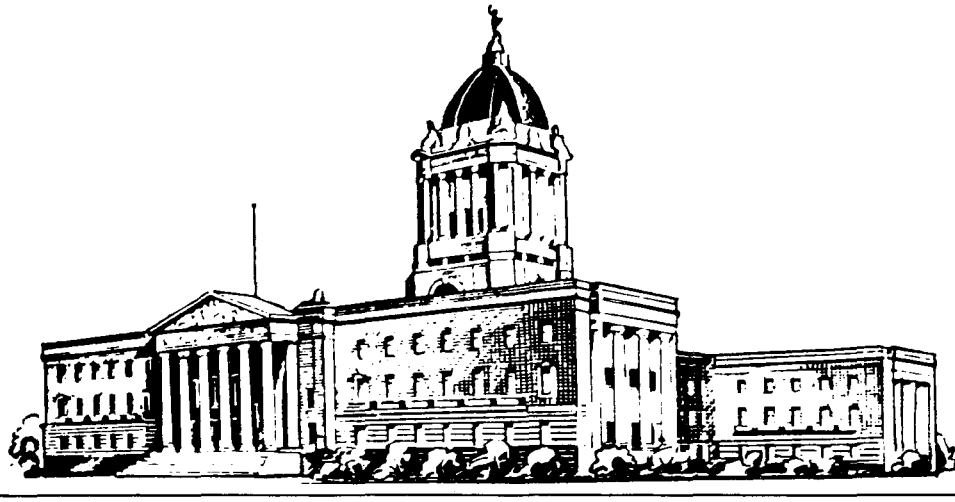
Legislative Assembly of Manitoba

HEARINGS OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman
D.J. Walding, M.L.A.
Constituency of St. Vital



2:12 p.m., Tuesday, February 8, 1977.

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THE LEGISLATIVE ASSEMBLY OF MANITOBA
STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS
2:12 p.m. Tuesday, February 8, 1977

CHAIRMAN: Mr. D. James Walding

MR. CHAIRMAN: Order please. We have a quorum gentlemen, the Committee will come to order. When we recessed at 12:30 we had reached, as I recall, on Page 124, section 6. Any discussion on section 6?

MR. ADAM: Can we have some clarification on the intention of the word "joint or individual efforts", the word "joint". Does this mean that if one of the spouses was freeloading on the other that this would change things, this word "joint"?

MR. PAWLEY: Mr. Chairman, this means joint or individual effort, that the proceeds are accumulated due to the joint or partnership effort, or even if it is by their individual efforts, then certainly those proceeds form part of the standard marital regime. I don't know really what Mr. Adam means by the phrase "freeloading on the other".

MR. ADAM: Well, I think the word "individual" is the one that would give equal rights to one of the partners regardless of whether he did not contribute maybe throughout his life or her life. We had one example, someone gave an example, not this morning, where there was a couple who were operating a real estate -- I think it was Mr. Barrow who mentioned this case -- where the man was alcoholic and never contributing and the wife was hiring help to look after the home and looking after the business throughout the marriage. I'm just wondering whether the one spouse should be entitled to anything under those circumstances.

MR. PAWLEY: The only problem with this is that once you open the door to question the fault in the division of assets, because that's basically what Peter is suggesting, that we be able to consider fault or individual contribution, then we're really back to the present situation, the present situation which has given rise to so much of the inequity before us, the uncertainty of trying to determine whether one is more at fault than the other, whether one has really contributed and the other has not contributed. The whole philosophy and principle of the legislation that we're dealing with is that the marriage is an equal partnership, the partners working together in a common relationship. By the way, I think we should make it clear that it's during cohabitation that this arrangement continues, as long as one spouse sees fit to continue to cohabit with the other, that all questions of fault or moral judgments are set aside in the understanding that there is an equal partnership that exists between the two, and that, of course, excludes the property that they separately bring into the marriage, the inheritance that either one receives or gifts that either one should receive. But certainly we're excluding any reference to the finding of fault in the division of assets.

MR. CHAIRMAN: Any further discussion on that point?

MR. PAWLEY: And I know there will be some situations that will not appear to be quite right but I think that those situations will be lesser in percentage than the present inequitable situations that occur as a result of the division of assets from marital breakdowns at the present time.

MR. CHAIRMAN: Mr. Barrow.

MR. BARROW: Mr. Adam was correct, this was brought out, I think it was in Brandon, where a lady and husband jointly were partners selling real estate. Early in the relationship he became an alcoholic and gave nothing at all to the business part of the business. He had no part in raising the children, he didn't make home life any better, so she performed a double duty of holding the home together, running the business, making life worthwhile for her children, and when the children get old enough to break down, she gets half the business. I think you have to have some flexibility or some leeway to provide a greater share for the one who earned it. In my opinion he doesn't deserve anything and yet you're going to split it down the middle because he happens to be on a contract basis through marriage. I can't see any equity in it, Mr. Chairman. --(Interjection)-- Opposite, certainly. We have the same situation where the woman contributes nothing.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: So, Mr. Chairman, then what we're going to do is return to the present situation and say to the courts, "you make those decisions, you make the finding of fault." That's really what Mr. Barrow and Mr. Adam are suggesting.

MR. BARROW: I'm not suggesting we have the answers, Mr. Chairman, but I think there has to be some flexibility in cases of this type. And, as my colleague said, the reverse is often true and to split something evenly when one has put 99 percent of the effort into it, to me seems very unfair to the partner who has worked so hard to hold things together for one reason or another. You may say she could have broken it off at any time, or he could have, but for different reasons they don't. I see a lot of complex situations arising from this kind of thing but I also think it should be looked at.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I'm afraid I'm going to have to disagree with Mr. Barrow and Mr. Adam, because this really goes against the whole gist of what we have heard from representation here by members of both sexes, that they want to get away from the fault situation, that is what is involved today in law. And if you're going to go back to this situation which Mr. Barrow has brought up, then you're going to be back in the fault situation again where you are going to have litigation, you're going to have people with bitterness. You had the case of that woman in Brandon who was in the process of a legal separation or a divorce, I forget which, but she stated very emphatically that she wanted no fault attachment to be brought into the matter whatsoever, that if there was going to be a sharing or a sharing out of the assets, that it should be on the basis of a 50-50 split as such, otherwise then we've been sitting here for weeks and months and this Law Reform Commission has been doing a job that we're not prepared to accept. I think, from the briefs that I've heard from people, they are in the opinion that the no fault system is the one that should come into effect and as such I am prepared to buy that argument.

MR. PAWLEY: I'd just like to add one point, that I would be prepared to see a refinement on this, that it relate to the period of cohabitation. I think as long as the spouses live together and share in each other's lives, that there's an equal partnership. I do think there ought to be an exception that if cohabitation comes to an end and one of the spouses lives separate and apart from the other one for a number of years and may in fact be not contributing at all, then I don't think that spouse ought to be able to enter into the picture and claim one half of the assets during that period that that spouse lived separate and apart and probably was wasting his or her time while the other one was working very hard. I think that we have to provide for that, in fact I have a letter which outlines that very type of situation that was forwarded to me. So if we're talking about restricting it to the period of cohabitation, that would be one thing, but if we're going back to the very essence of why we're here, the very reason that we are here is because of the Murdoch case and the present inequitable arrangements under the present law.

MR. CHAIRMAN: Any further discussion? If not, can we then move on to section 7? Mr. Pawley.

MR. PAWLEY: I wonder if legal counsel would just like to discuss that a little further with us. This means that upon termination of the contract, the standard marital regime, otherwise than by the death of one of the parties . . . oh, it's okay, I see, carry on.

MR. CHAIRMAN: Would you care to explain that to the Committee?

MR. GRAHAM: Mr. Chairman, otherwise than by the death, does that mean that the existing laws that are presently in effect where in some cases the spouse will receive less than one half, will still remain in effect?

MR. CHAIRMAN: We haven't got to that . . .

MR. PAWLEY: There's other recommendations dealing with that later on here. Maybe we should hold back on that until we reach those recommendations.

MR. CHAIRMAN: Agreed? Mr. Sherman.

MR. SHERMAN: Mr. Chairman, could I just have your permission, the permission of the Committee, to ask you one question related to section 5 which I know we covered before noon, but you'll recall that you and I had an informal discussion about that dissenting opinion and I'm just wondering whether you had decided to suggest

(MR. SHERMAN Cont'd) . . . to the Committee that that be re-examined or that we are sticking with the decision that was made at noon to reject that dissenting opinion.

MR. CHAIRMAN: I had not brought it up to the Committee, I did mention it briefly to the Attorney-General. Maybe you would like to refer back to it and make sure that we are all in agreement, that we understand the meaning of it.

MR. SHERMAN: On 5, I might say, Mr. Chairman, just for the benefit of the Committee, that, as you pointed out to me in discussion after 12:30, the dissenting opinion has to do here with specific marriage contracts related to the marriage or related to contracting out of the provisions of the standard marital regime after the married couple has operated under the standard marital regime for a year. When we were discussing it at the time, at 12:25, I was not clear on the specific distinction myself and once you and I discussed it informally after that I can see where the position taken by the dissenting commissioner is justified. I think I said, for the record, that I couldn't see the justification for it. I'd like to rescind that comment, I can see the justification for it. It doesn't make me any more in favour of that dissenting recommendation, but I can see the justification for it and if any Members of the Committee would like to re-examine it then perhaps it should be marked for re-examination instead of for rejection.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I'd just like to say, in connection with the minority recommendation that there are, I think, many situations in which a couple, for some reason or other, do wish to contract out of the standard marital regime. Now, ought we to restrict that contracting out until one year has passed from the date of the marriage? We have many second and third marriages where certainly the couple do wish to avoid any financial commitment of any type, any shape or form one to the other. There are children involved from earlier marriages and they wish to avoid that emotional string that they feel might be created. Would it be fair in such a marriage as that to say, "Okay, even at your late stage in life, we're not going to allow you to contract out of what we have imposed by law for you until at least one year has passed of your marriage relationship"? I would be concerned about that, Mr. Chairman.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I don't believe that that was the intent of Mr. Gibson at all. He was talking about the marriages that were going to occur. In the comments that he made on Pages 56 and 57 he is referring not to a marriage that has been well established for many years, but one that is just occurring and I would say that if you accept that philosophy, that is very similar to putting into law that any young married couple getting married can't buy a marital home for one year, and I don't think you would want to put that kind of stipulation on a marriage. It's a contract that they are going to sign when they get married, it's not an existing marriage as I understand it anyway.

MR. PAWLEY: You are opposed to the Gibson recommendation.

MR. GRAHAM: I would have to say that I am opposed to the Gibson recommendation.

MR. CHAIRMAN: I should say, perhaps in fairness to Mr. Sherman, that I made the point to him that if we . . . favouring the standard marital regime, we should perhaps not facilitate too easily the exceptions to that and the fact would remain, with this dissenting opinion, that that standard marital regime of a 50-50 split would be in effect for the first year and it's only when a consideration to vary that 50-50 split, whether it's 60-40 or 90-10, one way or the other, could then only be done by a contract on a one year period in order to really examine, that would not seem unreasonable. Mr. Silver.

MR. SILVER: The legal implications of that would be that in any marriage there would be a virtual guarantee that each spouse would get one half of what the other spouse owns, so that in a case where one is enormously wealthy and the other one is poor, during that interim period, if the standard marital regime applies . . . if the parties are not permitted to opt out of it in the beginning and it applies -- no matter what they want it applies during the first year -- then that will virtually guarantee the poorer spouse will have one half of the richer spouse's one million dollars. I leave the Committee to

(MR. SILVER Cont'd) . . . consider the implications of that, that's all.

MR. PAWLEY: Would that not be part of separate property though? It seems to me that separate property, you're referring to separate property brought into the marriage by the wealthy spouse, which would remain separate, or the income . . .

MR. SILVER: No, it would apply just to income, what is earned or acquired during the year, not to the property that is brought in.

MR. PAWLEY: Right.

MR. SILVER: But, if, one, the million dollars that the husband is bringing into the marriage, the interest earned during that first year on the million dollars will be subject to the marital regime.

MR. SHERMAN: Well, it will be anyway if we accept the concept of the standard marital regime and the 50-50 division of property, it will be anyway.

MR. SILVER: Unless they opt out of it.

MR. SHERMAN: Unless they opt out, that's right. Now, what this dissenting opinion says is that you can't opt out or change it for a year, right? I still think that I stick with my objection to that but I can see the justification for Commissioner Gibson's suggestion and on the basis of my conversation with the Chairman, I just wanted to make sure that we weren't foreclosing debate on the subject, that other Members of the Committee are satisfied with the decision to reject that dissenting recommendation.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: I was just wondering what would happen if they cohabit for a year and then get married. What would the ramifications be there then?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: My understanding is that the standard marital regime would not apply to people who are not married, who are just cohabiting without getting married.

MR. ADAM: We haven't dealt with that as yet but it seems to me that the majority of the briefs that have been presented to the Commission was that the common-law situation would apply similar to that of the standard marital regime.

MR. SILVER: That's only in the area of maintenance, of support and maintenance where the special conditions are fulfilled, only there would all the provisions apply to unmarried persons, but not in respect of property division.

MR. CHAIRMAN: May I suggest, Mr. Adam, if you wish to discuss that, maybe we could bring it up at the end of this section. If the Committee is satisfied with the decision it made on section 5, maybe we should go back to section 7.

MR. ADAM: Have we accepted that section or have we rejected it? I have it as rejected here . . .

MR. PAWLEY: We rejected the minority report.

MR. ADAM: We rejected that at 12:30, that still stands rejected?

MR. CHAIRMAN: That still stands as I have received no indication that the Committee wants to change its mind on this. Section 7, the Attorney-General suggested that should refer to just the time that they were cohabiting and not the actual marriage, if longer.

MR. PAWLEY: Well, I would like legal counsel to examine that with us and maybe report back. I would think that it's during cohabitation. I'm trying to prevent the situation by which one of the parties deserts the other and if a long period of time passes by, then the other spouse returns to make claim as against the remaining spouse for the assets accumulated during that time when there has been no cohabitation. I can see that as a problem that could occur. I suppose one can simply say that the spouse should have responsibility to bring separation proceedings against each other but these things can drag out without any legal action being taken for years and yet it would not seem to be fair for the one spouse who had mustered together considerable assets while the other one was not even cohabiting, to have a claim made on his or her assets.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: It is, of course, open to the industrious spouse unilaterally to compel the other spouse to, you know, when he deserts her, to make a division right there or then.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, perhaps the Attorney-General or legal counsel can give us some idea of what the average length of time is in the divorce courts, from the time that they cease to cohabit to the time when they go through a separation and then finally to a final disposition in divorce. What is it, an average of three years or . . . ?

MR. PAWLEY: It's less than that generally, depending upon the grounds of the divorce. With our present divorce laws, of course, it could be three, five years I guess under certain circumstances before grounds for the divorce would be established.

MR. GRAHAM: If I interpret the Attorney-General correctly, we are concerned here on the sharing of the assets that were accrued only during the period of cohabitation or is it on the period from the time that they were married until that marriage is officially declared null and void by divorce action?

MR. PAWLEY: Well I don't want to create complications and I'd like legal counsel to comment if he sees consequences or complications from my referring to cohabitation rather than to marriage, I don't want to foreclose our options but it seems to me that we do have some problems if it relates to marriage and not to cohabitation. On the other hand there may be other problems, greater problems than those that we cure.

MR. SILVER: A little later on the report deals with the cut-off dates for inclusion of assets. I think perhaps it might be better to postpone this point until we get to there.

MR. CHAIRMAN: Agreed? Section 8, Mr. Graham.

MR. GRAHAM: Mr. Chairman, dealing with this section it says, "would be realized by an equalizing payment, which when made," now what time period are we looking at here in that equalizing payment? Would that be six months or twelve months, or depending on how quickly they could arrive at some logical equalization?

MR. PAWLEY: A reasonable time, that would have to be established by the court.

MR. GRAHAM: I'm trying to get in my own mind -- a reasonable time frame of up to twelve months, or . . .

MR. PAWLEY: It would depend upon the assets, the complexity of the portfolio as to how much time would be required and it could involve two days, it could be six months depending upon the assets, as to what would be a reasonable period of time.

MR. GRAHAM: During that same period the one spouse will be able to make claim for maintenance, there would be a security there of maintenance anyway until this final . . .

MR. PAWLEY: Yes.

MR. GRAHAM: Very good.

MR. CHAIRMAN: Any further . . . Mr. Sherman.

MR. SHERMAN: Just one question for clarification, I perhaps have missed something here, Mr. Chairman. How do we get into a situation of a "smaller shareable estate"? We're dealing with the standard marital regime.

MR. GRAHAM: This is deferred sharing.

MR. SHERMAN: What's that got to do with it?

MR. GRAHAM: One will have more assets than the other one when it comes to settling up.

MR. SHERMAN: Well what's that got to do . . .

MR. PAWLEY: It's deferred because the sharing doesn't take place under the concept until the actual termination of the marriage, so one might have many more shares or assets than the other at that time of calculation.

MR. SHERMAN: But isn't there a contradiction in approaches here? We're starting with the standard marital regime which applies unless there has been a contractual change, it implies a 50-50 division of property . . .

MR. PAWLEY: Upon termination.

MR. SHERMAN: Right, upon termination and now we're dealing with termination so you automatically invoke the 50-50 principle, so I don't see that anybody is in a position of having the smaller shareable estate.

MR. PAWLEY: Gil, do you want to speak on that?

MR. GOODMAN: I think it's just a question of . . . you'll have let's say stock in your name and that would be part of the shareable estate. It may be any number of

(MR. GOODMAN Cont'd) . . . things that title is held in your name only and that is part of your shareable estate and it may be that what you have title to is worth, oh let's say $50,000, and what your wife has title to may be only $10,000, so that your shareable estate is $50,000, hers is $10,000, in effect you have to give $20,000 to her so you will both have $30,000.00.

MR. SHERMAN: I understand what's happening but it seems to me to be a contradiction in terminology. If you're starting with the concept that the estate, if the marital property is 50-50 when that marriage is terminated then, at no point in time, unless you contractually changed that arrangement, at no point in time are those $50,000 stocks that I acquired after I got married mine in 100 percent totality anway, they are 50 percent my wife's.

MR. GOODMAN: . . . they are in your name, I think that's all they mean by the term there, the smaller shareable estate. In effect it is in your name and you have to share that . . .

MR. PAWLEY: Upon termination, you can dispose of them during the marriage. Of course, this is the argument by the briefs on community of property, that we were faced with some contradiction by the deferred sharing as versus the community property relationship, so really Mr. Sherman has reached the nub of what appears to be some inconsistency because of the deferred sharing.

MR. GRAHAM: If you substitute the word "assets" for "estate" in your thinking, I think you get to a better . . .

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: This takes in businesses as well, if a man owns a business or a business is in his name. I bring that up only from this respect, that some of the briefs we had, or one of the things that was mentioned was that you could force the sale of a business in order to pay off.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: I think that point was raised during the hearings but to my way of thinking it would depend on what would be determined, what would be the portion of the business that was accumulated after the marriage, not, if one partner had come into the marriage with that business intact, what he had originally but what had accrued in value since the marriage, I think would only be the shareable portion. Am I correct in that assumption, not the total business? That was my understanding of what they are recommending, maybe I'm wrong.

MR. PAWLEY: That's correct.

MR. JENKINS: Just what they accrue after the marriage.

MR. PAWLEY: Right.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: The phraseology here, "equalizing payment, which when made" -- does that indicate the assets that are acquired from the time that a separation has taken place but they are now in court and the acquisition of property during that interval, when the final settlement is made, not from the day that they separated but from the day that the money is going to be paid over. One spouse has $50,000 and the other has $10,000 during that period. What are we sharing, the end result or the day that the breakdown takes place? That "which when made", does that mean . . . ?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I think that question will . . .

MR. ADAM: Do you understand what I was trying to get at? I don't know whether I phrased it properly.

MR. SILVER: I think you're asking about the cut-off date. . .

MR. ADAM: Yes.

MR. SILVER: . . . when that occurs, the cut-off date for what we include and what we do not include. I think that will be answered when we come to the area dealing with that subject later on. There is an area in the report a little later on dealing with the cut-off date that should govern in each case.

MR. ADAM: I see.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, there is something that has been bothering me for quite some time and that's dealing with assets that were brought into the marriage by one individual or by both individuals. Now . . . and I understand here they remain the property, separate property of the individual. Now, if those assets increase in value over the years, does the increase in value remain with the individual or does that become a shareable asset?

MR. PAWLEY: That becomes a part of the regime.

MR. CHAIRMAN: I believe that's dealt with under 13 at the bottom of the page. Any further discussion under 8? Can we accept the principle of 8 and move on to 9 then? Section 9, section 10.

MR. JENKINS: Mr. Chairman, could we have an explanation of this? I'm just not too sure what this means.

MR. CHAIRMAN: Mr. Silver, could you explain this?

MR. SILVER: Well, in calculating the relative assets that each spouse has and that should come into the pot for the purpose of dividing it, if one spouse had debts, his own personal debts,that exceed his assets, the debts should nevertheless be treated as being only equal to the assets. If the true value of the debts were taken into account, that spouse would end up getting more from the other spouse in order to equalize the shares but instead of that, no matter how enormous the debts are in relation to the spouse's estate, they are treated as if they are equal to the value of the estate and his shareable estate merely ends up as being zero, not minus, not less than zero but merely zero. There is only one exception, where this spouse has incurred these enormous debts directly for family maintenance obligations then a negative quantity, a less than zero quantity will be taken into account for what it actually is in this calculation.

MR. SHERMAN: . . . still be split 50-50?

MR. SILVER: Yes.

MR. JENKINS: Through you, Mr. Chairman, to Mr. Silver. In the last statement that you made that it was debts incurred directly for family maintenance obligations, supposing the assets were exceeded by the liability by $10,000, does that mean that each partner would then end up with a $5,000 debt? Who winds up with the debt then?

MR. PAWLEY: The person that incurs a debt would end up with that debt to their individual account unless, as I understand it, the debt was run up for purposes of family maintenance. I suppose one could argue and certainly this is . . .

MR. JENKINS: That's what I mean, these would be incurred for family maintenance and if you had a $10,000 debit, there was $10,000 owed by that standard marital regime.

MR. PAWLEY: It has been suggested to me that we are inconsistent here in that we recognize equal division of assets upon termination of a marriage but we don't recognize equal division of liabilities upon termination of a marriage once you reach the zero factor and I have been questioned as to whether or not we are being consistent in this way. I throw that out to the Committee.

MR. JENKINS: This is the point that I'm not sure on and to me it does seem kind of ludicrous because after all if these debts were incurred directly in the maintenance of the family then one or the other partners must have been in agreement to the running up of these debts and now they all of a sudden split up and . . . We're not talking now about maintenance, we're talking about tangible assets and in this case they wind up being tangible liabilities and if we're going to have a 50-50 sharing, in my opinion I think the two partners . . . If there is no fault attached and we have accepted there is no fault, but certainly there is going to be fault on somebody because somebody is going to have to pay that $10,000, there's just no other way out of it. One or the other partner is going to have to . . . I just want to know for my own satisfaction just what the Law Reform Commission recommended here when they came along with the last two lines.

MR. PAWLEY: I think that they have indicated that because of one partner, and we're accepting deferred sharing again rather than community property and again we have this little twist use of that, that the partner who conducts the business and may have run the business into the hole should not then saddle the remaining spouse who had nothing to do with that business with a large debt upon the termination of the marriage.

MR. JENKINS: Mr. Chairman, that isn't what I'm arguing about, I'm arguing about the last two lines here, "that were attained by the existence of debts incurred directly for family maintenance obligations." I would think that would be household management, buying of a home . . .

MR. PAWLEY: They're divided equally, those debts are divided equally, even under the zero factor.

MR. JENKINS: Fine then.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Well, I was just going to bring in here about the debts, it doesn't necessarily have to be somebody running somebody into debt or spending money wildly. If there's a starting up of a prosperous business which has a debt against it to borrow to get started, I think if the business is an asset or the business is worth so much value and there is a debt against it, it's going to have to . . . if somebody is going to have 50 percent of that, if it happens to be in my name and it goes to my wife, 50 percent of the value of that business, certainly the debt incurred or the money borrowed to start the business which is still owing, not as a debt but as a payment basically, has to become involved here. Now, does it?

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: If I understand the Attorney-General correctly in his response to Mr. Jenkins' question, when you are considering household debts, family maintenance debts, those would be split 50-50 without regard for who compiled them or why they compiled them, whether the husband was a spendthrift or the wife was a spendthrift. Okay, so then I move to Mr. Johnston's question and I must agree with him that I would find it most inequitable that if we're starting from the proposition that a business developed during a standard marital regime is a 50-50 proposition when you come down to the separation and the sharing arrangements, I would find it most inequitable that it's only 50-50 if that business is in a profit position and it's all the burden of the proprietor if it's in a loss position.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, I think we have to take a look at the divorce courts and the separations that occur and if the information I receive is correct, a vast majority of them are situations where financial difficulty is the main cause. Now we have used the term "family maintenance debts" which is a very broad all encompassing type of phraseology. I was wondering if the Attorney-General could outline to us just what types of situations he would consider to be a family maintenance debt. I think it is only fair that we should understand what we are talking about. For instance, would that include a new roof on the marital home, or the wife's gown, or . . .

MR. PAWLEY: . . . on Page 60 of the Law Reform Commission Report they refer to family maintenance in the form of rent, in other words shelter costs, clothing, food, children's dental work or the like, so I think it would include all dental, medical, the clothing, the rent or the shelter costs whatever they be, and I would think family recreational costs as well.

MR. GRAHAM: Would recreation be considered part of family maintenance?

MR. PAWLEY: I would think so.

MR. GRAHAM: I think it's only fair that we attempt to delineate what those family maintenance . . .

MR. PAWLEY: I would think so. I would think that a debt encountered in the purchase of cross country skis or a skidoo or something like that ought to be considered as part of the family debt, used by the family for recreation -- wouldn't you say, Mr. Silver?

MR. SILVER: The wording is family maintenance and I think the discussion portion of the report on that point talks about the essentials, food, dental work, medical bills, clothing. I don't really know whether they contemplated recreational facilities of that kind.

MR. GRAHAM: The Law Reform Commission was, in my estimation after reading it two or three times, I think they have been very vague in attempting to define what family maintenance debts would be.

MR. PAWLEY: I would have considered them debts which are, you know, the

(MR. PAWLEY Cont'd) . . . type of debt that is not allowed for purposes of calculating expense for taxation purposes, family debt. The other debts which are encountered in the expense of earning an income would be excluded but I would think those personal expenses that are expended for the cultural, recreational, or necessary living of the family, would be considered family maintenance, that would be my impression anyway.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: I'm just wondering how the homestead would fit into this particular situation. Let's say that the value of the homestead is $100,000 and there is $50,000 owing on the homestead; just exactly what would happen, under this shareable agreement, to the homestead?

MR. PAWLEY: That would be divided equally after the payment of the debts, the 100 less the 30 is 70, then the division is 35,000.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: I think a business or a farm, or anything which is successful and is able to meet its obligations of operation and pay a profit to the family, or payment to the family, and makes the loan at the bank payment, I regard that as a debt. It is a debt but I regard it as a payment which has to be made which was borrowed to start that business. Now, if the business is successful and it's going to be shared equally, both partners have to be responsible for seeing that that debt is paid if they are going to both share in a successful business. I can't really see why it shouldn't be on that basis. If you have something that is running successfully and there's a break-up and it has to be split between both, that debt which was incurred to start the business so the family could live has to be shared equally. When it says here, "incurred directly for family maintenance obligations," I can think of lots of people that have gone into debt to get a business going, a small store or whatever it may be, and the debt was incurred directly for the operation of a family or to support it.

I think what the Attorney-General is saying, you know, that there has got to be some way of showing the difference here, and when we get back into that area -- and we get back to the Murdoch case naturally, as the Attorney-General says, it's one of the reasons why we are all sitting here -- there are let's say the mom and pop type of businesses which are worked in together by two people building and working on it. There was one lady here who came before us and said she has worked very hard in the business, and watching it go down the drain. And then there is the other type of a business where -- and I'm going to use lawyers all the time -- where a fellow goes into a law practice, the success of the business certainly is to be credited to the wife in that case because he's out and able to go to work while she's at home, but the assets accrued in that marriage, let's say land, investments, apartment blocks, stocks and everything accrued by that family, I think are an equal sharing basis. But, unless the business has been a business where two people have worked together to build it, I think you have to take a look at the fact that you are making a request here that could possibly cause the sale of a business which would, in fact, take away the earning power of the family. Now, there's a little bit of difference here so, when we talk about debts incurred we also have to talk about the other.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think the Law Reform Commission did recognize that and that is why they have suggested that in cases of financial difficulty that there can be a deferment of the equalizing payment although the court would recognize that that payment is due. There can be up to five years for the opportunity for that payment to be made.

MR. F. JOHNSTON: Mr. Chairman, in that case I see two debts being incurred on . . . I see a person having to pay off a debt because of the assets of the store and I see the guy left with also paying off the mortgage payment or the loan payment to get it going. I see him stuck with two. I see it that way, I could be entirely wrong.

MR. PAWLEY: Mr. Silver, do you want to expand on that?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Yes, that could very well happen.

MR. F. JOHNSTON: Mr. Brown made a comment across the way that it puts the guy in a hopeless position. It could very easily put the girl in a hopeless position, who owns a dress store or something of that nature. It's a thing that has to be looked

(MR. F. JOHNSTON Cont'd) . . . at from both sides.

MR. SILVER: If we use this narrow definition of family maintenance, in fact, if we accept at all this concept of no negative value, then the situation you describe could very well occur, certainly.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, this question that Mr. Johnston has raised certainly is not new to the Committee and it is time that it should be raised again, at this juncture, but it is something we addressed ourselves to, at least superficially, early on in the Committee sittings and it is certainly very much at the nub of whatever laws we're able to shape here. I think probably that kind of situation could be worked out on a deferred payment basis. I think we have to give great consideration to whether it's five years or what. I think there would have to be judicial discretion applied for each individual case. It might be that some business proprietors, male or female, could pay off a $50,000 estate sharing debt to a separated spouse in five years, other businesses might not generate sufficient volume to do that. I think they'd have to be judged on individual merits but I'm still troubled by the earlier question that was raised, that if that business does not have a net worth of $100,000 which would be split $50,000 each and the $50,000 would be paid to the other spouse on some such arrangement as I've suggested, what if it's in a net loss position of rather than $100,000 in black ink, what if it's $24,000 in the red ink? I say 50-50 is 50-50, should that liability not be incurred on a 50-50 basis?

MR. CHAIRMAN: Mr. Graham and then Mr. Pawley.

MR. GRAHAM: Mr. Chairman, I think probably the best way to get around this and to try to understand what they mean by no negative value below zero in a shareable estate, maybe it would be better if we took a look at the opposite position and look at what could occur if we did allow a negative value to be put on that. Maybe the Attorney-General could give us some of the implications if we allowed an estate to be valued below zero.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I think it's quite right that there are implications and my concern would be this, I would pose this to the Committee, that if we were accepting community of property, immediate co-management, co-ownership of the business or farm, whichever it be, so that the decisions are really being made jointly, then that would be one thing, but we agreed earlier that we did not want to enter onto that path, that it would create too much complication. That was the view that was expressed. Now, if we saddle the one spouse who we have refused that right to co-own or co-manage in an economic partnership type of arrangement from Day One, if we saddle that spouse with the debts encountered by the other spouse that's had the sole ownership and sole management, sole control of the assets, with the debts, then I suppose it could be argued that this has hardly been fair because there hasn't been that equal partnership, equal involvement from Day One, because we haven't accepted the community of property arrangement. So, should we saddle the one spouse with the debts encountered by the other one when the spouse encountering the debts hasn't involved the first spouse in the decision-making pertaining to the earning of that income? I think we are going to be up against that type of human argument as to whether or not this is really fair. You could certainly, I suppose, take it in the other direction and say why should the other spouse benefit from the profit, from the net surplus; except the answer to that of course is that the other spouse made that still possible, has made that possible for the spouse that earned that surplus to earn it by the very fact that she contributed a number of responsibilities to allow that spouse freedom to proceed on that route. But isn't that the problem, Mr. Silver? If we are not going to involve the spouses in co-ownership and co-control, co-management, then we are going to have difficulty, it seems to me, arguing that there should be complete responsibility for all the debts encountered by that one spouse who didn't enlist the assistance of the other spouse from Day One in the co-ownership and the co-control and the management and the decision-making from Day One.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: A question, Mr. Chairman. How are you going to determine whether or not the business is in a debt position because the proprietor, male or female, was bleeding it in effect to maintain the family in a viable position? Maybe the family would be in debt if the proprietor were not paying himself or herself as a consequence of business bank loans in order to maintain a family income that enabled the family to stay out of debt.

MR. F. JOHNSTON: I wish people would stop bringing up good points.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: I just made a quick comment that these points of Mr. Sherman's are all very good and I can see the Attorney-General's statement that if they are not involved, the thought is there and, of course, as Mr. Sherman says, it could be just that very thing. It would seem wrong for us to pass legislation that would put anybody in a position -- and I must say I'm thinking mostly of small businesses or business partnerships, or even farms -- in the position of (a) having to pay off the money used to start the business and, (b) having to pay off the other spouse, if it is a good viable business and a good operation which is what is keeping the family going. And I add to that it would be wrong to put in things that would encourage the sale which would take away the income from the family whether they were separated or not. If there is going to be a separation and we've been talking paying maintenance and keeping families alive, we've got to make sure that we try to do everything to keep the incomes alive.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, we're getting down to something that to me is fundamentally basic. I think we're trying to put into law rules and regulations that would govern every conceivable situation that occurs. I think there is a genuine desire from the briefs that we have heard to try and remove from the courts some of the decision-making powers that the courts have, whether that is due to the length of time that it takes a court to render a decision or the slowness of the procedure that occurs in courts, or maybe it is a lack of faith in the ability of the courts to register fair decisions. But I still get a little concerned and a little uptight when we try and put into legislation a set rigid form of handling every conceivable situation when the circumstances in every situation are different. I think that we have to, at some point in time, say we cannot legislate any further to govern every conceivable situation and we have to, at some point in time, allow the judge the discretion to deal with an individual case in an individual way and I think that it is up to us to try and bring forward legislation that indicates a desire to move in a certain direction but I think we have to allow the freedom of the court to interpret the law, to adapt to individual cases. I, myself, would like to see certainly laws that would give direction to the courts but I wouldn't want to completely tie the hands of the courts in the administration of justice in the cases that come before it.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: Is there some way, taking the Murdoch . . . I'd like to ask the Attorney-General and legal counsel regarding the Murdoch case, as I read it, the judge was left with no other decision to make but to say that Mrs. Murdoch didn't have any claim because there was nothing in legislation or anything to support her claim, is there some way that we can completely reverse that decision as to say that in circumstances such as families, business or otherwise or in the case of business or farm, that either spouse has a legitimate claim? We do not debate that because it was built together in the time that either spouse spent, whether in the home taking care of children, it was regarded as a contribution to that family and there is, without any doubt, a legal claim by one or the other on that business, farm or whatever it may be, but that the circumstances surrounding every case regarding debts against a business or whatever it may be, have to be looked at and evaluated by somebody as to how much to either side. I think I'm getting down to what Harry was just saying, how can we possibly legislate every case except to say that there is a legitimate claim on the basis of input of spouses or two people? I asked counsel if I am right about the Murdoch case, that the judge claimed he didn't have any other choice.

MR. PAWLEY: I think there was a choice because it was a split decision, six to three. There was a difference within the court itself.

MR. F. JOHNSTON: Can we take away the split decision and say that there is a legitimate case where two people are involved in assets and that?

MR. PAWLEY: Frank, you're not proposing that we vary the 50-50 concept though, your only concern is the debts.

MR. F. JOHNSTON: I'm not really opposed to the 50-50 concept but, you know, I could put it maybe another way. If there's a separation and there's going to be a 50-50 concept and one has to pay off the other and if there's a loan against the business to start it which has been created to have a business which gives the family income, when you make that payment I think a judge should be able to say "Well, on the basis of this loan, if the other is going to take it over, the payment might not be as much to the other spouse." The decisions surrounding a business, and the Attorney-General brings up the point that we're not letting anybody make any . . . the one spouse has certain decisions. You know you can have a position where the income of the family is good, the business is good, everything is good, but we've said there is no fault, you can separate, or two people just decide to separate because they don't want to live together, that has nothing to do with the business. It could be an exceptionally good viable financial stable family but the two people don't want to live together. Now, on that basis, the decisions for the operation obviously were right, everything was probably right or it wouldn't be successful. So we have to take a look at the debts or everything surrounding that particular circumstance and I think every one of them are going to be different but I firmly agree that the input of a wife that stays home to take care of the family so the husband can work and build a business is an input, no question about it. I don't think we should spend any time on that at all, it's just that we want to see it happen but it's not going to happen the same in every case. Disagreement between husband and wife does not necessarily have anything to do with the . . . they might fight every day about a domestic thing but they might spend a certain time every day agreeing that the financial stability of this family is fine.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I think, Mr. Chairman, what we need is the differentiation that the Attorney-General and legal counsel are seeking and working on at the present time in terms of categories of property, the definition of family property and the definition of commercial property. When we have that, when we look at this deferred sharing procedure then I think we have to come to a consensus that they are handled in entirely different ways. In terms of commercial property, certainly on separation where there is an asset position, the assets acquired during the standard marital regime should be divided 50-50 and in commerical property where there is a deficit position or a loss or debt position, I think we'll have to make the decision that individual cases will have to be studied on their individual merits and that judicial discretion will be necessary to determine whether that debt position was acquired through the procedure that I alluded to a few minutes ago about trying to maintain the family in a viable position and therefore being willing to allow the business to go into debt. If that's the case then I suggest that those debts are part of the obligations that should be split 50-50. You could only arrive at that by adjudicating each case on its own merit.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Mr. Chairman, I think we're getting bogged down here on this particular section and I think the majority of the briefs that we have received were in favour of the recommendations of the Law Reform Commission, and if we are going to be bogged down I would suggest that we hold this section over for re-examination and maybe we could carry on.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: In response to that, I don't feel that we are bogged down, I feel that we are wrestling with the nuts and bolts of one of the central concepts in the proposed legislation and if the Law Reform Commission made no recommendations on it, I can only suggest, and I do not do so cynically, but I can only suggest that the Law Reform Commission did not consider the questions that have been raised here. I think that could be said about a number of topics we've looked at. This Committee has looked at many aspects of this proposed legislation that, on my reading of the Law Reform Commission, the Commission failed to examine thoroughly. So I don't accept

(MR. SHERMAN Cont'd) . . . the suggestion that we are bogged down here. We have come to grips with a question that was not gripped in the Commission's deliberations.

MR. PAWLEY: Should we put a question mark on that until we have further reviewed it, Mr. Chairman?

MR. CHAIRMAN: It might be a good idea, I have received no clear indication of the Committee's feeling on the principle that you put forward.

MR. PAWLEY: I don't think we are ready to force the thing to a head until we have all given it further thought, at least I'm not.

MR. F. JOHNSTON: . . . get it done the way we want it and we'll keep sending it back until you are right.

MR. SHERMAN: If isolating and identifying a problem is being bogged down, then we're bogged down, but I prefer to regard it as identifying a problem.

MR. CHAIRMAN: The Attorney-General put before you the principle that if there is equal sharing of assets there should be equal sharing of liabilities, which is contrary to section 10 that we were looking at. Now that's the matter of principle before the Committee. If you don't want to make a decision on it now, we'll think about it and come back to it again later.

MR. PAWLEY: There was agreement with that except there was some uncertainty as to the negative value, whether that sharing of liabilities would extend to negative value. That's where we reached an impasse for the time being, until we've looked at it more.

MR. F. JOHNSTON: Mr. Chairman, the impasse is really here, that this Committee, I think all of us would recommend that there should be an equal sharing . . . who decides the equal sharing to the satisfaction of both people -- well, when I say satisfaction, if they can be satisfied fine, but who actually decides what is equal sharing in each circumstance is where we are bogged down. As Harry said, you couldn't really tie them down to black and white, but we have to depend on somebody to decide what is equal sharing. We agree that there should be . . . I would go along with a recommendation from this Committee that we agree there should be equal sharing.

MR. PAWLEY: The court would have to review the calculation . . .

MR. F. JOHNSTON: And the calculation of debts, loans and everything involved has to be done probably by an actuary or something, or an accountant, and then the judge or that person making the decision has to get all the information on both sides of each individual case, which we will never do here or be able to do here, and make a decision. But I think we agree that there should be equal sharing.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I agree that we agree on that but there is also a point of disagreement on which we agree, Mr. Chairman, and that is with respect to the term "negative value" and I don't think that the recommendation as it is presently written meets the approval of the Committee because, by definition, what Mr. Johnston is saying implies that the courts have the option open to them as they examine all these records, of coming up with a negative value in a certain situation. So I don't think we can accept the phrase "a negative value" in that proposal but we can accept the rest of it.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, if I could just express the other question. Dare we expose the spouse who again has had no control, no management, no participation in the day by day decisions relating to a business, can we fairly saddle that spouse with possibly the very irresponsible reckless decisions made by the other spouse unless we give that spouse involvement from Day One?

MR. SHERMAN: Not unless the judge says so.

MR. GRAHAM: If you're going to make them the benficiary of all the wise and fruitful decisions . . .

MR. SHERMAN: Not unless a judge says so, but if a judge says these business debts were incurred so that the family could stay out of debt, then there is some mutual responsibility.

MR. PAWLEY: There are inconsistencies whichever way you turn. I certainly think we have to review it and we have to look at some area of judicial involvement here insofar as the debts are concerned. Could we take this back and review it some more?

MR. CHAIRMAN: I think that would be a good idea and then we could move on. Section 11.

MR. SHERMAN: Number 11, Mr. Chairman?

MR. CHAIRMAN: Yes.

MR. SHERMAN: Well, I have to record a reservation about the qualifying phrase "maximum time to be accorded for payment of the judgment should be five years." I don't see how you can pin it down to five years, I think that once again that would be open to judicial discretion.

MR. GRAHAM: There is always the appeal procedure isn't there? There's no appeal?

MR. PAWLEY: It wouldn't help, it's limited to five years.

MR. SHERMAN: I would think, all things being equal, that the person . . .

MR. PAWLEY: I'm wondering, is five years long enough? Are we tying it down to too short a period of time, given some circumstances? There might be a very large share to be paid and yet very little income that that spouse can muster to pay that portion. Five years isn't very long is it?

MR. SHERMAN: Well my feeling, Mr. Chairman, is that all things being equal most people would, I think, want to discharge their responsibilities as quickly as possible. Just take a hypothetical case of a business that has a paper value of $200,000, so you are looking at $100,000. Now what if that business only generates $20,000 revenue a year . . . well even $20,000. He would have to put all that revenue every year into discharging of that -- or she would -- or else you've got to borrow the money which -- today it is 9 3/4 percent but it has been as high as 12 1/2 percent as we all know and we have no guarantee that it won't go there again. Normally, if you or I were in that position we would like to get it paid off within two years if we could, but I don't think that you should lock a person into a five year maximum.

MR. PAWLEY: There is another danger too, that if you impose a five year term maximum, the courts will always probably allow the five years even though only a year or two is required in order to pay the share, they'll tend towards five. So why don't we just leave it to the court's discretion period.

MR. SHERMAN: Yes, it should be left to the court's discretion.

MR. PAWLEY: According to each circumstance, they'll deal with it.

MR. CHAIRMAN: Would that be agreed? Anything else on 11, 12? Mr. Graham.

MR. GRAHAM: Mr. Chairman, at the present time just what information is available to a credit reporting agency? We have had The Privacy Act and consumer legislation, what else is there that has put limitations on what information is available to a credit agency?

MR. PAWLEY: I think only The Consumer Protection Act insofar as the consent of the individual is required before an investigative check can be done. I don't know whether there are any boundaries to which information can be gathered by the agency. Mr. Silver or Mr. Goodman, are there any boundaries drawn as to the nature of the information that the agency can collect in its investigation, as long as it was within the law, of course?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I would hesitate to say anything without looking at the relevant statutes, the new statutes.

MR. GRAHAM: The judgment that is handed down is a matter of public record, isn't it?

MR. PAWLEY: Yes it is. Every chattel registered, every land title registered, every judgment, every execution, every garnishing order is really a matter of public record. It's available to the whole world if they wish to . . .

MR. GRAHAM: So all this is doing then is spelling out that credit agencies cannot use that or make reference to it.

MR. GOODMAN: Just as it must be clearly stated to be a judgment for an equalizing payment.

MR. GRAHAM: That's all?

MR. GOODMAN: Yes, they are just making sure . . .

MR. GRAHAM: I don't think it is very important then.

MR. GOODMAN: Right, right. All they have to do is clearly state it to be a judgment for an equalizing payment, that's all the recommendation says.

MR. PAWLEY: What would be the reasoning behind 12?

MR. GOODMAN: Well, if you have something set out as a debt to another person, who knows, your wife may have remarried and she's under another name and it looks like you have a debt against you for $10,000 and they want to make sure that when the record comes out from the credit reporting agency, that it sets out clearly that this is a judgment for an equalizing payment and that's really all No. 12 says.

MR. PAWLEY: It would specify that? Oh, I see.

MR. CHAIRMAN: Is that agreed? (Agreed) Section 13, allowable deductions. Mr. Graham.

MR. GRAHAM: Mr. Chairman, I have a few questions regarding awards and settlements of damages but if there is something before that I'll wait.

MR. CHAIRMAN: Maybe we could take it paragraph by paragraph. This paragraph dealing with gifts, inheritances and trust benefits, could the Chair ask you if that would include lottery winnings?

MR. PAWLEY: No I don't think so.

MR. GRAHAM: That's income.

MR. PAWLEY: That would be income, windfall.

MR. CHAIRMAN: Second paragraph . . .

MR. PAWLEY: The Chairman must expect to win one.

MR. CHAIRMAN: Second paragraph, the income from such gifts, inheritances and trust benefits. Mr. Graham.

MR. GRAHAM: Mr. Chairman, here we are exempting from the spouse's shareable estate the income from gifts, inheritances, etc., so that those gifts can appreciate in value as the years go on and yet they are kept out of the shareable estate. We seem to be inconsistent when we say that the other assets that a partner in the marriage brings in, that he has acquired before, the appreciation in value of them becomes a shareable asset, where here we say that gifts, inheritances, are not a shareable asset. I think there is a little inconsistency here.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, the only thing I would say to Mr. Graham is that the income from the gifts, inheritances and trust benefits, are only excluded from the shareable, it says here, where the intention has been expressed by the donor to specifically to confer the income benefits on the recipients, so that not only has the capital been a gift but also at the same time the income from the capital has been specifically termed to be part of the gift by the donor. I don't know whether you can do it any other way because it is in the hands of the donor. The donor is making the gift, the donor is indicating clearly to whom he or she is making that gift, it is in the control of the donor, and if you can take away from the donor that right to confer the income as well as the capital part of the gift to the recipient -- I don't think you could very well take that right away.

MR. GRAHAM: Well, we're just talking about gifts, we'll go on now to the awards and settlements of damages and the proceeds of insurance policy claims.

MR. CHAIRMAN: Yes, if there is nothing further on that paragraph.

MR. GRAHAM: That inconsistency is there, I submit.

MR. SHERMAN: What's that, Harry?

MR. GRAHAM: Well, we'll take settlements of damages, we'll just take for example, if a husband has been severely damaged and has an award of the courts -- well for argument's sake he gets $100,000 -- but he is also prevented from earning income and over a ten year period the other spouse has invested every ounce of energy and effort to not only do their share but the other spouse's share of the work in making the marriage work as well, should she then not be privileged to have a sharing of the income that he received from that damage?

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I think that she would in that case because here we are dealing with two aspects, damages in tort, first there would be the award of general damages for pain, inconvenience, delays, etc., general damage, which would be a general sum of

(MR. PAWLEY Cont'd) . . . money, that would be separate, but in addition to the general damage there would be a specific sum which would be paid for lost earnings during that period of time, the lost earnings during the time in which that spouse was not working. Those lost earnings I believe, Mr. Chairman, if I read this correctly and legal counsel can correct me if I'm wrong, would in fact be part of the shareable estate just as if that person had not been injured but had continued to work, then that income would have also been part of the shareable estate.

MR. GRAHAM: Go back and read the first two lines of section 13, "In reckoning a spouse's shareable estate there should be allowed as deductions the following assets."

MR. PAWLEY: Right, but I still think, Mr. Graham, that there is no problem here because we are deducting from the net estate the awards and settlements of damages in tort and there they are thinking in terms of those general damages, that pain and suffering thing I mentioned, inconvenience, except -- and they save us here -- by saying that they are not including in that category anything that is specified as for income. So they are treating the income in a separate way than they are treating the general damage. Am I correct?

MR. ADAM: Doesn't 14 solve your problem?

MR. GRAHAM: Mr. Chairman, I go back to Page 62 and read their reasoning there and maybe I'm not reading it right.

MR. PAWLEY: Page 62 says, "The pain, the suffering, the impairment, the physical loss if any, or the defamation of character and reputation, for examples, are all essentially personal to the victim." I certainly agree there although it says, "No doubt, a loving spouse would truly and sympathetically share the agony, but that kind of sharing, real and appreciated as it would be, can hardly be quantified through a statutory marital property sharing regime." So, no argument there, they don't deal with the question of earnings here do they?

MR. GRAHAM: You go into the next paragraph.

MR. PAWLEY: The next paragraph, "Awards for personal injuries especially, often include compensation for out-of-pocket expenses, lost income both actual and prospective, and sometimes diminished expectation of life. Such compensation is almost always specifically quantified if the award be made, and damages assessed, by a court. Not infrequently, however, the damages are paid as a result of negotiation and a comprehensive settlement of compensation claims." And then they go on to say don't they, that those would be shareable because of the very fact that they are not really personal but they are really part of the compensation for lost income that would otherwise flow to the family.

MR. GRAHAM: It says, "We realize full well that our above recommended exception to the exclusion would create some complexity, but the alternative would be only a blunt exclusion of all tort awards from computation in a spouse's shareable estate."

MR. PAWLEY: Which wouldn't be fair if that was done.

MR. GRAHAM: And it says, "If no rule be enacted, then the balances must be handed over to the judiciary to exercise discretion on a case by case basis." They are suggesting judicial discretion.

MR. CHAIRMAN: Would it satisfy you if that distinction were made clearer, Mr. Graham?

MR. GRAHAM: What I'm concerned about is here they spell it out rather specifically and then in the end they suggest judicial discretion.

MR. PAWLEY: There is certainly judicial discretion as to determining how much is of a general nature and how much is of a specific nature but it seems to me once the court has judicially determined the respective amounts, then our task is easy, because the general damage is separate property and the specific damage, the earnings, are shareable property. Do you feel that the wording is unclear?

MR. GRAHAM: Well maybe it is my thinking that is unclear. Now the proceeds of an insurance policy claim, am I correct in saying that they are solely to the benefit of one spouse and are not shareable?

MR. PAWLEY: Not all of it.

MR. CHAIRMAN: Have we dealt with the paragraph that we were on, Mr. Graham?

MR. GRAHAM: No, not completely, but we're dealing with allowable deductions.

MR. CHAIRMAN: We were on the second last paragraph . . .

MR. GRAHAM: Awards and settlements, well I think . . .

MR. CHAIRMAN: Is that to the satisfaction of the Committee now? If so, we can pass on to the last one dealing with insurance policy.

MR. ADAM: It sets out on Page 63 how that works.

MR. GRAHAM: Page 63, that's if a third party, maybe a mother or a father has purchased an insurance policy for one person only.

MR. PAWLEY: In the normal course the insurance policy claim as well as the value of the insurance premiums would be considered shareable. So again we are only dealing with the insurance policy claim when it is part of a gift. In the vast majority of the cases it would be shareable.

MR. GOODMAN: You've got point 14 coming up.

MR. PAWLEY: Yes, under 14.

MR. CHAIRMAN: If there is nothing further under 13 we can move on to 14, agreed? Mr. Graham.

MR. GRAHAM: Mr. Chairman, I'd like to ask a question here. In the evaluation of payments under a life insurance policy, is there a difference in the payment to a female as compared to a male if both policies are the same size? Is there a lower monthly payment on accrual, for a woman aged 65 as compared to a man aged 65 if the principal is the same?

MR. PAWLEY: I think there could be because there would be that actuary determination as to the average length of life and life insurance companies place a longer life span on the female than on the male, so I believe it would be possible that there could be some small variation.

MR. GRAHAM: How do you work out the cash surrender value on that type?

MR. PAWLEY: I don't know whether we have anybody here that's . . .

MR. GRAHAM: I'm certainly not an insurance man, I don't know the first thing about it.

MR. SILVER: It says the amount for which the insurance policy can be surrendered, the cash amount that the company will pay out for surrendering the policy.

MR. PAWLEY: It is usually established by way of a table which is included in the insurance contract, which indicates at the end of each year, in the event of the surrender of that policy, what the cash value of the policy would be. I believe there is always a table included. Am I not correct? I think so.

MR. GRAHAM: Then this would cause no problem in establishing the value of each individual's . .?

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Except, Mr. Chairman, that where the person is still living they recommend here on Page 63, "We further recommend that where any benefits come to a spouse during the course of marriage, they should be included in that spouse's shareable property, unless the benefit represents indemnity for personal injuries or some tort caused incident or accident, in which case the rules about damage awards would apply."

MR. CHAIRMAN: We dealt with that under 13, we are now on section 14. Is 14 agreed to? Section 15.

MR. PAWLEY: That would be from that table that I referred to.

MR. CHAIRMAN: Agreed? Section 16.

MR. GRAHAM: I see we have an alternative here. Does that cause any problems?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well the second alternative comes into play only if there is no cash value, it's really not an alternative. But if it has cash value number one applies, if it has not any cash value number two applies.

MR. CHAIRMAN: Any further discussion on 16? Section 17. Mr. Graham.

MR. GRAHAM: I'd like to ask if the Attorney-General foresees any real problem in assessing the value of the prenuptial assets of one spouse or the other in the computation? To my mind I think this would be a rather grey area that could cause a lot of problems.

MR. PAWLEY: Well I think that what Mr. Graham has in mind, and I would ask it of legal counsel, is whether the prenuptial assets have the value as of the time of the marriage or at the time of their acquisition? You're thinking in terms of real property?

MR. GRAHAM: I'm thinking mainly, or using that as an excellent example.

MR. PAWLEY: I would think they would be valued as of the date of the marriage. Updated, the value would be updated to the date of the marriage.

MR. GRAHAM: How are you going to do that?

MR. SILVER: It would be difficult, it has to be done for taxation purposes now.

MR. PAWLEY: You do it for capital gain tax.

MR. CHAIRMAN: It's dealt with later on in the report having to do with the inflated value of assets. I was just looking through for it now.

MR. PAWLEY: Is there a provision for it?

MR. CHAIRMAN: I believe it is mentioned.

MR. GRAHAM: I'm just trying to work out in my own mind how a court could establish the value of, say a 20 suite apartment building that was brought into the marriage in 1942.

MR. PAWLEY: I think they would have to appraise the apartment as of the date of the marriage, so if it was brought in - you mean brought into the marriage in '42? Oh, I see what you mean.

MR. GRAHAM: It may have been purchased 10 years previously or inherited.

MR. PAWLEY: I think they would have to and I suppose appraisers would have some record or some means of appraising the value as of that date from records available to them relating back to that time. I don't doubt it could be difficult but I would think there would be means by which accredited appraisers could do that if there was disagreement as to the valuation. Would I be correct sir?

MR. SILVER: I'm not sure.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, perhaps it would be better to take a broad look at it, and I would like to pose it to the Committee in this respect. I think there's a grave danger that when we come to the sharing of assets, and we're talking about cases where we are definitely disposing of the assets in an equalizing manner in the case of separation or divorce. And I suggest to you that there is a real possibility that when we try to establish the value of assets, and we're dating them back fifteen, twenty, maybe twenty-five years, that in the arguments that are carried out in trying to establish those values, that the greater portion of the assets will accrue to the legal counsels involved rather than to the two beneficiaries involved. And I think that we have to weigh the relative value of whether the legal hassle that is liable to occur would be of benefit to those that you are trying to get those benefits to, and in my own mind I feel that we may very well find that the two ex partners end up both being the loser because we have decided that what you had previous to marriage was yours but the increase in value that occurs is a shared one. I think the increase in value that could possibly accrue to those sharing, in most cases, would be more than eaten up by the legal costs involved in trying to arrive at a value. Now I know in the case of very large assets that were the property of one of the spouses prior to marriage it could be a sizable amount, but I have to state my apprehension that we may very well be causing a great deal of legal hassle here that would more than eat up any of the benefits that would accrue to the people involved by bringing in the increase in value of the assets that were very definitely one spouse's only, prior to marriage, and trying to share with the other spouse the increase in value of that occurred since they were married.

A MEMBER: You're talking about capital gains.

MR. GRAHAM: In a sense yes.

MR. ADAM: And property worth $20,000 then is worth $240,000 today.

MR. GRAHAM: Yes, but you're trying to establish a value on it at a time somewhere in between that, between the time of acquisition and the date of . . .

A MEMBER: Inaudible.

MR. GRAHAM: Either that or stay married.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I think, one, that we do have this in capital gains tax now where there has to be a date at which the property is considered to be of certain value for purposes of the capital gains tax, additional from that point on is capital gain so that there's appraisals now involved in the capital gains. I think also that insofar as the involvement is concerned that that only becomes necessary if the parties fail to agree, of course, the courts would refer it to the master of the court who would try to work out the calculations. There's no doubt that there could be problems, but the only other alternative would be to say that the income from the separate property remain separate throughout the marriage and that could be considerable deviation from the direction in which we want to go here.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: I wonder, Mr. Chairman, rather than taking the inflated value, which is going to be very hard to determine, if we should maybe take the assessed value because the assessments certainly should be available for a period of years going back. The inflated value is going to be very hard to determine.

MR. GRAHAM: Many of these properties though aren't real property, it's an asset.

MR. PAWLEY: Assessed property, with the delays in reassessments and what not, the assessed value often isn't as accurate as it should be for these type of purposes. Sometimes assessment, although it's supposed to be at a certain ratio, often is more like 20 percent of value or 25 or 35 or 40 percent depending on how far behind is the reassessment process in the particular municipality. So that isn't the most accurate basis, and then of course we do have the personal property issue as well.

MR. GRAHAM: Can I ask you one more question then? Are we going to solve more problems than we create if we go in this direction?

A MEMBER: It's the other way around.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: I was just going to add to that, that very often your assessment probably is about 40 percent of the actual value.

A MEMBER: You bet.

MR. BROWN: Now certainly you could then, if you were going to use the assessment as a guideline, you could then pretty well establish the value from your assessment.

MR. GRAHAM: When claiming an assessment some property has to be . . .

MR. BROWN: Okay, that could be taken into consideration.

MR. GRAHAM: I'm really concerned about this.

MR. PAWLEY: What you're proposing then, Mr. Graham, is that the separate property remain separate as well as the capital gain and income from that separate property, are you?

MR. GRAHAM: I'm saying that we could try and assess the relative merits of leaving it that way as compared to what we are doing if we move in this direction. What are the problems that occur this way as compared to the relatively straightforward clear-cut method of spelling it out clearly as remaining the property of one spouse.

MR. PAWLEY: What I would be afraid of is that if we go back to the Murdoch case, and I don't know what the circumstances were there, whether the property was accumulated during the marriage or whether much of that farmland was there prior to the marriage and brought into the marriage relationship by Mr. Murdoch - but say it had been brought into the marriage relationship by Mr. Murdoch 25, 30 years ago, I believe was the extent of that marriage, and if the land at that time was worth only $10,000, at the time of the breakup was worth $150,000, then in fact we haven't done too much insofar as Mrs. Murdoch has been concerned because all the capital benefit has really

(MR. PAWLEY cont'd) . . . . . accrued to the benefit of the Mr. Murdoch type of situation. I think to make matters worse . . . it was acquired after.

MR. GRAHAM: Let me put it to you another way then. Supposing - and I'll use the Chairman's Joe Blotz and Mary - supposing before she was married she loved to fool around with painting, she had 30 or 40 or 50 paintings that she had done before she became married, and during her married years her reputation as a painter grew, that suddenly those paintings that she had done before she was married became very valuable, should her husband then share in the increase in value of the paintings that she had painted before she ever married him?

MR. PAWLEY: Well I don't know how we would - you pose a very valid question but if we go back to the principle of the fact that her talents under your example seem to improve, her reputation was extended, enhanced during the term of the marriage, certainly that is a profit during the marriage relationship itself which brought about an enhanced value of those original paintings.

MR. GRAHAM: They would probably have increased in value whether she got married or not.

MR. PAWLEY: Well she might not have had the same peace of mind.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: I wouldn't presume, even after we're married, to have any basic claim on something that, say my wife had been left to her by her parents before she was married in any way, shape or form. And to give the example, what if she has taken that money and set it up in a fund for the children? You know, I really in that respect have to say that I think she's doing a marvelous thing but, you know, I don't know. When we take the assumption that something has gained value or something that's gained before marriage, or we say that something came to one spouse or another, and I guess I can't say in the millions, but something that came to one of the spouses from their parents or an uncle or an aunt, to presume that you have complete rights or half of that or anything at all about it is to me just taking away the actual privacy or the actual right of that person to have something of their own that was left to someone by somebody close to them. And if you have a situation where you say, "That's fine this has come to me and there's now a family and that is going to be Scott's, the grandfather's clock, that's going to be Joan's or whatever girl or whatever boy you designate it to." So how do you really, I just think that while we're talking along the lines of some things that belong to one another or to both, there are some things that belong to one person which has probably a greater value to them than it would ever be to me, what might be of great value to me but not so much to the other.

I don't like to get to the technical end of it by saying, "What if you have set it up for a fund for the children, what if a piece of jewellery that a girl has before she's married that was her mother's become much more valuable after you're married." I think it's still hers to say that it was left to me and I'm to give it to my sister or somebody else. I don't really . . .

MR. PAWLEY: A gift's right.

MR. F. JOHNSTON: It's a gift. There's a difference in gifts. Okay, fine.

MR. GRAHAM: It's not a gift if she had it prior to marriage, it's an asset.

MR. F. JOHNSTON: Well if I've gone the wrong way, fine so be it.

MR. PAWLEY: With a gift that if there's specific intentions conferred upon the beneficiary by the donor, that the income and the benefit of the improvement in value would rest upon the beneficiary, so be it under the recommendation number 13.

MR. F. JOHNSTON: Uhuh, sorry.

MR. PAWLEY: However, if the donor doesn't make that clear then the benefit would be shareable.

MR. CHAIRMAN: Mr. Johnston is referring to a prenuptial asset.

MR. PAWLEY: Prenuptials. That wouldn't be shareable, no. Only the increase in value becomes part and you're saying that the increase in value should be excluded from the SMR. Is that correct Mr. Johnston?

MR. F. JOHNSTON: Yes. I really think that on this particular point I'm taking the side of the women. No, I quite frankly say to you that if a girl comes into a marriage with funds of her own, be it shares, stocks, bonds or anything else, she has

(MR. F. JOHNSTON cont'd) . . . . . every right to assume that she has something of her own which can grow to use as she pleases. And you should say, okay the same thing for a man, but it gives her also the independence that if she marries some jackass she can walk out of him because she's got funds. I think we're taking away something on the one side there, I know we want it to be even on both sides but it's the girls that get into this most of the time. I don't know why we have any claim on that basis. As a matter of fact I defy any one of you to walk up to your wife and say, "That's mine".

MR. CHAIRMAN: If members would refer to chapter 17 now, after all it's 17 that we're on. It does deal with the method of computing these values. What it says if you read it is that it will be the total of all assets with certain deductions. The first deduction is for prenuptial assets. An assessment will be made to determine the net positive value. It's a little unclear whether it means the cash value at the time of the marriage or whether it means in inflated dollars with inflation added on to that value, but it gets at the problem that you are raising Mr. Johnston. Mr. Pawley.

MR. PAWLEY: Mr. Adams asked me a question that if one of the spouses created a trust fund for the children which trust fund developed from the income from the separate property brought into the marriage prenuptial, would that trust fund for the children be shareable or would it be retained in total unencumbered by the other spouse in such an instance. Mr. Adams didn't like my legal advice so I'm seeing whether yours is the same.

MR. ADAM: Does she have that liberty or does he? Mr. Goodman couldn't answer?

MR. PAWLEY: No, I think Mr. Goodman can, Mr. Goodman is a very good lawyer.

MR. CHAIRMAN: Mr. Goodman.

MR. GOODMAN: I was just saying that once an asset comes within the standard marital regime I don't think that either spouse can unilaterally deal with that asset without consent of the other spouse.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Now that's the point I wanted to have clarified. Supposing that one of the spouses wanted to remove that asset from the other spouse and if he or she was able to do it in that manner or some other manner that we may have not touched upon. In other words if one of the spouses wanted to set up a trust, and Mr. Johnston brought up this question in the first instance, assets were acquired from property owned prior to the marriage, if one of the spouses wanted to tie up those profits or whatever into a trust fund to the exclusion of the other spouse, that's what I'm just saying whether he or she would be prevented from doing that or would she require, as you say Mr. Richmond, the consent of the other spouse in order to set up that.

MR. GOODMAN: Not in the example you give. I should think there's no vesting to the other spouse and certainly if I have an asset which I have title to I can deal with that asset in any way that I wish. Now, of course, there are certain things, it depends on what will be immediate vesting and what all will be included in immediate vesting besides the marital home. It seems to me there's been agreement on the marital home and as to what in addition to the marital home that seems to me is still sort of lopped up in the air, but certainly I can deal with any assets that are in my name, put them in a trust fund.

MR. SILVER: If we're going to have the separation of assets into family category and commercial category and if the asset you're talking about is in the commercial category, meaning that ownership of one half does not vest in the other spouse until the marriage breakdown or something, then before that marriage breakdown occurs the spouse who owns it can do anything he or she wants with it including the setting up of a trust or anything or he can do anything he wants, dispose of it, spend it, anything at all without requiring the consent of the other spouse.

MR. ADAM: And then share in the other spouse's 50 percent after the breakdown?

MR. SILVER: Well after the breakdown whatever is left of that asset . . .

MR. ADAM: The other spouse's asset, not prenuptial but the profits from the assets, the profits from the assets that one spouse brought in while they were married.

(MR. ADAM cont'd) . . . . . The other spouse, he sees an impending breakdown so he says, "I'm going to get rid of this money in a hurry, I'm going to give it away." Then he or she could share in 50 percent of the other's.

MR. SILVER: Yes, however, if the other spouse realizes that that's what the first one is doing she can apply to the court and we will see that later on in the report. She can make an application to prevent it.

MR. CHAIRMAN: We're on section 17, Method of Computation of a Spouse's Shareable Estate. Mr. Graham.

MR. GRAHAM: Mr. Chairman, we haven't so far dealt with the minority report of Gibson, Hanly where they suggest that the value of money or the inflation factor be brought into the computation of the value of the assets as well.

MR. CHAIRMAN: Can we agree, at least to begin with, that the shareable assets shall be the value of all assets less the prenuptial assets? Mr. Sherman.

MR. SHERMAN: Just a question, Mr. Chairman, with respect to prenuptial assets. If your wife, Mr. Chairman, for the sake of discussion, brought $50,000, for the sake of discussion, into your marriage and you and she and your family used that $50,000 in one way or another during the duration of your standard marital regime, on separation and division of property do you owe her that $50,000, and if you do what is the precise sum at that point. The value of money has changed and the interest levies would be an additional consideration. How is that responsibility computed?

MR. CHAIRMAN: Well the suggested method is to take today's assets and deduct that $50,000 that you mention. Whether the $50,000 should be adjusted for inflation in that number of years is the subject of the minority recommendation over the page on 128, that's maybe what the Committee should be grappling with right now, whether it should be at the $50,000 figure or some inflated figure.

MR. SHERMAN: But if that $50,000 or whatever sum, just for the sake of argument, were used for family purposes and family maintenance I infer from what you're saying that that doesn't command any special consideration, it's still $50,000 that your wife brought into the marriage as a prenuptial asset and you owe her that $50,000 back at the time of dissolution of the marriage. Is that correct?

MR. CHAIRMAN: Well I assume the $50,000 would be deducted from the total of the joint assets, which is then subject to a 50/50 split, if my reading of this section is right.

MR. SHERMAN: Oh, well that's a good point and that's really the substance of my question.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: The $50,000 that she brought in would simply not be included in the calculation.

MR. SHERMAN: That's right but what happens? Does Mr. Walding then owe, quite apart from the calculation dividing the property, does Mr. Walding then owe his wife $50,000 because she brought $50,000 into the marriage and it's no longer there?

MR. SILVER: No, he would not.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: If she has $50,000 when they're married, if she chooses to bring it into the marriage and spend it on the family it's up to her, we're not saying she has to though, at least I'm not saying one or other should have a claim on it, but if she chooses to that's up to her.

MR. GRAHAM: You're getting down to this zero equity again.

MR. F. JOHNSTON: You know I keep thinking of another concern, that we talk about bringing things into a marriage, I'd have to ask Harry or you fellows from the rural area what happens when we go back and think about the case, the Murdoch case. What if two people get married and the fellow owns a little farm that's hardly ever been worked before they were married or he owns the land, and they get married, and it was in his name before they were married, and all of a sudden they build it together. That becomes a fine line wouldn't it and I imagine there's lots of that would happen where a father or a mother would leave a piece of land to their son or daughter for them to start out on.

MR. SHERMAN: So there's no implied intent here that what one brings into a marriage one should also be entitled, and I guess I'm putting this question through you, Mr. Chairman, to legal counsel. Can we assume that there is no implied intent here that what one brings into a marriage one is entitled to take out of a marriage, that what one brings into a marriage could be expended during the lifetime in a standard marital regime, for purposes of that regime or at least with the tacit consent of both parties in a regime, and . . . ?

A MEMBER: It's not commercial.

MR. SHERMAN: Commercial or non-commercial. And that the partner who brought that into the marriage cannot then say when the dissolution point comes that - all right the first thing we do is sit down and separate the shareable assets from the non-shareable, and I brought $25,000 into the marriage, it's a non-shareable asset and I'm entitled to get $25,000 out in place of it. Do you see my question? And I'm not saying it should be that way but I'm just wondering how do we compute that.

MR. CHAIRMAN: Before you go on, if you refer to page 68 of the report it gives you a hypothetical case and how such things would be worked out. Maybe we could take a moment to go over that. Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, I think the problem that Mr. Sherman has posed is one that gets back to that question of whether you can have a negative shareable estate and I think we have to recognize that when it comes to the dividing of all the assets each partner has a shareable estate which then goes in to form the total of the estate which is then divided. Now if her $50,000 which she put in is no longer there and that is deducted from the other partners shareable estate, can you then arrive at a minus factor? If we assume that what each party had prior to marriage remains theirs then we have to also assume that the liabilities that accrued against that have to become a joint factor, and perhaps it may be that only $25,000. She has to be responsible for losing half of that $25,000 and he has to be responsible for losing half of that 25. So does he then have a minus factor which he owes to Mary or can that shareable estate not be valued at less than zero?

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I appreciate your direction to page 68 and 69 and I will reread them and certainly assess them, but on my superficial assessment of them at this junction I don't know that it actually gets to the question that I'm raising, unless taking the example on page 68 we isolate the things that Mary had before marriage which were the lake cottage, some furniture, etc. in the extent of $6,600, and my question really is related to that $6,600, that $6,600 that she brought into the marriage. That is $6,600 that she brought into the marriage, therefore, it has no place in the shareable estate. Now when you reach the point of dissolution of the marriage what if that cottage and that furniture is no longer there, it was sold by the couple and something else was done with the money or the money was spent on family expenditures or whatever, was the $6,600 that she brought into the marriage in an isolated category which is always guaranteed? Does the fact that she brought it into the marriage guarantee her that she can take it out of the marriage, in which case where do you find that $6,600?

MR. ADAM: Does the bottom of page 69 deal with that somewhat, to some extent? The last paragraph.

MR. SHERMAN: In response to Mr. Adam, Mr. Chairman, asking if the bottom of page 69 deals with that. It only deals with it insofar as computing the shareable estate, is the way I read it anyway, computing the estate for division. My question is really independent of the estate for division, my question has to do with the capital or assets that either partner brought into the marriage and owned independently of the marriage.

MR. CHAIRMAN: The question being can they be guaranteed of walking out of a marriage with those same assets?

MR. SHERMAN: Yes, and not even quite as declamatory as that, I'm not really asking can they be guaranteed because I'm not suggesting that they should be guaranteed. What I'm asking is are they guaranteed? Is the way the proposal is framed by the Law Reform Commission inclined to provide that guarantee? I don't know, I don't know which way to interpret.

MR. CHAIRMAN: Mr. Goodman can you answer that?

MR. GOODMAN: Well I would think that the recommendations would encourage spouses to retain the assets they brought into the marriage, because once they are sold of course they are lost and the money that you receive for them just would become part of a shareable estate as I read the recommendations. There certainly is no guarantee and, of course there are so many things that people will bring into a marriage. Now some of them will be of the value of a cottage, but so many assets will be worth ten, fifteen, twenty hundred dollars, and of course these assets may well be sold early on in the marriage and long forgotten by the time it comes to terminate the marriage. But certainly once it's sold it seems to me the asset is no longer there and the money just becomes part of the shareable estate.

MR. SHERMAN: Well I suppose it might be possible for a person to have considerable feelings of guilt over that depending on their personal situation.

MR. GRAHAM: It's probably what caused their divorce.

MR. GOODMAN: Right.

MR. SHERMAN: You could feel rather guilty about that don't you think. . .

MR. GOODMAN: Oh, yes.

MR. SHERMAN: If your wife had brought $20,000 into the marriage and you had blown it, or vice versa.

MR. F. JOHNSTON: Don't you have to say the marriage blew it?

MR. SHERMAN: Well that's what I'm getting at. I guess the Law Reform Commission is saying the marriage blew it. I pass, Mr. Chairman.

MR. CHAIRMAN: Can we agree with the Commission's recommended method of arriving at the shareable estate? Are there any sort of problems there? Does the Committee wish to discuss the matter of values at the time or whether inflation should be taken into that? For example: Mary's cottage at the lake, is that to be left at the value of the $11,500 or is inflation to be taken into account? Mr. Johnston.

MR. F. JOHNSTON: Are we going backward? There was a time when the father said that the girl will marry this man and everything the girl has will become the property of the husband, etc., etc. I think the property of the girl's or the man's when they go into marriage, before marriage, is basically their property and they're going to have a marriage and work together and share it, but you know to turn around and now say that what I have when you come into that marriage is going to become the property of the other is a step backwards in my estimation. I think you have the right, somebody has some right to say that what happens to be mine is mine.

MR. JENKINS: Once you draw into a marriage contract you're married.

MR. GRAHAM: . . . I know people who don't want you to do this for at least a year.

MR. SHERMAN: Well it's the same question isn't it, Mr. Chairman. I appreciate Mr. Johnston's comments, it's the same question. It troubles me a bit that somebody can bring an asset into a marriage which is supposed to be their own, independent of the division of property we're considering here, property acquired during the SMR, and yet lose that thing that was supposed to be their own because it had to be utilized for one reason for another or was utilized for one reason or another during the SMR, and that troubles me a bit. And I can tell you quite frankly I'm not speaking from the male perspective on it, I'm thinking of those women who bring things into a marriage and then their husbands use them for purposes, it may be family purposes or they may be business purposes or it may be done in the good nature of sort of just using the money but the day we turn the corner we'll pay it all back sort of thing, but sometimes you never turn the corner. Now that woman has lost that asset which, with respect, the technical way in which we're framing this proposed legislation is supposed to be something that's unassailable, that's outside the property that's up for division. And it's okay, you know it may be nice to say well just write it off that's one of those things, but the Attorney-General has raised the question of fairness in terms of making a spouse responsible for the debts of a company that she or he had no management authority over. And I suggest the question of fairness can be raised in this area too.

MR. CHAIRMAN: Mr. Johnston.

MR. F. JOHNSTON: It would only be lost if there's not an agreement. But if

(MR. F. JOHNSTON cont'd) . . . . . somebody said to me you've got $20,000 we need it, and they said yes, sure we do, it's put in voluntarily but there's nothing to say that it has to be.

MR. SHERMAN: How voluntarily is voluntarily? I can see the situations where you need $20,000 and your wife has got $20,000 and it may be a very careful and reluctant agreement on her part because you're in trouble, she's still in love with you, it's fairly early in your marriage, she doesn't want to see you go down the drain, but it's certainly not something that she would want to do, all things being equal, because there goes her little nest egg.

MR. GRAHAM: It's at the bottom of page 70.

MR. SHERMAN: There goes her little nest egg. Well, Mr. Graham says there it is on page 70 so now I'll turn back again, Mr. Chairman. Page 70 gives us our answer, Mr. Chairman. There has to be provable consent. Oh, it gives us our answer except it underscores the illustration that I just offered a minute or two ago because it says, if I may quote from page 70, Mr. Chairman: "If either the donor or the recipient spouse precipitously used the benefit to pay off the mortgage without getting the other spouse's subsequently provable consent to do so, etc." No, I'll have to withdraw that, this is referring to the recipient spouse. I was thinking about the other spouse.

It seems to me that page 70, sir, refers to the recipients, an action on the part of recipient spouse and I was thinking of the precipitous action being taken by the non-recipient spouse with the reluctant acquiescence. I am not going to say with the agreement, with the reluctant acquiescence of the recipient spouse. But later on page 70 the Law Reform Commission, Sir, says, and I'm quoting from the middle of page 70, second paragraph: "Our colloquial advice then would be: 'If you can't prove it, forget it'." I guess that's the position they take on the kind of situation that I've raised.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think we've got to move along here, we seem to be bogged down. I was just wondering if legal counsel has considered the recommendation of Gibson and Hanly regarding inflated dollars and deflation.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well it's, I guess, just a matter of policy as to just how refined you want the calculation to be, but perhaps it can be said that deflation, the possibility of deflation, balances out the possibility of inflation. I mean it's just presumption.

MR. GRAHAM: That's just presumption.

MR. SILVER: This would add considerably to the complexity of the whole thing, of an already complex regime.

MR. CHAIRMAN: Would inflation in that case also would include appreciation and depreciation or are those two separate things?

MR. SILVER: No, no those are different things. Here this dissenting opinion is simply dealing with the increased value of money or decreased value of money.

MR. GRAHAM: When you're working out the value of either spouses' estate the inflation factor would be one that would be similar in the establishment of both estates, but where the discrepancy would come in is where the estates are of unequal value. I personally have to go back to the contention I made previously that if we're going to get into all these arguments about whether we use an inflated dollar or an deflated dollar, whether the appraised value of the assets of one spouse when we come into the marriage, not at the time of the purchase of those assets but the value at the time when they come into marriage, whether or not all of this is really worthwhile. Are we going to or is it the legal profession that is going to be the main beneficiary in all these hassles about the establishment of values? I sometimes wonder whether the people involved are not going to be the losers rather than the beneficiaries of all the hassle and harangue that I can foresee as occurring when you try to establish the values of the assets that existed at the time of the marriage.

MR. CHAIRMAN: Mr. Goodman.

MR. GOODMAN: It seems to me that you would obtain the opinions of assessors and they would give you their opinion as to what the value of the asset is now and they could determine, give an opinion as to the value of the asset back in 1942, to go to your example, and then if counsel and, the parties couldn't agree as to the value of the asset

(MR. GOODMAN cont'd) . . . . . and the increase in the value of the asset then of course it would just go to court and the court would normally ask the master to do the necessary accounting and he would come out with a decision which would be binding on the parties. Of course they could appeal to the court.

MR. F. JOHNSTON: Do you appeal?

MR. GOODMAN: Oh, well, you're always going to have this process, any time you have access to the courts there's going to be appeals and yet I would think that the first couple of years, of course, something new is going to be a little bit more difficult. People would get to learn to know exactly what the standard marital regime is and obviously it's not going to mean less work for lawyers. I might go into private practice.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Of course, in a lighter vein, these days so much work is being taken away from the court and from lawyers by statute and given to boards and other personnel, so maybe there is some kind of justice here.

MR. GRAHAM: Is it right then to assume that the added implications of the minority report then would further complicate matters beyond the redeeming factors that they feel are necessary? I have a tendency myself to ignore it.

MR. GOODMAN: Well it would make it that more complex and yet it may be just a further refinement, I think you can look at it that way which may appeal to you as being more just in its approach.

MR. GRAHAM: What do you feel about it Bill?

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: I think, Mr. Chairman, if you ask me for an opinion, I think if you're going to bring in the inflated dollar value on an asset brought into the marriage something 20 years hence it definitely is going to create an argument, that's for damn sure, because somebody's going to say, well that asset or whatever you brought into the marriage is certainly not worth one partner or the other. And perhaps, I think, in that respect the majority of the report is more reasonable because you, by bringing in the recommendations of the minority report here you certainly bring another facet to this whole argument altogether. I can't see lawyers going broke, I can see them having a hell of a lot more work than they're having right now.

MR. CHAIRMAN: If we're now prepared to come to any consensus on the matter of inflated dollars can we just run over this section 17 and see if we can agree on the suggested method of computing those value assets?

MR. GRAHAM: I thought we'd already done that.

MR. CHAIRMAN: I wasn't sure if we'd settled Mr. Johnston's concern about a woman bringing an expensive diamond ring into a marriage and being assured of still obtaining ownership to it.

MR. GOODMAN: I think that comes in half way down page 127, gifts and inheritances of personal apparel or adornment. So first of all it's brought in before the marriage and it seems to me he's talking about a gift or inheritance of adornment.

MR. CHAIRMAN: I understood Mr. Johnston to be concerned about the wife having the right to keep that and that it should not be able to be sold for the benefit of the marriage, or if it were that she should then have the value of that when she left. Is that correct Mr. Johnston?

MR. F. JOHNSTON: No, I don't think I recall talking about the value of it when she left, and I was satisfied that if it was a gift or an inheritance of something of adornment as you mentioned that it belongs to he or she on that basis. That really satisfies me from the point of view of those small articles or gifts or anything of that concern or inheritance. My main concern in the whole thing is the statement that - and I think we solved it - we were talking about if it was there before the marriage that I think a person that has something before the marriage should have the right to say whether it comes into the marriage or it doesn't. In the case of the ring, Mr. Chairman, if it's sold during the marriage and if it's agreed to sell it, it was agreed to sell it during the marriage as far as I'm concerned. If a husband sold it without the wife knowing it he stole it as far as I am concerned, but I was more concerned about the point of giving people that privilege. And when Bud says that it's a tear-jerking decision

(MR. F. JOHNSTON cont'd) . . . . . that was being made because she loves the fellow and everything, all right she loved him and put it in, but the fact is she doesn't have to, and that was my concern. The other thing is that I think there's lots of cases where there's a marriage and one of them does have an ownership of, say, a farm and they start from scratch together. I don't know how you get over that if you say what's yours before the marriage is in there, but no I'd go back, I didn't have any concern over the gifts. You know right now we have a situation where the courts do decide things regarding separation in marriage and I'm trying to just sit and say, Well what are we trying to overcome, we're trying to make it fairer, where were the laws, there certainly were unfair laws that we want to overcome and make them fairer to both sides, but at the present time what we've been talking about right now with the dispute is basically being done now isn't it? Don't lawyers on both sides get together and make a case to a judge to decide what is fair to both sides? Can I ask legal counsel that? Isn't that what's basically being done at the present time? And I can see that there are some inequities in some parts of the law but we just want to make sure that we get rid of the things that are not fair to one side of the marriage or the other, but right now.

Also what we're talking about right now is that you're talking about coming into the marriage with something. I think in many of the marriages two people enter into it without a damn thing. I would owe my wife a bedroom suite if we go along with this thing and I don't think I brought a hell of a lot of money into it either. But what we're really talking about here is people that enter marriage that have a certain amount of wealth, property, etc. and they've got to look after that themselves, either by contract or be prepared to accept the decisions of the judge after they've both had their lawyers. But I go back to what I started before, I don't think there should be a requirement forcing a person to put everything in. To answer your question, Mr. Chairman, I was satisfied on the gifts and adornment.

MR. CHAIRMAN: There seems to be general acceptance of section 17, but with a reluctance to take into account inflation in that. If that's a fair assessment of the views of the Committee maybe we can move on to 18. Agreed 18? (Agreed) Section 19. Mr. Graham.

MR. GRAHAM: When we come to section 19 I think we have to go back to pages 72 and 73 of the report, and they list there the manner in which termination of an agreement of a standard marital regime can occur. They have the one recommendation which I think may be cause for some concern where they say, "We recommend that the application should be permitted on the part of both spouses jointly, or on the part of one alone." And that's the opting out part of it. I'm not too sure myself if that's the opting out of the whole process or just out of the standard marital regime.

MR. CHAIRMAN: 27 (c) is the unilateral opting-out provision. This seems to deal with something else.

MR. GRAHAM: This is dealing with the termination of a standard marital regime.

MR. SILVER: Well that's when the spouses are not able to agree and must resort to the court to make the decision for them, then the suggestion here is that either one of them can make application or both of them, that is one can make the application when he or she runs into a problem with the other one or they might both agree that it's much too complicated for them and they want the assistance of the court. That's the way I read that sentence that you read from page 73.

MR. CHAIRMAN: Does this not say that they can terminate it without going to court if they both agree?

MR. SILVER: Yes they can.

MR. GRAHAM: Without going to court? But can one do it unilaterally without going to court?

MR. CHAIRMAN: It says written agreement of the spouses.

MR. SILVER: Well we will see later on that where the parties do not invoke this regime by agreement then either one can invoke it unilaterally, but it isn't as simple as that. Presumably the other spouse would not agree so it would end up in court anyway.

MR. CHAIRMAN: But this is an agreement section.

MR. SILVER: No, where there is no agreement and one spouse has to do it unilaterally.

MR. CHAIRMAN: Yes, but 19 the one we're on now refers to where there is agreement between the two spouses.

MR. SILVER: Yes.

MR. CHAIRMAN: Is that agreed? Section 20.

MR. GRAHAM: Well the only part I have to worry on or my concern at this particular time is that it would be at that juncture when one of the spouses made an application, that would be the point in time at which the assets and the liabilities would be reckoned. Is that correct or would it continue on after that point in time? Here's one person, one party to a standard marital regime who says, "I want out." Now they haven't got a separation, they haven't got a divorce, can he then make an application on the part of one alone?

MR. SILVER: No, there has to be one of the grounds set out here.

MR. GRAHAM: They just simply stop living together.

MR. SILVER: Well if they stop living together then that is a ground, but it has to continue for, I think, six months at least.

MR. PAWLEY: What happens to the assets during that period?

MR. SILVER: Well if there's any danger of the assets being dissipated by the other spouse or absconded with then the first spouse can apply to the court for an order appointing a receiver to gather in everything, to protect the assets until they can be divided. Now we'll see that later on.

MR. CHAIRMAN: Twenty is agreed to. Twenty-one.

MR. GRAHAM: Is that a six year probation or six month?

MR. SILVER: Six year.

MR. GRAHAM: I'm not too sure on the meaning of section 21, could somebody explain it?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well if one spouse, which the report here in this paragraph calls the squandering spouse, if that spouse during a period of six years or a period of years keeps on dissipating assets, spending moneys, spending shareable assets foolishly and in other ways losing whatever the family has, then he will be accountable for a period up to six years for the assets that he lost, that were lost as a result of his dissipation. So that the value of the assets that were lost as a result of his dissipation will have to be determined and added to his own estate. In other words he will end up with that much less on a division.

MR. GRAHAM: He could end up with a negative estate or is that negative aspect still the predominant factor?

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Mr. Chairman, with all due respect to the Law Reform Commission I don't know how the devil you could ever enforce such a thing. I mean certainly one partner, the one that's accused of squandering is going to say that he didn't squander it, he used it for the upkeep of the marital home. I really am puzzled, I don't know just how this could be worked. Does the Attorney-General or legal counsel have any ideas how this could be framed in legislation that would be workable?

MR. GOODMAN: Well I think it's just a question of proving it, and certainly let's say there are all sorts of people who dissipate all sorts of assets by gambling for example, and if you can prove that you had a bank account with $50,000 on it and then the husband went to Las Vegas for a week and he took $20,000 with him and he came back with nothing I think that's fairly good proof that you've dissipated, the husband has dissipated $20,000 and it's really, I think, just a question of proof. It may be difficult to prove, much more difficult than that, but it's a question of the principle, I think, and whether you accept the principle.

MR. PAWLEY: What if it was squandering due to absenteeism and alcoholism, which I think should be a very common situation, whether it's wasteage due to the one spouse becoming alcoholic and losing a lot of time off work and spending money irresponsibly, would that be considered dissipated under 21?

MR. GOODMAN: Well if he's spending money improperly that's one thing, the

(MR. GOODMAN cont'd) . . . . . fact that he's off work, it's a question of dissipated assets. If he doesn't have the income because he's off work, of course, this has nothing at all to do, as far as I read it, of dissipated assets. It just means he just won't have as much income, but it may be that the money that he spends on liquor may well be considered to be a dissipation of assets in a particular case.

MR. GRAHAM: No, but if you go back and refer to section 10, "The shareable estate of a spouse should never be reduced, despite the extent of debts and liabilities, to a negative value." You can only take it down to zero then, eh?

MR. GOODMAN: That's the recommendation.

MR. PAWLEY: This would be not a debt or liability but would be pure squandering.

MR. GOODMAN: In effect, in my example, if you could prove that in the past year one spouse had spent $40,000 on gambling and the shareable estate of all assets at the termination of the marriage, let's say there was $50,000, by virtue of section 21 you'd add another $40,000 so instead of a $50,000 shareable estate you'd have a $90,000. Even though that $40,000 is gone that would be added, and in effect of that $50,000 instead of the squandering spouse getting $25,000 of it he would get $5,000 and the other spouse would get $45,000.

MR. GRAHAM: Well then let's put it in the other light. If he has squandered $40,000 and his share of the estate is only $20,000 he comes up then with a $60,000, and his half is 30 but there's only 20 there, does he owe his wife $10,000?

MR. GOODMAN: I couldn't follow that in a million years. No, no the figures you were giving me, I got lost on your figures, but certainly to that extent it could be that all of the shareable estate would go to the other spouse.

MR. GRAHAM: But he couldn't end up with a minus figure according to section 10?

MR. GOODMAN: I don't know that section 10 has any application to this section 21. Section 10, of course, you're dealing with debts and liabilities and one spouse will not be required to share in payment of those debts and liabilities under section 10. In section 21, it seems to me that it could well be that the court could add to the value of the squandering spouse's shareable estate and thereby cut him off of everything and all of the estate would then go to the other spouse, that is a distinct possibility. And it may be that the court will say that you owe . . .

MR. GRAHAM: Well that's the point I was saying.

MR. GOODMAN: But as I say, I don't think Section 10 has any application to them.

MR. CHAIRMAN: Order please.

MR. GOODMAN: In effect it just means, to apply section 10, it would mean that the wife doesn't share - let's say if the court says, "Well you've squandered so much money, all of the estate goes to your wife, plus you owe her $5,000." She wouldn't have to share in that 25, you know, she wouldn't have to share, $2,500 wouldn't be her share of that debt of his, in effect, which would be the only way that section 10 would apply, it seems to me.

MR. CHAIRMAN: Order please. It's 5:30 gentlemen, our usual time of adjournment and we haven't reached the end of the report yet. There are no other days that were set aside for continued discussion on this except for the 15th when we hope to get the report, do you wish to come back this evening and try to finish.

MR. PAWLEY: Mr. Chairman, I have difficulty, I see Mr. Sherman has as well I believe, about this evening; and tomorrow is Cabinet. What is the consequence if we just carry on on the 15th as we are doing now and have to come back even after the session has started for the report? Is there some procedural problem that we'd run into. --(Interjection)-- So we don't have to worry about the convening of the Legislature. So let us just carry on as we are doing with the days allocated. Surely we can finish up on the 15th and then deal with the report on another day later.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Yes, I would find it impossible to be here this evening and I don't want to miss the Committee meetings unless I have to, although there may be others here who wish that I would. Certainly we'd be prepared to sit another day if a mutual

(MR. SHERMAN cont'd) . . . . . date like Thursday or Friday could be agreed upon by all members of the Committee, but I would hope we're not being bound to consideration of the report on the 15th, and the Attorney-General says we're not because I think we may need much more time yet.

MR. PAWLEY: You know, I am thinking, in view of the numerous questions that have been raised, that I just don't see how we would be in any position to make a report on the 15th. There are a lot of legal questions that remain to be researched and answered. I don't think there's any need that we should tie ourselves down to any deadline as long as we get it into the House in reasonable time.

MR. SHERMAN: As long as we can defer that consideration of the report so that we can complete our deliberations here, then I don't think there are any problems on our side, Mr. Chairman. But I was going to ask whether, to use Mr. Graham's and Mr. Adam's expressions, we seem to be getting bogged down on this particular point and I was just going to ask, just before you adjourn, whether I could request a legal opinion for the next meeting, Mr. Chairman, on section 17 which we have passed, but I go back to page 70 which we were considering and just point out to legal counsel that in those first two paragraphs on page 7 when they're referring to the kind of situation that I proposed, the Commission says that if such and such and such happens the gift would accrue equally to both spouses. It doesn't say that it would be considered a shareable asset, it says the gift would accrue equally. Well a gift accruing equally presumably means that the gift is 50-50, so I go back to the question I asked earlier. If the item that the partner brought into the marriage is not guaranteed to them in total then is at least guaranteed to them in 50 percent of the total, if the gift accrues equally. I'd like a legal ruling on that because I don't think that the questions with respect to section 17 have been entirely answered, they haven't been answered to my satisfaction, Mr. Chairman.

MR. CHAIRMAN: Note has been made of that point Mr. Sherman. If there's nothing further before the Committee we will adjourn now and reconvene on the 15th at 10:00 a.m. in this room. Committee adjourned.