suitable gainful employment ceases, because, his efforts notwithstanding, he failed to secure his maintenance permanently, after the divorce. If he succeeds in securing a part of his maintenance permanently, he can demand the difference between the permanent partial maintenance and the full maintenance.

(5) The maintenance claim under subsection (1) to (4) may be limited in time, insofar as, especially taking into account the duration of the marriage as well as the structure of household management and gainful activity, an indefinite maintenance claim would be inequitable; as a rule this does not apply if the person entitled to maintenance alone has had or has the care and control of a common child or preponderantly so otherwise than only temporarily. The duration for care of the child is deemed equal to the duration of the marriage.

§ 1574. [Suitable gainful employment]

(1) The divorced spouse is not required to engage in any gainful employment unless it is suitable for him.

(2) A gainful employment is suitable only if it is appropriate to the ability, age, and health of the divorced spouse and also to his marital living standard; in considering the marital living standard, the length of the marriage and the time required for bringing up or educating a common child shall be taken into

account.
(3) To the extent that it is necessary for engaging in a suitable gainful employment, the divorced spouse is obligated to accept education, further education or re-training if a successful completion of his education is expected.

§ 1575. [Education, further education or re-training]
(1) a divorced spouse, who in the expectation of the marriage or during the marriage omitted to acquire or interrupted formal education or occupational training, can demand maintenance from the other spouse if he as soon as possible undertakes this or another appropriate education in order to obtain a suitable employment which secures permanent self support, and a successful conclusion of the education can be expected. This right continues only during the period which is customary for the completion of such education; delays in the education caused by marital circumstances must be taken into account.
(2) The same is applicable if the divorced spouse undertakes further education or re-training for the elimination of disadvantages which arose by reason of the marriage.
(3) If after the completion of the education, further education or retraining, the divorced spouse demands maintenance under § 1573, the higher educational status attained shall not be taken into account when the gainful employment suitable for him is determined (§ 1574(2)).

§ 1576. [Maintenance on the ground of equity] A divorced spouse can demand maintenance from the other spouse insofar and as long as he cannot be expected to engage in gainful employment for other serious reasons and the denial of maintenance, after taking into account the interests of both spouses, would be grossly inequitable. Serious reasons may not be taken into account merely because they caused the failure of the marriage.

§ 1577. [Income and assets of the person entitled to maintenance]
(1) The divorced spouse is not entitled to demand maintenance under §§ 1570 to 1573, 1575 and 1576, as long and to such extent as he is able to support himself from his own income and assets.
(2) Income shall not be taken into account so far as the obligee does not defray the full amount of the maintenance (§ 1578). Income which exceeds the full maintenance shall not be taken into account to the extent that it is deemed equitable considering the mutual financial circumstances of the parties.
(3) The obligor is not required to convert the assets so far as the conversion would be uneconomical or inequitable considering the mutual financial circumstances of the parties.
(4) If at the time of the divorce it was expected that the maintenance of the obligor would be permanently furnished from his assets, but the assets were subsequently lost, no claim for maintenance exists. This is not applicable if at the time of the loss of assets no gainful activity could be expected of the spouse by reason of having to care for the upbringing up of a common

child.

§ 1578. [Amount of maintenance; necessities]
(1) The amount of maintenance is determined according to the marital circumstances. The assessment of the maintenance claim according to the marital circumstances may be limited in time and reduced thereafter to reasonable necessities of life, insofar as, especially having taken into account the duration of the marriage as well as the structure of the household management and gainful activity, an indefinite assessment under the first sentence above would be inequitable; as a rule this does not apply if the person entitled to maintenance has had or has the care and control of a common child alone or preponderantly or otherwise than just temporarily. The duration of care for the child is deemed equal to the duration of the marriage. The maintenance includes all necessities for life.
(2) The expenses for a suitable insurance for the event of ill health as well as the expenses of education or occupational training, of continuing education or re-education pursuant to §§ 1574 and 1575 also form part of necessities of life.
(3) If the divorced spouse is entitled to demand maintenance under §§ 1570 to 1573 or § 1576, necessities of life include also the expenses of a suitable insurance in the event of old age as well as disability preventing professional or employment activities.

§ 1579. [Grossly inequitable maintenance claim] a claim for maintenance shall be denied, reduced or limited in time insofar as burdening the obligee would be grossly inequitable also after protecting the interests of a common child entrusted to the person entitled for care or bringing up, because;

1. the marriage was of short duration; the duration of the marriage is deemed equal to the period during which the person entitled could demand on account of care or upbringing of a common child under § 1570;
2. the person entitled is guilty of a crime or another serious intentional offense against the obligee or against a close relative of the obligee;
3. the person entitled wilfully caused his own destitution;
4. the person entitled wilfully disregarded important property interests of the obligee;
5. before the separation the person entitled grossly violated his duty to contribute to the support of the family during a protracted period;
6. the person entitled is solely culpable for an obviously serious misconduct against the obligee;
7. there is some other serious ground, which is as grave as the grounds mentioned in nos. 1 to 6.

§ 1580. [Duty of disclosure] Upon demand the divorced spouses are mutually obligated to disclose their income and assets. § 1605 shall apply *mutatis mutandis*.

§ 1581. [Maintenance according to ability to pay] If the obligee is unable to pay maintenance to the claimant, due to his income and financial circumstances and also taking into account his additional obligations, without endangering his own suitable self support, h e is required to pay maintenance only to such extent as is equitable considering the needs and income and financial circumstances of the divorced spouses. He is not required to realize his assets, so far as realization would be uneconomical or inequitable in view of the financial circumstances of both parties.

§ 1582. [Coincidence of claim of a divorced and a new spouse]
(1) When the amount of maintenance due to a divorced spouse is ascertained in a case under § 1581, the divorced spouse has precedence over a new spouse provided that the latter would not be entitled to maintenance by the analogous application of §§ 1569 to 1574, §§ 1576, 1577(1). If the new spouse would have a claim for maintenance, the divorced spouse still has precedence if he is entitled to maintenance under § 1570 or § 1576 or if the marriage with the divorced spouse was of long duration. The duration of the marriage is considered equal to the period during which a spouse was entitled to maintenance owing to the care of and education of a common child pursuant to § 1570.
(2) In other respects § 1609 remains unaffected.

§ 1583. [Community of property with new spouse] If a remarried spouse obligee lives in marital community of property with his new spouse, § 1604 shall apply *mutatis mutandis*.

§ 1584. [Ranking of several obligees] The divorced spouse who is obliged to provide maintenance is liable ahead of the relatives of the obligor. However, so far as the obligee is unable to pay, the relatives of the divorced spouse are liable ahead of the divorced spouse. § 1607(2) shall apply *mutatis mutandis*.

§ 1585. [Manner of maintenance payment]
(1) The current maintenance is to be provided by payment in cash. The payment shall be made each month in advance. The obligee owes the full monthly payment even if the right to maintenance ceases during the month due to remarriage or death of the claimant.
(2) The person entitled may demand a capital settlement instead of periodic payments, if there is serious reason therefor and the obligee would not be inequitably burdened thereby.

§ 1585a. [Furnishing security]
(1) The obligee must furnish security if required to do so. The obligation to furnish security ceases if there is no reason to assume that the payment of maintenance is in jeopardy or if the obligee would be inequitably burdened by having furnished security. The amount to be furnished as security shall not exceed the amount equal to the maintenance payments due for a year, insofar as owing to special circumstances of the case a higher security appears appropriate.

(2) The manner of furnishing security is determined according to the circumstances; the limitation under § 232 are not applicable.

§ 1585b. [Retrospective maintenance]
(1) The person entitled may demand maintenance for the past if there is an exceptional necessity (§ 1613(2)).
(2) Otherwise the person entitled may demand performance or damages for non-performance in the past only from the time when the obligee defaulted or when the claim for maintenance became pending in the court. Performance or damages for non-performance in respect of a period preceding pendency by more than a years may be claimed only to the extent that it can be presumed that the debtor intentionally avoided the payment.

§ 1585c. [Maintenance agreements] The spouses may conclude agreements as to the maintenance obligations for the period after divorce.

§ 1586. [Remarriage or death of person entitled]
(1) The claim for maintenance becomes extinguished on the remarriage or death of the person entitled.
(2) Claims for performance or for damages on account of non-performance in the past remain valid. The same is applicable to the claim for the payment due in the month during which the remarriage or death occurred.

§ 1586a. [Revival of maintenance claim]
(1) If a divorced spouse contracts a new marriage and this marriage is also dissolved, he may demand maintenance from the previous spouses under § 1570, if he is charged with the care or upbringing of a common child from the previous marriage. If the care or upbringing ends, he may demand maintenance under §§ 1571 to 1573, 1575.
(2) The spouse from the marriage which was dissolved on a later date is liable before the spouse of the marriage dissolved on an earlier date.

§ 1586b. [Death of obligee]
(1) Upon the death of the obligee the obligation to provide maintenance passes to the heirs as a liability of the estate. The limitations mentioned in § 1581 cease. The heirs is however not liable over and above the amount equal to the compulsory portion which would be due to the person entitled had there been no divorce.
(2) For the purpose of calculating the compulsory portion, peculiarities resulting from the property status which obtained between the divorced spouses shall not be considered.

§ 1587. [Conditions]
(1) An equalisation of support occurs between the divorced spouses to the extent that expectation or promises of a pension on the grounds of age or disability or incapacity have been established or

maintained for them or one of them during the period of marriage in the manner stated in § 1587a(2). Expectations or promises which have been established or maintained without the aid of the property or without the work of the spouses are not taken into account.
(2) The period of marriage within the meaning of the provisions concerning the equalisation of support is the time between the first day of the month in which the marriage took place and the last day of the month which precedes the one during which the action for divorce was filed.
(3) The ensuring provisions find exclusive application to the expectations and promises of pensions regarding which equalisation of support occurs; provisions concerning property rights shall not apply.

§ 1587a [Spouse's duty of equalisation; maintenance claims required to be equalised]
(1) The spouse who has the higher income expectation or prospect has the obligation to effect the equalisation. The claimant spouse is entitled to one half of the difference in value.
(2) For the determination of the difference in value the following shall be taken as a basis;

1. In case of a pension or expected pension from public service or from an employment contract with a right to a pension under the provisions or principles governing public service, the amount to be taken into account is what would result as the pension at the time of filing the action for divorce. Moreover the time already earned towards a pension up to this date is to be augmented by the time which will elapse until reaching the age limit (total period). The determining value is that part of the pension which corresponds to the ratio between the length of the pensionable service time falling within the duration of the marriage and the total period. Increase conditioned on accidental injuries shall not be taken into account. To the extent emoluments of retired professors are equivalent to the receipt of a pension and the provisions concerning public service apply *mutatis mutandis* to the time countable towards a pension.

2. In case of annuities or expected annuities from statutory annuity insurance, the amount to be taken into account is that which would result as old age pension at the termination of the marriage from the payment periods falling within the subsistence of the marriage without taking into account the increase factor.

3. In case of payments, expected pensions, or prospects of receipts of old age pension from the enterprise:

a) if at the time of filing the action for divorce the connection with the enterprise is continuing, the part of the pension which is taken as a basis is the one which corresponds to the ratio between the period of being a member of the enterprise within the subsistence of the marriage and the period from the beginning of being a member in the enterprise to the date of prospective age limit provided by the pension's rules, moreover intervals which count as membership in the enterprise shall be taken into account; the pension is determined according to the

amount which would result upon reaching the fixed age limit as prescribed by the pension rules, if the assessment basis would have been determined at the time of filing the action for divorce;

b) if the membership in the enterprise is terminated prior to the filing of the action for divorce, the part of the earned pension to be taken into account is that one corresponds to the ratio between the length of the membership in the enterprise during the subsistence of the marriage and the total length of membership time in the enterprise. In this case the periods counted as equivalent to belonging to the enterprise shall also be taken into account. This is not applicable to such payments or expected payments from an insurance relationship creating additional pension arrangements in public service to which number 4c) is applicable. The provisions on contractual pension settlements shall apply to benefit rights or prospective old age pensions by enterprise which have not reached maturity on the date of issuance of the judgement.

4. In case of other annuities or other similar recurring payments which are intended to be support for old age, disability or incapacity for professional or occupational activity, or expectations or prospects thereof, the basis shall be:

a) if the annuity or payment is measured according to the length of a chargeable period, the amount of pension payment which would result from that part of the chargeable period which would fall within the duration of the marriage, if the pension had matured on the day of filing the action for divorce;

b) if the annuity or payment is not measured solely or entirely according to the length of the chargeable period or pursuant to the rule in d), that part of the ascertainable full annuity or payment which corresponds to the ratio between the period to betaken into account when this annuity or pension is ascertained, and which falls within the duration of the marriage, and the presumable full period reckoned for reaching the age fixed for the start of the retirement benefit;

c) if the annuity or payment is measured according to a part of the paid up contributions made during the marriage, the amount which would result from the contributions paid during the marriage as if filing the action for divorce and the maturity would coincide.

d) if the annuity is determined according to the rules applicable to statutory annuity insurance, that part of the retirement annuity which results at the time of the filing of the divorce action corresponding to the ratio between the whole number of accountable years of insurance.

5. In case of annuities or prospective annuities from an insurance contract made for the purpose of providing a pension for the insured, the applicable principle is:

a) In case of annuities or prospective premium payments beyond the date of filing the action for divorce , to adopt as a base the amount of annuity which would be paid by the insurer after conversion into a premium free insurance had the case of loss occurred on the above date. If there were premium payments made for the insurance during a period preceding the marriage, the amount of

annuity shall be reduced accordingly;

b) if there is no obligation to pay premium beyond the date of filing the action for divorce, to adopt as a base the amount of annuity which would be paid by the insurer, had the case of loss occurred on the above date. Letter a) sent. 2 is applicable.

(3) In case of pensions or rights to pensions or prospective pensions under subsection (2) no. 4 above, the value of which does not increase in the same or substantially same manner as the value of expected pensions mentioned in subsection (2) nos. 1 and 2 above, and also in the case mentioned in subsection (2) no. 5 above, the following shall apply:

1. If the payments are made out of a cover fund or a comparable cover reserve, the calculation shall be based on the standard old age pension which would result, if the part of the cover reserve falling within this period had been paid as contributions to a statutory annuity insurance;

2. If the payments are not or not exclusively made out of the cover fund or a comparable cover reserve, the calculation shall be based on the standard old age pension, which would result if the cash value of the partial pension insurance would be determined as of the date of filing the action for divorce and paid in as contribution to a statutory annuity insurance. The rules of determination of cash value are issued by the Federal Government with the concurrence of the Federal Council.

(4) Subsection (3) no. 2 is applicable to payments or future benefits expected payments from pensions funds of enterprises pursuant to subsection (2) no. 3.

(5) If the annuity is not measured according to the valuation guidelines mentioned in the preceding subsections, the Family Court shall determine the annuity income subject to equalisation by analogous application of the preceding rules in an equitable manner.

(6) If one of the spouses is entitled to several expected future pension benefits within the meaning of subsection (2) no. 1, the total payments resulting after the application of the rules concerning periods of non-accrual and the total length of pensionable employment falling within the marriage shall form the base for computing the value thereof; the procedure is analogous if the pension would be subject to rules governing non-accrual, or accrual periods, on account of being an annuity or a similar recurring payment.

(7) For the purpose of the valuation pursuant to subsection (2), no consideration shall be given to the fact that a waiting period, minimum period of insurance coverage, or similar time-based conditions are not yet fulfilled at the time of filing the action for divorce; subsection (2) no. 3, sent. 3 remains unaffected. this is not applicable to such periods upon which the pension for minimal income earners in statutory annuity insurance depends.

(8) In calculating the value, supplement payments included in a pension, annuity or payment which are paid on the basis of subsisting marriage as well as allowances for children and similar

family based components shall be excluded.

§ 1587b. [Transfer and determination of pension rights by the Family Court]

(1) If a spouse has during the marriage acquired annuity rights in a statutory annuity insurance within the meaning of § 1587a(2) no. 2 and these exceed the prospective pension rights within the meaning of § 1587a(2) nos. 1 and 2, which the other spouse acquired during the marriage, the Family Court shall transfer half of the difference in the value of these pension rights. The rest is governed by the rules on statutory annuity insurance.

(2) If during the marriage a spouse acquired an annuity right within the meaning of § 1587a(2) no. 1 as against a corporation, institution or foundation of public law, one of their associations including the central association, or one of their unions, and this annuity right alone or with an expected pension within the meaning of § 1587a(2) no. 2 exceeds the expected pension annuities within the meaning of § 1587a(2) nos. 1 and 2 which the other spouse acquired during the marriage, the Family Court shall adopt as the difference in value, with regard to these pension rights in statutory annuity insurance, one half of the amount still remaining after having applied subsection (1). as for the rest, it is governed by the rules on statutory annuity insurance.

(3) Insofar as the equalisation cannot be accomplished in the manner laid down in subsection (1) and (2), the spouse required to make the equalisation shall pay the spouse entitled, as contributions for the creation of an annuity right to a specified pension in a statutory annuity insurance, the amount necessary to equalise the difference in value; this is applicable only as long as the person entitled has not yet fulfilled the requirements for the eventual receipt of old age pension from a statutory annuity insurance. The rest is governed by the rules under subsection (1) or must be established under subsection (2) are required to be included in the equalisation; when the accounts are settled there shall be only a one-time equalisation undertaken.

(4) If the transfer or establishment of annuity rights in statutory annuity insurances would presumably work to the detriment of the person entitled, or if the equalisation of pensions in this manner were uneconomical in the prevailing circumstances, the Family Court shall settle the equalisation in a different manner upon petition by one of the parties; § 1587a(1) sent. 2 applies *mutatis mutandis*.

(5) The monthly payments towards the pension right in the statutory annuity insurance funds, which are transferable pursuant to subsection (1) or required to be established pursuant to subsection (2) and (3), together with the monthly payment for already established pension rights in the statutory pension rights in the statutory pension funds of spouses entitled to equalisation, may not exceed the amount specified as the maximum amount in § 76(2) sent. 3 of the *Book Six of the Social Security Code (Sozialgesetzbuch)*.

§ 1587c. [Exclusion of equalisation support] There shall not be an equalisation of support:

1. so far as the making of a demand on the debtor having regard to the circumstances of the parties, especially the acquisition of property by each during the marriage or in connection with the divorce would be grossly inequitable; hereby circumstances may not be taken into consideration solely on the ground that they led to the failure of the marriage;

2. so far as the creditor has, in expectation of the divorce or after the divorce, by his act or omission, caused the pension rights or prospective support due to him, and liable to equalisation under § 1587(1), to fail to materialise or to be lost;

3. so far as during the marriage the creditor has for a long period grossly violated his duty to contribute to the maintenance of the family.

§ 1587d. [Suspension of the obligation to establish pension rights]
(1) The Family Court may upon application of the debtor order that the obligation under § 1587b(3) be suspended, so far as by such payment the debtor would be inequitably burdened, especially rendered incapable of supporting himself in a proper manner and fulfilling his legal obligation with regard to support of the divorced spouse and equal ranking descendants. If the debtor is able to make payments by instalments, the court shall also fix the amount of instalment payments incumbent upon the debtor.
(2) The Family Court may upon application set aside or alter a final judgement, if the circumstances have materially changed after the divorce.

§ 1587e. [Duty to furnish information; extinction of claim for equalisation]
(1) § 1580 applies *mutatis mutandis* to the equalisation of pensions under § 1587b.
(2) The equalisation claim becomes extinct with the death of the creditor.
(3) the right to payments by way of contributions (§ 1587b(3)) becomes extinct as soon as contractual equalisation of support under § 1587(1) sent. 2 can be demanded.
(4) The equalisation claim does not become extinct upon the death of the debtor. It can be enforced against the heirs.

§ 1587f. [Claim for contractual equalisation of support; assumptions] In cases in which:

1. the establishment of an annuity right in a statutory annuity insurance pursuant to the provisions of § 1587b(1) sent. 1 is not possible;

2. the transfer or establishment of annuity rights in a statutory annuity insurance pursuant to the provisions of § 1587b(5) is excluded;

3. the spouse who is obliged to make the equalisation has failed to make the payments for the establishment of an annuity

right in a statutory annuity insurance incumbent upon him pursuant to § 1587b(3) first half sentence of the first sentence;

4. payments from the pension fund of an enterprise which must be included in the equalisation owing to the existence of annuity rights or prospects not yet vested at the time of the judgement;

5. the Family Court provided a settlement in the form of a contractual equalisation of support pursuant to § 1587b(4) or the spouses agreed upon the contractual equalisation of support pursuant to § 1587o, the equalisation takes place on the petition of one of the spouses pursuant to the provisions of §§ 1587g to 1587n (contractual equalisation).

§ 1587g [Right to claim annuity payments]

(1) The spouse whose equalizable pension exceeds that of the other must make periodical cash payments (equalisation payments) to the other spouse amounting at any given time to one half of the excess amount. The periodical payment may only be demanded if both spouses have obtained a pension or if the spouse obliged to make the equalisation has obtained a pension and the other spouse is unable, within the foreseeable future, to carry on a gainful activity suitable to his education and ability owing to disease or other infirmity or physical or mental feebleness, or has reached the age of sixty-five.

(2) § 1587a is applicable *mutatis mutandis* to the determination of the pension liable to equalisation. If the filing of the action for divorce has changed the value of a pension or a pension right or a prospective annuity, or if a pension or a pension right caused a prospective annuity to be lost, or gave rise to qualifications for an annuity right which have not obtained before the filing of the action, this must also be taken into account.

(3) § 1587d(2) applies *mutatis mutandis*.

§ 1587h. [Exclusion of equalisation right] A claim for equalisation pursuant to § 1587g does not arise:

1. so as the claimant is able to support himself in a manner suitable to his circumstances from his own income and his own property, and the grant of a pension equalisation would mean an inequitable hardship for the obligee considering the financial circumstances of both parties. § 1577(3) is applicable *mutatis mutandis*.

2. so far as the claimant in the expectation of the divorce or after the divorce, caused by his action or omission, a pension liable to equalisation under § 1587, to be withheld.

3. so far as the claimant during the marriage grossly and for a long period violated his obligation to contribute to the support of the family.

§ 1587i. [Assignment of pension claims]

(1) The claimant can demand from the debtor the assignment of pension right included in the equalisation up to the amount of current equalisation payments, which have fallen due or will fall due within the same period.

(2) The validity of assignment to the spouse under (1) is not contrary to the exclusion of the transferability and liability to attachment of such claims.
(3) § 1587d(2) applies *mutatis mutandis*.

§ 1587k. [Applicable provisions; extinction of equalisation claims]
(1) §§ 1580, 1585(1) sents. 2,3 and § 1587b(2), (3) are applicable *mutatis mutandis* to the equalisation claim pursuant to § 1587g(1) sent. 1.
(2) The claim becomes extinct which the death of the claimant; § 1586(2) applies mutatis mutandis. To the extent that the claim becomes extinct pursuant to this provisions, the claims assigned pursuant to § 1587i(1) are transferred to the debtor.

§ 1587l. [Cash settlement for future equalisation claim]
(1) A spouse can demand from the other a cash settlement in consideration of his future equalisation claims if the other will not be inequitable burdened thereby.
(2) The value at that time of the mutual annuity rights or prospective pensions determined pursuant to § 1587g(2) includable in an equalisation of pension rights shall serve as the basis for fixing the amount of cash settlement.
(3) The cash settlement may only be demanded in the form of cash contributions to a statutory annuity insurance or to a private annuity or life insurance. If the settlement elected is in the form of cash contributions into a private life or annuity insurance, the claimant must cause the insurance policy to be made out for his person to cover the event of his death or the reaching of the age of 65 or a lesser age, and to provide that this share in the profits is to be applied for increasing the insurance payments. On application the debtor shall be permitted to pay in instalments, to the extent that this is equitable considering his financial circumstances.

§ 1587m. [Death of the claimant] The claim for the payment of the cash settlement becomes extinct on the death of the claimant, to such extent as it has not yet been performed by the debtor.

§ 1587n. [Set-off against claim for maintenance] If the claimant receives a cash settlement pursuant to § 1587l, he must allow a set-off against a maintenance claim from the divorced spouse in the amount he would receive as the equalisation of pensions under § 1587g, if the cash settlement had not been paid.

§ 1587o. [Equalisation agreements; form]
(1) The spouses can conclude an agreement in connection with the divorce on the equalisation of annuities or rights to a pension on the grounds of age or disability or incapacity to earn an income (§ 1587). Annuity rights in a statutory annuity insurance under § 1587b(1) or (2) may not be established or transferred by the agreement.
(2) An agreement under (1) requires notarial authentication. § 127a

is applicable *mutatis mutandis*. The agreement requires the approval of the Family Court. The approval shall be withheld only, if after the inclusion of the maintenance agreement and the property settlement, the payment agreed upon is manifestly unsuitable as financial security for the claimant in case of disability or old age, or fails to bring about an equalisation between the spouses which is suitable by reason of its nature and amount.

§ 1587p. [Payment to the former payee of the annuity] If by virtue of a valid judgement of the Family Court annuity rights in a statutory insurance have been assigned to the spouse entitled thereto, the latter must allow being debited in favour of the debtor-spouse with an amount which the person providing the pension pays out to the debtor-spouse up to the end of the month, which follows the month in which the divorce judgement was served on him.

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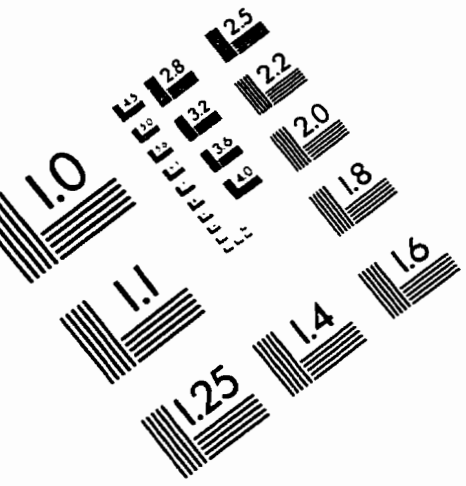

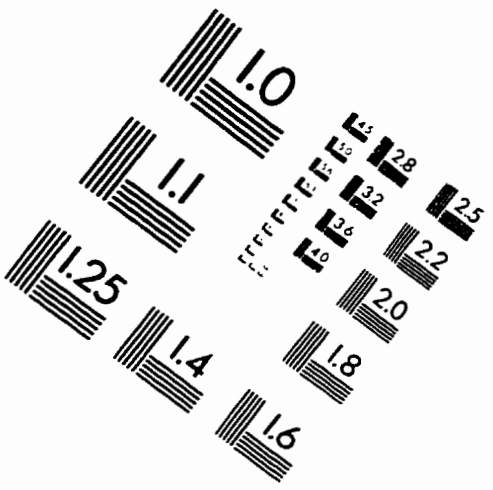

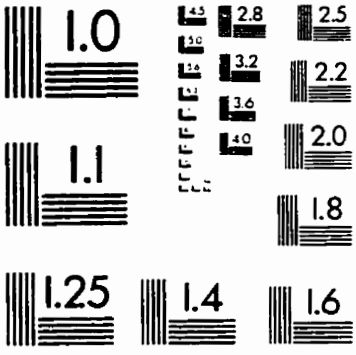

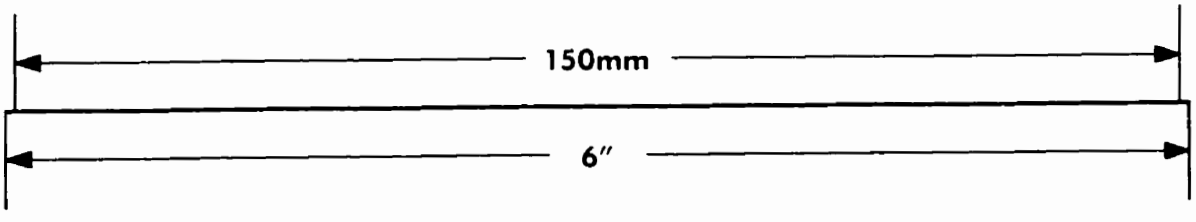

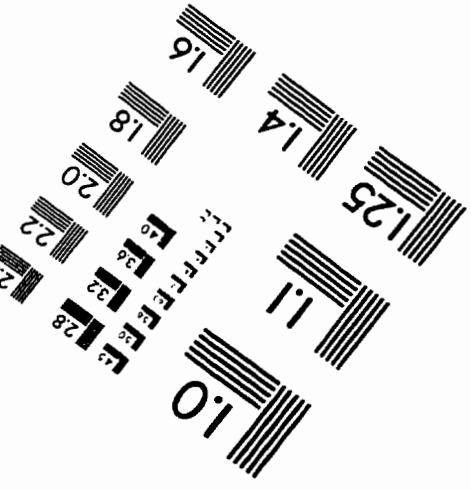

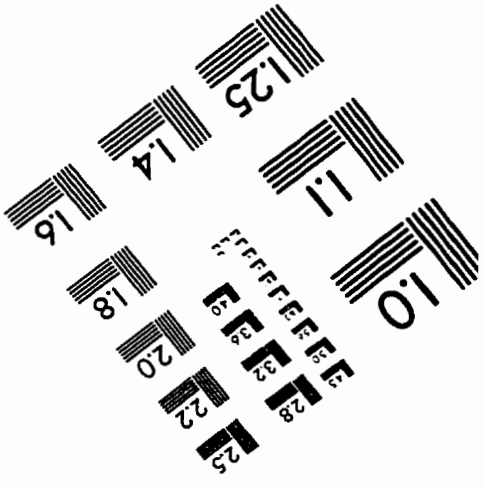

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