Legislative Assembly of Manitoba

HEARING OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

CHAIRMAN

Mr. D. James Walding
Constituency of Ste. Vital

THURSDAY, June 16, 1977, 3:10 p.m.

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TIME: 3:10 p.m.

MR. CHAIRMAN, Mr. D. James Walding.

MR. CHAIRMAN: We have a quorum, gentlemen. The committee will come to order. When we adjourned at lunch time we had reached Section 24 as amended. There was some discussion of a further amendment to this section. Mr. Silver now has a suggested further sub-amendment for Section 24. Mr. Cherniack.

MR. CHERNIACK: Mr. Silver suggested the wording just a moment ago, to take care of the point that Mr. Sherman was making, and that would be after the word "gift" — the third last word on third last line — I would move to insert the following words: "for inclusion in those assets."

The point then would be that whatever is the excessive portion, or that much thereof that was considered excessive, would be put back into the general total amount which would be accountable for division between the parties.

MR. CHAIRMAN: Any discussion on the amendment as moved? Mr. Sherman.

MR. SHERMAN: Mr. Chairman, the amendment is an improvement, in my view. It improves the clause and changes what I think would have been an inequitable impact. I still, though, would like to just leave the one caveat on the clause that I made before for the record. It does seem to me that the way the clause is constructed that it is inconsistent with the changes we made the to 13(2) which I referred to before the lunch hour.

MR. CHAIRMAN: I would remind all honourable members that these microphones are not as sensitive as the ones we were using and they should speak a little closer to the microphone, please.

MR. SHERMAN: I just want to put in that one caveat, Mr. Chairman, the amendment is acceptable to me. It does take care of one problem that I raised. But I still would just like to leave on the record my concern with the fact that an innocent recipient is being held responsible here and we made a change in that principle in 13(2) when we took the innocent third party off the hook — so to speak — and left that kind of situation; one where the spouse was liable to the other spouse.

Here we are certainly deviating from that principle and we're saying that the innocent third party is responsible for making up the difference and for resolving the problem. So I want to leave that caveat on the record.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Are we not really saying that where a spouse makes an excessive gift to a third person which is, in fact, a dissipation of the assets, is that not what we are really saying? We're just saying where an excessive gift is made, out of the commercial assets, to a third person. Let's take this situation. A manager of a firm is retiring from a firm owned by one spouse and the spouse who has made the decisions with respect to the commercial assets feels that the person in his retirement is entitled to a substantial bonus; that's his decision to make. The decision as to whether it's excessive or not you are going to suggest has to be determined by the court if the other spouse makes an application. It's not his judgment; it has to be a court's judgment as to whether it's excessive under the circumstances.

MR. PAWLEY: Yes.

MR. SPIVAK: So that in effect the termination, as opposed to a retirement where an employee, or even a participant in the commercial assets — although not an owner but a participant in the commercial assets — the spouse in charge of one of those assets makes a determination for termination and arrives at a settlement. Do you consider that as a gift to the third person? It's handled in the normal course. Is that going to be considered a gift under this terminology? To begin with, in terms of policy, is this the kind of thing that we are trying to capture or not?

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Is Mr. Spivak referring to the settlement that is made in respect to a *bonafide* settlement in relationship to services, or whatever, rendered?

MR. SPIVAK: Mr. Chairman, I would refer to a similar kind of bonus that's given at Christmas time by many owners of commercial assets to employees, which is not an obligation or a commitment on the part of the owner to fulfill but he does so for whatever reasons. Now that bonus is essentially a gift to a third person.

MR. PAWLEY: Well, Mr. Chairman, it seems to me that it relates to the judicial discretion of the judge. If I could, again, just read Page 77 of the Law Reform Commission Report dealing with this, "The net, we think, should cover any person who accepts a gift or transferred property and who knows, or should be taken to know that the donor or transferor is a married person subject to a subsisting standard marital regime, or who did not trouble to inquire astutely. That recipient should have to restore the value to the spouses' combined shareable estates unless it were conveyed with the clear assent of both spouses. This may seem harsh to some, but we think that only a few recoveries would have to be effected in each generation. After all a person, firm or corporation, not being a registered or recognized charity, political party or lottery, should not be entitled to 'lay

dumb'about the source of substantial gifts or transfers for nominal consideration. We recommend the enactment of appropriate provisions to express the above observations."

I certainly concur it ought not to be for nominal; it should not be an attempt to avoid the provisions of the legislation by large gifts which would have no other purpose but to destroy the very nature of the standard marital regime that we are attempting to establish.

MR. SPIVAK: Well, can I then say this. I want to inquire of Legislative Counsel, if in the situation that I described the amount that is paid out to the employee, or the participant in the business, is an amount upon which income tax is declared that will be deemed not to be a gift, then, in these terms, is this correct or not?

MR. PAWLEY: You're asking Mr. Silver?

MR. SPIVAK: Yes, I want to know that. Because I want to go back to that situation that you just described. If, in fact, an amount is received and tax is paid on it . . .

MR. SILVER: Would you please start the question at the beginning; I was working on the bill.

MR. SPIVAK: Well, I want to understand where a spouse makes an excessive gift to a third person, if money is paid out for whatever reasons to an employee which is over and above the normal course of conduct or the normal terms of employment, and it's a substantial sum — possibly for retirement, possibly for separation, for whatever reason, possibly just as a bonus — would that be considered an excessive gift?

MR. SILVER: Would that be what?

MR. SPIVAK: Would that be within the category of a consideration by the court as an excessive gift?

MR. SILVER: I would say "yes".

MR. SPIVAK: Not withstanding the fact that the participant would be paying income tax on it? In other words, it is additional to the income.

MR. SILVER: Well, I'm only saying that it's within the broad category. Whether it is excessive or not would depend on factors such as the one you are mentioning, whether there was any special reason for the gift, such as retirement or not. And that, in itself, may be enough to render it as a normal gift. But I am saying that kind of gift, a gift from an employer to an employee — let's say a male employer to a male employee or a female employer to a female employee — would not be excluded from the application of this principle.

MR. SPIVAK: All right, let's now look at another situation, a professional partnership — and in the course of the professional partnership a decision is made by several of the partners to separate from another partner. But in order to do that a lump sum payment has to be made which is far more than the actual value of the interest that the person in the partnership has. That money then is paid. Are you suggesting at this point that a wife has the right to go to the court and indicate that there was an excessive gift given to the partner who has been paid-out, in terms of the values . . .

MR. SILVER: It doesn't sound like a gift at all.

MR. SPIVAK: Why?

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: The example Mr. Spivak has provided, from the words he uses and the description that he provides us, is not a gift. It is an arrangement that has been made by one in a partnership to attempt to buy his or her way out of that partnership. It's not something which is a gift. The value received is not nominal in Mr. Spivak's case.

MR. SPIVAK: It's not nominal?

MR. PAWLEY: No, you said that it was being done in order to buy a way out of a partnership and there were difficulties in so doing and the amount being paid was excessive, if I understood your example.

MR. SPIVAK: That's right, which dissipates the commercial assets.

MR. PAWLEY: Yes.

MR. SPIVAK: Well, which reduces the value of the commercial assets. Are you suggesting that is a normal arrangement; that's not a gift, that is buying out of an arrangement and that can't be questioned, it doesn't come within the ambit of this section?

MR. PAWLEY: It's not a gift in return for something which is no more than nominal. Mr. Chairman, the problem is that I am sure we can muster many many different examples of situations and I don't think we, as a committee, will be able to say yes, no, . to most of the examples that will be posed. In the final analysis a court will have to determine whether or not it is a gift in the meaning of gift, that it is a *bona fide* gift, not something which is excessive and I say to Mr. Spivak that I don't think that there is any way that we can be more definitive than the reference to gifting and excessive gift.

MR. SPIVAK: Let me put another example because I want to understand what the government's intention is. A father has control of the commercial assets and he gifts to his son money for the purchase of a home. Would that be considered, or could that be considered an excessive gift to a third person?

MR. PAWLEY: The father has control of the commercial assets and gifts a home to the son?

MR. SPIVAK: Or gifts money for a home . . .

MR. PAWLEY: Money for a home to a son? Well, it's possible, it could be; it depends again on the nature of the assets, the extent of the assets, the relationship that exists between the father and the son, the question as to whether or not there was any consideration. I would think from the example that Mr. Spivak gave, again if there was many commercial assets and did not jeopardize the — I think the wording, if I could just refer to Section 24, "It appears that the remaining assets of the spouse are insufficient or unavailable for the making of any equalization payment."

So first I would have to ask Mr. Spivak if, in his example, the remaining assets left over after the gifting of the money for the home were insufficient or unavailable for the making of equalizing payment required under the accounting pursuant to notice.

MR. SPIVAK: Yes, but the common practice then, I think, would be in a situation where a father who has control of a bank account would, in fact, pay out a portion to his son for the purchase of a home. The bank account may very well be the only asset and on that basis if you are saying that if the amount is more than 50 percent of that bank account, then in effect that would be considered an excessive gift.

MR. PAWLEY: Well, it could be if there is no consideration for it, Mr. Spivak.

MR. SPIVAK: Well, no, I am saying it is a gift. I'm not saying . . . that's a very common thing.

MR. PAWLEY: But it could be considered a gift; it could be excessive if the mother of the boy you referred to is left in a situation where the remaining assets were insufficient or unavailable for making of any equalizing payment.

MR. SPIVAK: Well, but again, we are dealing with real situations . . .

MR. PAWLEY: I know.

MR. SPIVAK: . . . and I think it would be a common situation where either some money held some way is the only commercial asset that reaLY IS HELD BY ONE SPOUSE AND THAT WHATEVER THE REASONS, PART OF THAT MONEY IS GIVEN TO A SON OR A DAUGHTER OR A BROTHER OR A FATHER OR A MOTHER, AND YOU ARE BASICALLY SAYING THAT IT CANNOT BE MORE THAN 50 percent.

MR. PAWLEY: Well, again, I want to refer you to the wording in Section 24, that is the wording that the court would refer to in any determination.

MR. SPIVAK: But I just want to know what your intention is. You are basically saying that if equalization cannot be achieved, that that would be excessive. Therefore, if we take an example of $10,000 and the father gifted $6,000, that would only leave $4,000 and that would be less than equalization . . .

MR. PAWLEY: The court might consider that a gift, yes.

MR. SPIVAK: But that's what you consider. I am not asking that this point be . . . if that's what you're really trying to cover at this point. You are basically trying to cover that they could not be more than 50 percent. Now that, I assume, is what you are really trying to cover at this point because you want equalization to be there and in the situation that I have given, $6,000 would be more than 50 percent. And that's the limit we're putting on . . .

MR. PAWLEY: Yes, of course, we would have to know what liabilities were involved and whether there was any consideration.

MR. SPIVAK: Well, I am assuming that it is a gift in which there is no consideration.

MR. PAWLEY: But are there any liabilities within your example?

MR. SPIVAK: No, I am assuming that's the only commercial asset and that's it.

MR. PAWLEY: Well, your example then, it would seem to me the example that you provided us, that the remaining assets would be insufficient or unavailable.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: Well, Mr. Chairman, I still think that this particular clause has a real potential for some serious inequities in it. I wonder if one of the solutions wouldn't be to shorten the time span considerably so that if the concern of Mr. Pawley and others that someone would use this, the option of giving gifts — excessive gifts, if you like — as a way of avoiding responsibility or share of the assets, obviously to go back two years is a fairly long time. If it was reduced say to three months or something like that which would be within a period which would be more reasonable according to the context of a marriage breakdown but to try to trace back two years when the marriage was working out and that was a normal part of the ongoing activities, the father giving a gift to the son or to parents or paying his education and things like that, but if you're trying to protect someone using this as a way of avoiding responsibilities under the Act, then it would seem to me then to simply shorten the ti period to a three-month or six-month period, something prior to the application. In that way, you would capture any attempt of someone saying, "Hey, we're headed towards a separation; let's get out of it and I'm going to start giving money all around, all over the place." But I think to accept the idea that there is going to be an ability for the court to order a third party to pay back certain portions because it is excessive, I think would be really be unfair, extremely unfair, and maybe one of the ways out of it would be simply to capsulate that time span from two years down to, I would suggest, three months.

MR. PAWLEY: Mr. Chairman, in answer to Mr. Axworthy, it is possible now — and to Mr. Spivak — it is possible now that the court would attempt to set aside on what appears on the surface to be a gift, I think, running back six years. I know of a situation, an example, a situation now where a wife is attempting to set aside a conveyance which was made by her husband to the husband's brother of a half section of land which comprised a substantial part of their estate. The conveyance had taken place quite some time before the break up of the marriage — I am trying to think of the time space — but it was certainly something much longer than six months in the particular one that I am thinking of and the matter is now before the court. So even now there are provisions dealing with that. Here we have shortened it from the normal six years to two years. It may be that the spouse, despite the gift, doesn't wish to bring things to a head, hopes that it is only one incident, one occuiience, and doesn't mean an attempt as part of a pattern to destroy the relationship which exists and it may be only after there is further incidents after that that she recognizes that the intent really is to undermine the standard marital regime.

ù I am always concerned about limitations, relieving people of their rights. Too long a limitation period is not good but then if it's too short will end up with this problem as we have here from time to time of people petitioning for relief against the limitation period.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I have a suggestion to make. I am looking at the Law Reform Commission Report which I read this morning, I think, in relation to gifts, wherein they actually make the suggestion that it be recoverable within six years previous to the time in which termination of the regime is made effective. Now, we in our own caucus committee felt that that was too long and we thought we made a tremendous change by moving from six years to two years.

Well, I'm not sure that I would like to say that it has to be an immediate or a six-month or quick decision because that in itself may break a tenuous marriage.

But I read further, and let me repeat one sentence that I read this morning: "We think that this should cover any person who accepts the gift or transferred property and who knows, or should be taken to know, that the donor or transferer is a married person subject to a subsisting standard marital regime, or who did not trouble to enquire astutely."

Now, we are talking about an excessive gift and I am suggesting that we add this kind of description to the kind of a person who is the recipient. If the person who has received that gift is a person who knew or should have known that the circumstances were such that it could well be an excessive gift, then I don't think it matters an awful lot if we do go back two years and say to that person, "You should have known where you were at, pay it back." Don't forget, I'm not saying "we" should; a court would adjudicate on whether it was excessive and with the addition of the words I'm sort of lifting bodily out of the Law Reform Commission, would then know the kind of a person who will be "suffering," because apparently that's a concern here, that a third party who was the recipient of such a gift will suffer by being asked to give it back. Don't forget, that person did nothing to deserve the gift. It's a gratuitous windfall for that person and therefore the person, knowing that it's a gratuitous windfall, having every right to know or be expected to know that it is a gift which may be excessive, should take the precaution of knowing what's happening.

So that's a suggestion I'm making.

MR. CHAIRMAN: The amendment as read? Mr. Sherman.

MR. SHERMAN: Mr. Chairman, let me put this to Mr. Cherniack and the Attorney-General, that the clause as amended is acceptable as far as it goes but that there be some additional words added at the end of it as it presently appears and that those additional words would read approximately, subject to legal perfection, like this: "except that where the recipient is an immediate family relative of the donor of the gift, the spouse making the excessive gift shall be liable to the other spouse for the value thereof."

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: May I ask Mr. Sherman what would happen if all of the assets were given to a person in the immediate family and then being liable to the spouse doesn't mean a thing if there is no asset left from which to give it. —(Interjection)— Put him in jail.

MR. SHERMAN: I would make the suggestion that the spouse making the gift is not going to be entirely without funds or without income for the rest of his or her life and there could be, could there not, a judgment involving an attachment that would impose the obligation on that spouse to make that value up to the other spouse.

MR. CHERNIACK: I think that the mere fact you are saying that it's excessive, and I said earlier this morning that I think an excessive gift to a child is vastly different from an excessive gift to a stranger and the court would take into account that this was a gift made to a child, and it's only half the difference that we are concerned about.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: In that example I gave Mr. Sherman, or referred to earlier about the brother, what

would his example do in that case?

MR. SHERMAN: I beg your pardon, Mr. Chairman?

MR. PAWLEY: The example that I made reference to about the brother transferring the bulk of his farm land to his brother. What would your example do there?

MR. SHERMAN: It would do what it would do where any other immediate relative was involved; it would mean that it would put the onus on the spouse, the brother making the gift, to make up the difference no matter how long it took, rather than on the recipient of the gift. That's what concerns me, why the recipient of the gift should be held responsible.

MR. CHERNIACK: Because it was a windfall, because it did nothing to deserve it.

MR. PAWLEY: My understanding of this, and I think Mr. Silver can correct me, there are provisions now which can require the reconveyance of that property.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Mr. Chairman, if the members will just cast their minds back when we started these hearings, we had the Chairman of the Law Reform Commission and he explained to us what, in the opinion of the Commission, the excessive gifts were. I think he used an example at that time of the boss giving a $25,000 mink coat to his secretary for Christmas. These were things that were considered to be excessive gifts. —(Interjection)— This is what an excessive gift to a third person . . . You are now introducing the immediate family into this thing and as the point that Mr. Pawley has raised — which is now, I believe, before the courts, which would dissipate the total assets of that family and who knows, maybe they are playing games games; that's a fine way of getting out of the deal. They can split it up amongst themselves after they are through, with no recovery for the spouse that is really going to be out in the cold on her ears.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I just don't want to let go the suggestion that Mr. Sherman is making of the analogy with Section 13(2). There we are dealing with a *bona fide* purchaser for value, a person who has paid money in exchange for goods that he has received and we say he should be protected even though title may be questionable.

But here we are talking about a person who receives a gift which that person did not deserve, for which that person did not pay and which is something that that person should have realized is not in the normal course and therefore that person does not need or, to my mind, deserve any protection, knowing that the gift is excessive. And I say it in that language, "didn't deserve, didn't earn, didn't pay for it," because that's what is excessive. If there were other considerations, love, affection, payment for services, those would not be excessive. It would be up to the court to determine. Therefore you cannot really compare it with the danger to a person who is a *bona fide* purchaser for value. There is a big difference and I make that important distinction.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, it seems to me that we are in a basic conflict of philosophy here. I appreciate what Mr. Jenkins has said, but it seems to me that the view that is being taken is similar to the view that was originally taken on the subject of dissipation. I think it's a legitimate view, but with respect, I think it's a "now" view. I think what perhaps some members of the Committee are thinking of here, is the case of a man with a girlfriend on whom he is lavishing fur coats, jewels and other material assets of that kind. But the problem is, just as it was when we were dealing with the term "dissipating," that that is not broad enough. That is not a broad enough view to take because there are many situations where a parent could be bestowing gifts on a child, as we have suggested, that would inspire and expand an attitude of envy that was already existent between that child and the spouse of a second marriage. That's the kind of situation that can arise and does arise very frequently.

It's those situations that I think have to be considered, not just the blatant, obvious examples such as was the case when we were looking at the subject of dissipation.

Mr. Cherniack says that if I lavish a certain amount of whatever I have upon my son or my daughter, that it's perfectly all right to go back to that 19-year old boy or girl and get it back because that boy or girl did nothing to deserve that.

MR. CHERNIACK: Only if it's excessive.

MR. SHERMAN: Well, this raises a very fundamental difference in philosophy. It doesn't matter to some of us whether those children did anything to deserve it or not. The central fact is that they are our children and we can lavish things on them if we are in a position to do so. I'm not in a position to do so, but if I were.

I think that to just base a legislation on the fact that philosophically Mr. Cherniack doesn't believe those children deserve it is somewhat questionable.

MR. CHERNIACK: Wait, wait. Firstly, don't put words in my mouth that those children didn't deserve it. Let's bear in mind . . .

MR. SHERMAN: Or didn't do anything to earn it.

MR. CHERNIACK: Okay, I say they didn't earn it; I don't say they don't deserve it. I say they didn't

earn it and therefore I say we are dealing with a commercial asset, assets acquired during the family marital regime and therefore assets in which the spouse has a stake. If the spouse agrees that this is a logical thing, then the spouse will not do anything about it. But if he is giving an excessive gift to a child, to a parent, to a stranger and the gift is deemed excessive by a judge and it is obviously given without the consent of the spouse who helped earn it, then I say that they should be accountable because I have to remind you, I guess, every so often, we are dealing with something that we have all agreed, including Mr. Sherman, is something in which the spouse has earned the entitlement to share. That being the case, and being done without the consent of that spouse and considered excessive by a judge, then by all means, the person didn't earn it. They deserve it out of love and affection, but that's a distorted love because it's already directed to the detriment of the spouse during whose marital regime it was accumulated, then I say that's going too far.

MR. SHERMAN: Just one question, Mr. Chairman, how did the spouse of the second marriage, how did the second spouse earn it?

MR. CHERNIACK: She only earned that portion which accumulated during their marital regime. If it is an asset that was acquired before the marriage, the second marriage, it is not included. Am I right, Mr. Silver?

MR. SILVER: Right.

MR. CHERNIACK: Yes, so that I don't say she earned what he accumulated prior to the marriage. That isn't involved in this gift. It is a gift being made of that asset which she did share in accumulating because it was done during that portion of their marriage when they were married. But if he had accumulated funds prior to the second marriage and he wants to give them all to his child, out of love, or to his girlfriend out of love, or to a stranger for no reason at all, then he is free to deal with that. I don't think there is any constraint on him, at least there is none intended as I can see in this entire legislation. She didn't participate in the accumulation of that portion.

MR. CHAIRMAN: Mr. Johnston.

Q **MR. F. JOHNSTON**: Mr. Chairman, the word "excessive," if I decide to give my car which I use for business to my son to help him start up and all of a sudden there is a separation two years later — I might say the car might have been bought after I had been married a second time — do you mean to tell me that that son of mine is in a position of . . . or someone is in a position of saying, "You didn't earn it, you shouldn't have got it, it's a gift?" I suggest that that's bringing business really into the marriage where it shouldn't be.

The statement that the people don't "deserve," the word "earned" doesn't come into it. The basis of whether you want to help somebody that is a son or daughter of yours start up comes into it and that's your business.

MR. CHERNIACK: Not your wife's business?

MR. F. JOHNSTON: On the basis of Mr. Sherman, I could have bought a car two months after my second marriage and given it away a year later and a year later he might have to pay it back. I assure you that, you know, somebody has got to make some decisions.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, again, we have to return to first fundamentals insofar as the legislation is concerned, the equal partnership, the equal participation in the assets that accumulate during the term of the marriage.

Now, if, in Mr. Johnston's case, the car given to his son as a commissioned salesman, if that gift is not of such a nature, is not of such a value as to interfere with the equalizing payment that would be required if there was an accounting, then there is no problem here. But if that car is a Mercedes-Benz that cost $25,000 and all that is available by way of commercial assets is $30,000 in total, so that the end result is there is only $5,000 available for equalization — $30,000 accumulated by the couple during the term of their marriage, and you would OK a gift of $25,000 out of that $30,000 accumulated by both the husband and wife as a straight gift with no consideration and then attempt to sustain the principle of this legislation? Mr. Chairman, we would be, I think, generating such a huge loophole in this legislation that a truck could drive through it.

MR. F. JOHNSTON: Mr. Chairman, the Attorney-General is the one driving the loopholes and making a bit of a fraud out of the statement he made because he uses $30,000 and $25,000 Mercedes. What's an excessive gift? I think an excessive gift is a $4,000 automobile. What's excessive? — (Interjections)—

MR. CHAIRMAN: Order please.

MR. F. JOHNSTON: What's excessive? So I say I think it's a pretty nice gift and if I want to do it, that's it, if the family is not being hurt . . .

MR. PAWLEY: Could I ask Mr. Johnston a question? If your family is not being hurt and if in your example there still would be sufficient or available for making the equalization payment required under the accounting, then what problem is there with your example?

MR. F. JOHNSTON: When you make the equalization payment, who's to say whether they are satisfied with the equalization payment. Who's to say whether they are satisfied with the equalization

of any type?

MR. PAWLEY: Well, parties don't make that determination; the court does.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: The difficulty I have is because of the clause here: "It appears that the many assets of the spouse are insufficient or unavailable for the making of any equalizing payment required"; and Mr. Pawley's explanation earlier that in effect "excessive" becomes more than 50 percent of the commercial assets. That, I think, is the determination, because it is more than 50 percent of the commercial assets and obviously equalization cannot be made. So therefore, in terms of t that will be the fact Now let's review the determination, any number of situations. Let's turn it around another way. Let's assume a wife works and she has a bank account that has accummulated over a period of time and she is preparing that for payment for her children for their education. She lives with her husband, her husband is employed and his income is used for the running of the family regime. At a given point, he either stops participating because he becomes alcoholic or what-have-you, and as a result, she then deals, as she must, with the commitment given to the children for their education and pays out of the money that has been saved in the bank for the children's education. Now, let's assume she pays more than 50 percent of that amount which is required by way of direct gifts to them — I don't mean in terms of education, but direct gifts to them because they may not be living at home. At that point, the question of excessive comes into play, and I would leave it to the court's judgment except for the implication that if it is more than 50 percent of the commercial assets, because the equalization can't be obtained, at that point there is a liability on the part of the child to the husband.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Ready for the question.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: Mr. Chairman, I am wondering what would happen if a gift was given — let's say a $10,000 gift — and at the time that the gift was given, it was not excessive. But there is a two-year period over here. During that time, a business could go bankrupt and then this gift would become excessive. This would mean that the third person would have to return that gift.

MR. CHERNIACK: Mr. Silver can answer that. He will be believed more than I will.

MR. SILVER: The gift must be excessive at the time it is given. Of course, if it is not excessive at the time that it is given, the fact that it becomes excessive later on, doesn't matter.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Well, I want to ask Mr. Silver, if one gives more than 50 percent of the commercial assets available to any one person, will that be considered an excessive gift?

MR. SILVER: It depends on all kinds of factors.

MR. SPIVAK: Well are you not suggesting in this particular clause that if more than 50 percent is given of the commercial assetsto any one person, it would not be excessive?

MR. SILVER: No, not necessarily.

MR. SPIVAK: Well, the Attorney-General indicated that that was his concern at the time.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Could I ask one more question, Mr. Chairman? I don't mean to prolong the work of the committee on this clause but let me put a question I put earlier. What if this excessive gift was in the form of cash to be used for something — an education or whatever. Now let's just say that the excessive value came to $10,000and that money is gone. You're saying that you'll recover from the recipient that $10,000.00. How are you going to get it when the money is gone? You were going to say, that child is going to have to pay that back at $100.00 a month for the next how many months are involved . What is the difference? You're worried about not being able to recover it from the other spouse because there wasn't anything left in the assets under the equalization, but what is the difference in the worry? I say on the one hand you would attempt to extract $100.00 a month from the donor because on this hand you are going to have to attempt to extract $100.00 a month from the recipient. I don't see that there is any difference in the worry from the government's point of view, and the ne would seem to be fairer than the other to me.

MR. CHAIRMAN: Ready for the question on the amendment? The amendment then, as read by Mr. Cherniack, is it agreed?

MR. SHERMAN: No, Mr. Chairman, we accept the amendments but we don't favour the clause as it stands and we would like to vote on it.

MR. CHAIRMAN: I was putting the question on the amendment moved by Mr. Cherniack.

MR. PAWLEY: Oh, I thought that — really you're voting against the clause. You would indicate no opposition to the amendment; it was the clause.

MR. SHERMAN: That's right, we accept the amendment.

MR. CHAIRMAN: It's the question on the amendment that I am putting to the committee.

MR. CHERNIACK: That last one, is that "of the gift for inclusion in those assets."

MR. CHAIRMAN: No, the words beginning "or so much of that value as may be excessive . . ."

MR. CHERNIACK: Oh, but there are two then. There are two. After "ift", "for inclusion in those

assets."

MR. SHERMAN: That's the second one.

MR. CHERNIACK: Well, I would make it as one; there's no objection to the two of them. "For inclusion in those assets" after the word "gift." Mr. Sherman has indicated agreement to that.

MR. SHERMAN: Yes.

MR. CHERNIACK: That was at 2:45 we agreed on that.

MR. CHAIRMAN: : Well it was agreed, not . . .

MR. CHERNIACK: I know, not voted on, just agreed on. An hour and 15 minutes.

MR. CHAIRMAN: There were two inclusions as moved by Mr. Cherniack in amendment. Is the amendment agreed to? (Agreed) Section 24 as amended. Mr. Sherman.

MR. SHERMAN: No, would you call a vote, Mr. Chairman, please.

MR. CHAIRMAN: Very well, those in favour of Section 24 as amended: 5. Those opposed: 3. The Motion is carried. 24 as amended is so ordered.

Section 25. Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move

THAT Section 25 of Bill 61 be amended

(a) by renumbering the section as subsection (1); and

(b) by adding thereto, immediately after subsection (1) thereof, the following subsection: (There should be a change in the heading there to "two-year period.")

Commencement of two-year period.

25(2) A two- year period for the purposes of sections 23 and 24 shall not commence before May 6, 1977.

MR. CHAIRMAN: The amendment as read: 25(1)(a)—pass; 25(1)(b)—pass; 25(1)—pass; 25(2)—pass; 25—pass. Section 26. Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move

THAT section 26 of Bill 61 be amended by adding thereto, immediately after the word "agreement" in the 2nd line thereof, the words "under Part II".

MR. CHAIRMAN: The amendment as read—pass; Section 26 as amended—pass; Section 27—pass. Page 12, Part II, Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I would move

THAT Part II of Bill 61 be struck out and the following Part substituted therefor:

PART II

Agreements Affecting the Standard Marital Regime Agreements existing on May 6, 1977.

28(1) Subject to subsection (5), the standard marital regime does not apply to spouses who have

(a) any marriage settlement under The Marriage Settlement Act, or any marriage contract or other marital agreement under any other law, made between them before May 6, 1977 and still subsisting on that date; or (b) any release or quit claim deed affecting any marital home or assets of the spouses or either of them, where the release or deed was given by one to the other before May 6, 1977 and was still subsisting on that date;

and the standard marital regime remains inapplicable to those spouses so long as the marriage settlement, marriage contract, marital agreement, release or quit claim deed, as the case may be, is in effect.

Agreements made after May 6, 1977.

28(2) No marriage settlement marriage contract or marital agreement as described in clause (1)(a) and made between 2 spouses on or after May 6, 1977, and no release or deed as described in clause (1)(b) and given by one spouse to the other on or after May 6, 1977, is valid, effective or binding as between the spouses unless it complies with the requirements of section 30 or is confirmed by an agreement made under subsection (3).

Agreements to vary or substitute standard marital regime.

28(3) Subject to subsection (5) and section 30, where two spouses either before or after their marriage is solemnized but on or after May 6, 1977 agree with each other in writing that, with respect to their marriage,

(a) the standard marital regime shall not apply; or

(b) the standard marital regime shall not apply in part, and the agreement specifies what that part is; or

(c) the standard marital regime shall apply in a varied form, and the agreement specifies what that form is; or

(d) subject to subsection (4), alternative provisions shall apply in place of the standard marital regime or in place of a part of the standard marital regime, and the agreement specifies what thoseprovisions are;

then, with respect to that marriage, the standard marital regime does not apply, or applies only in accordance with the agreement, or the alternative provisions apply in place of the standard marital regime or in place of a part of the standard marital regime, as the case may be.

Alternative provisions.

28(4) Alternative provisions in an agreement under clause (3)(d) may consist of or may include provisions contained in a marriage settlement, marriage contract, marital agreement, release or deed, as described in subsection (1).
Presumption.
28(5) Where a marriage settlement, marriage contract, marital agreement, release or deed as described in subsection (1), or a marriage settlement, marriage contract, marital agreement, release or deed confirmed by an agreement made under subsection (3), or an agreement made under clause (3)(b), (c) or (d), is silent with respect to a specific provision of the standard marital regime, that provision is presumed to remain applicable.
Registration.
29(1) Any marriage contract, marital agreement, release or deed to which reference is made in subsection 28(1), any confirmatory agreement to which reference is made in subsection 28(2), and any agreement made under subsection 28(3), or a notice thereof, may be registered as provided in The Marriage Settlement Act in respect of the registration of marriage settlements.
Public record.
29(2) Every person, upon payment of such fee as may be prescribed therefor under The Marriage Settlement Act, may peruse and make copies of or take extracts from anything registered under subsection (1).

MR. CHAIRMAN: Your amendment then moves as far as Section 29.

MR. SHERMAN: I'm sorry, Mr. Chairman, I got into another conversation. How far have we gone — to 28(1)? Have we just put it?

MR. CHAIRMAN: Mr. Jenkins has moved Motion 14 on Page 12, down to and including Section 29 on Page 14. He is not moving Sections 30.

MR. SHERMAN: Good, okay. Thanks.

MR. CHAIRMAN: We'll take it clause by clause. Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I wonder if this isn't the time to mention a suggestion to the Minister to the committee. It has been decided in our caucus that there should not be a requirement for independent legal advice which would eliminate Page 15, and that means Section 30. Mr. Silver has indicated that consequent upon that decision, there would be several changes made in the preceding Sections 28 and 29 only related to that question of independent advice. I am wondering whether we could not debate that deletion, and once having settled that question, then we just ask Mr. Silver to indicate the changes that would follow consequent upon that. It seems to me that that would save time which I think we always want to do.

MR. CHAIRMAN: The Chair has a procedural problem ; that Section has not been moved.

MR. CHERNIACK: I know. Well, Mr. Chairman, could we not at this stage indicate that there are changes from the proposed amendments which would eliminate reference to independent legal advice, and that gives us an opportunity to discuss the fact that the amendments as distributed would be varied. You know, this committee can make all the rules it likes and the Chairman would follow them if the committee agrees. I am just trying to save time. If you would rather go by a procedural way, then goody for you.

MR. CHAIRMAN: Section 28(1)(a). Mr. Sherman.

MR. SHERMAN: I would like to propose two amendments, informally, for considerat: ion in 28(1)(a)that after the word "law" in the middle of the third line of subsection (a), that we should be inserting the words "whether written or oral" so that it would read "marital agreement under any other law whether written or oral made between them." I believe oral agreements have had validity in law. Naturally one has to prove them, demonstrate that they are there, but should that not be recognized here?

MR. CHAIRMAN: Sub-amendment moved by Mr. Sherman. Mr. Silver.

MR. SILVER: Since we are not specifying that these agreements set out must be written, I think it would be interpeted as meaning either one, written or oral, without saying so I am not saying thatI am against inserting the words you suggest "written or oral", I am merely saying that even without those words, it has the meaning that you would like it to have, in my opinion.

MR. SHERMAN: I appreciate Mr. Silver's interpretation. I would also like to hear from the chief law officer of the province on that point. Would that be the way the Attorney-General would interpret it?

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Yes it's a question of . . . You were asking in connection with oral agreements, Mr. Sherman?

MR. SHERMAN: Yes, whether we shouldn't insert in the middle of the third line "agreement under any other law, whether written or oral,".

MR. PAWLEY: Mr. Cherniack and I have briefly consulted but this didn't arise during our discussions in caucus. But it's a question of evidence.

MR. PAWLEY: An agreement is an agreement regardless. It's just that I suspect it would be something that would be quite hard to establish — oral agreement. Because of that, I would be prepared to concur with the inclusion.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I think it is redundant. I agree with Mr. Silver, an agreement is an agreement. As to whether or not it is an agreement is a subject for the court to establish and whether it's oral or written, or skywriting, I don't know what other kind it can be. But in any event, it's an agreement and it's redundant. Now, if Mr. , I Silver doesn't see any harm in it guess that there is no harm in it then.

MR. SILVER: As a matter of fact, under the general law, some of these agreements, if they deal with real property, will have to be in writing or they won't be enforceable in court. Now, if we say in the marital agreement, whether written or oral, I suppose it could mean that we are saying that any agreement, even those that under the general law must be in writing, are acceptable for purposes of this section if they are oral.

MR. CHERNIACK: Well, if there is that danger, Mr. Chairman, then I withdraw my suggestion that it doesn't matter; I see it could matter.

MR. SILVER: Whereas if we leave it open and let the law take its course, if somebody comes along with an oral agreement, that's fine if the court is able to establish that there is an agreement and if there is no problem about real estate requiring a written agreement, then it's covered.

MR. CHAIRMAN: Mr. Sherman. .

MR. SHERMAN: Well, if Mr. Silver foresees that kind of difficulty, then that injects another aspect into it. The only reason I suggested it is because there are many references through the bill to spouses agreeing with each other in writing. There are a number of references to agreements in writing in the bill and to clarify the point that settlements and contracts of this kind don't necessarily have to be in writing, I felt that phrase would be useful. But I don't want to make an issue out of it.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: After hearing Mr. Silver point out that if we include "oral," then in fact there could be difficulties pertaining to the Statute of Frauds I would have to agree with him insofar as land would be concerned. I think it would be very dangerous for us to insert "oral" under those circumstances.

MR. SHERMAN: Okay, I withdraw the suggestion, Mr. Chairman, and move on to my next one.

MR. CHAIRMAN: The sub-amendment is then withdrawn. Agreed? (Agreed) 28(1)(a)—pass? Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I have another proposed amendment for 28(1)(a) which probably will meet a similar fate but I'll put it anyway.

In the fourth line of subsection (a) that the words "before May 6th,1977" be struck out and replaced by the words "before the date on which this Act was proclaimed."

The reason I do that, Mr. Chairman — if I may speak to it for a minute — is because there are persons who have . . . I recognize why we have May 6th in there in terms of the application of the standard marital regime and the Marital Property Act to separated spouses and I am in accord with what we did there. This is a different situation, though. Here you are dealing with people who have perhaps made marriage settlements, marriage contracts and other marital agreements in the past few weeks since May 6th, 1977. What we're saying here is they're going to have to go back and reaffirm all of those and reconfirm all of those, which is another step in terms of expense and also, possibly, one that could lead to some difficulties. —(Interjection)—

Just overhearing Mr. Silver, I think that if you go on to 28(2) you would find that they do have to go back and reconfirm them.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, it just seems to me that any settlement arrived at after it's been publicly announced that we're carrying out this kind of legislation would have to have been made with the knowledge of one party and not the other. If they were both involved, then we have already learnt that lawyers are already drawing agreements taking into contemplation the possibility of the passing of this Act.

You know, we heard before people saying it's unfair to some that they would be cut out by a few days. Well now Mr. Sherman's proposal is unfair to those who may have made a settlement without full knowledge of the rights that would be effective for them, as a result of this action. We have discussed this before. It seems to me that we did settle it yesterday.

MR. SHERMAN: I can see that there would be unfairness to some but the way it is worded there will be unfairness to some.

MR. CHERNIACK: Why would it be unfair to anybody?

MR. SHERMAN: Because there are persons who have, since May 6th, entered into marriage contracts and marital agreements and those agreements are now completed and concluded. And what we are saying by this section is that they have got to go back.

Going on to 28(2) you will find that they have got to go back and comply . . . Well, complying with

the requirements of Section 30 is now out but they have got to go back and have them confirmed by an agreement made under Subsection 3. We are still coming to that, I realize that, but it's the principle that is involved in 28(1)(a).

MR. CHERNIACK: I think the principle is that they can be reopened to make them comply with the Act and with the knowledge of the Act, and I think that's important. There was a suggestion that we don't have any date and allow people to go back thirty years, and we all said, "No, there has to be a cut-off." We came to the conclusion that the cut-off should be May 6th, which is the logical date. It seems to me that anything done after that . . . The Act may not come into force for another six or seven months and you've got one awful lot of juggling that may be carried out, and the danger of undue influence. Therefore, it seems to me that that is the best date. I thought we had settled that.

MR. SHERMAN: Well, we settled it with respect to persons living separate and apart — we did — as far as the application of the standard marital regime. I'm sure we hadn't . . . Because this, you know, this is one of the new amendments that we hadn't dealt with yet. I feel there is a difference because there are certainly persons who have entered into such agreements since May 6th. Now they have got to do it all over again.

MR. CHAIRMAN: The sub-amendment moved by Mr. Sherman—pass? —(Interjections)—

MR. SHEAN: Well the Chairman has called the question and I'm saying that Mr. Cherniack is not prepared to pass that.

MR. CHERNIACK: Well, as it is. Thank you. Is there an amendment that he called? Did you call an amendment?

MR. CHAIRMAN: Mr. Sherman has moved his sub-amendment.

MR. CHERNIACK: I thought he said he wanted to discuss it informally first. I'm sorry. I'm in error and if you wish to reopen it, then I wish you would, and then we could. . . Or we could vote on it.

MR. SHERMAN: No, I have said all I have to say on it, Mr. Chairman. I don't see any point in belabouring the point.

MR. CHAIRMAN: Does the sub-amendment moved by Mr. Sherman pass? The sub-amendment is lost. 28(1)(a)—pass; 28(1)(b). Mr. Sherman.

MR. SHERMAN: Thank you, Mr. Chairman. I would have moved this same amendment on 28(1)(b) and I presume I can assume that it obviously would not be acceptable there, either. Is that right, Mr. Cherniack?

MR. CHERNIACK: Oh, why ask me? I would probably agree with you but these people are still adamant.

MR. CHAIRMAN: The sub-amendment moved by Mr. Sherman to delete the date May 6th in the fourth line thereof and substitute with the words "the date . . .

MR. CHERNIACK: No, he didn't move it, Mr. Chairman. He said he would have moved it; he didn't move it.

MR. SHERMAN: I'll move it and we'll just defeat it and move on.

I move that in the fourth line of subclause (b) that the words "May 6th, 1977" be struck out and replaced by the words "the date on which this Act was proclaimed."

MR. CHAIRMAN: Shall the sub-amendment be approved? It is then lost.

28(1)(b)—pass; 28(1)—pass; 28(2), I believe there is a further sub-amendment. A technical typographical error in the third line, the first word of the third line, the letter "w" is missed out of the word "between". Mr. Silver.

MR. SILVER: In the third last and second last line the reference to Section 30 should be deleted because there is no longer going to be a Section 30. Section 30 deals with independent legal advice. So that the following words "complies with the requirements of section 30 or" would be deleted and it would remain reading "unless it is confirmed by an agreement made under subsection (3)."

MR. CHAIRMAN: The sub-amendment moved by Mr. Cherniack? Mr. Spivak.

MR. SPIVAK: I know we're not talking about clause 30 but I want to understand. We're saying that there will not be a requirement for independent legal advice. —(Interjection)— No, you are not going to be moving those so that means that there will be no requirement. And so that in effect the parties can make an agreement themselves by writing, by whatever agreement, and by just an exchange of letter, or just by signing it themselves.

MR. SHERMAN: Don't emphasize it too much or they're liable to put it back in.

MR. SPIVAK: No, I'm not but I just . . .

MR. CHERNIACK: Is that on the record?

MR. SPIVAK: No, but you see the problem I have is with the wording "unless it complies with the requirements or is confirmed by an agreement . . . "

MR. CHERNIACK: That has just come out. Mr. Silver just indicated . . .

MR. SPIVAK: Oh, I thought it was just Section 30 he took out . . .

MR. CHERNIACK: "it complies with the requirements of section 30 or."

MR. SPIVAK: Oh, I'm sorry, that has been taken out.

MR. CHAIRMAN: Section 30 has not been moved as an amendment.

MR. SPIVAK: No, no, "is valid, effective or binding as between the spouses and confirmed by an agreement . . . "

MR. CHERNIACK: "unless it is confirmed by an agreement".

MR. CHAIRMAN: The sub-amendment moved by Mr. Cherniack—pass; 28(2) as amended—pass. 28(3). Mr. Silver.

MR. SILVER: Here again, for the same reason as before, the reference in the first line to section 30 should be deleted. The following words will be deleted out of the first line: "and section 30," so that it would read "Subject to subsection (5), where two spouses either before or after", etc.

MR. CHERNIACK: Is that the only change in all of (3)?

MR. SILVER: Yes, that's the only change there.

MR. CHAIRMAN: The sub-amendment moved by Mr. Cherniack, agreed? (Agreed) 28(3)(a)—pass; 28(3)(b)—pass; 28(3)(c)—pass; 28(3)(d)—pass; 28(3) as amended—pass; 28(4)—pass; 28(5). Mr. Sherman.

MR. SHERMAN: Mr. Chairman, the question I want to ask on 28(5) is whether it in fact means that every agreement made in Manitoba could be opened up? "a preliminary agreement made under clause (3)(b), (c) or (d) is silent with respect to a specific provision of the standard marital regime, that provision is presumed to remain applicable." Does that direction mean that, in fact, you could open up any agreement made in Manitoba to reach that kind of determination?

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, the way I interpret it is if any of those agreements are silent on any aspect of the marital regime, then that portion can be not opened up but can be dealt with. No, I'm wrong . . .

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: As far as the effect of an agreement being silent, that doesn't affect the situation where we are talking about agreements made after May 6th, 1977. The aspect of where an agreement is silent — the standard marital regime when an agreement is silent — as to a specific aspect or provision of the standard marital regime that is it doesn't say whether it should or should not apply then that provision applies automatically. That's the only effect of an agreement being silent on a particular provision of the SMR.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: I just have one question, Mr. Chairman, through you to Mr. Silver. If my wife and I made no variation to the standard marital regime at the effective date of this bill then the standard marital regime as set out in this Act is the one that will apply in our marriage. Is that correct?

MR. SILVER: If you and your wife what? Would you tell me again?

MR. JENKINS: Well, if we do nothing, absolutely nothing . . .

MR. SILVER: Yes, you do nothing and you have no agreement. You make no agreement. . .

MR. JENKINS: Then the standard marital regime as laid out in this Act will be applicable . . . ?

MR. SILVER: Yes, automatically; applicable all the time, not just on break-ups.

MR. CHERNIACK: I read it further. The reason 3(a) is left out is that 3(a) is a complete opting out.

MR. SILVER: That's right.

MR. CHERNIACK: But (b), (c) and (d) are partial opting out.

MR. SILVER: Yes.

MR. CHERNIACK: And therefore I read 28(5) to mean that where there is some item that is not dealt with under the partial opting out, that is what remains after the partial has been dealt with, is still subject to the marital regime.

MR. SILVER: Yes.

MR. CHERNIACK: That's what I took it to say earlier but . . .

MR. SILVER: I'm sorry, I guess I misunderstood.

MR. JENKINS: In other words if my wife and I wanted to opt out of certain things then we would have to make — well according to the agreement, according to (b), (c) or (d).

MR. CHERNIACK: I'd say to Mr. Jenkins, Mr. Chairman, that if he and his wife agreed that the Hunting Lodge should be opted out of, because it's Mr. Jenkins alone and she's not interested, then they could make an agreement leaving out the Hunting Lodge but that means everything else other than that still comes within the marital regime.

MR. CHAIRMAN: 28(5)—pass; 28 as amended —pass; 29(1).

MR. SILVER: There are changes there. First of all if we take out Section 30 that leaves a gap and since it's a new bill we want to have a proper sequence of numbers in the sections so I suggest that 29(1) become section 29 and subsection 29(2) become section 30.

Okay, then in 29(1), or 29 as we will call it just the change in numbering. . . . No, that's the only change there'

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: I just want to understand the reasoning here with respect to the registration because

its requirement says "may" and basically you're saying that marriage contracts may be filed, and it follows on 30 that therefore they're available for public scrutiny by anyone who wants that but they don't have to be and the legal effect of it is exactly the same, whether they're filed or not Why are we asking then that they be filed or that they may be filed.

MR. SILVER: Well, I'm not at all sure when we say the legal effect would be the same. I would interpret that to mean that the agreement itself is just as valid whether it's registered or not. But as far as notice, whether or not that agreement constitutes notice to anyone in any situation where notice might be required, in that sense the registration or failure to register might affect the aspect of notice whether it can constitute notice. That's the only thing I see there.

MR. CHERNIACK: Mr. Chairman, I have never dealt with the Marriage Settlement Act. I have no experience with it, but as I read it there is a requirement in the Marriage Settlement that the agreement shall be in writing and it shall be registered. I would imagine that there's a possibility that if I were to sign a marriage settlement under the Marriage Settlement Act and had to register then it may be that I would want to register an agreement along with that so that there was a record of some kind. Now, I'm not clear on why I would do it but I think that making it possible is not harmful to anyone and if somebody thinks it strengthens their position — for one thing it won't get lost so easily — then in any event that's why I believe it was determined that it may be registered but need not be. Somebody may think it gives additional security by way of notice. Frankly I doubt it, but still maybe it does.

MR. SPIVAK: Well, again, the only concern is the wording is such, so long as it is not "shall" and so long as it is not "obligatory" that I think is the main thing. In many cases the situation in the agreement that is signed between the couple is private and their own business other than to those whom they deal with who question them and may ask for specifics or may ask for whatever consents or affidavits are required to be considered. So it is just that it should not be obligatory and that would be the only thing that would be concerning me. Nor, would I want a situation — and maybe I can't visualize this exactly — where in dealing with a company, in some commercial transaction, they will say we want you to register it simply because that is a greater protection to any others that may be dealing with you because we have dealt with you in another way. That's all I'm concerned about.

MR. CHAIRMAN: Section 29 as renumbered—pass; Section 30 as renumbered—pass;

MR. SILVER: There's a change there. A small one. The last word and figure in the Section which now reads subsection (1) becomes Section 29.

MR. CHAIRMAN: With the correction 30 as corrected. Mr. Sherman.

MR. SHERMAN: It seems to me that this section offers a very very wide public access to personal records and I feel I must register some concern about that. Whether this is a prelude to compulsory registration that might be phased in at a later date I think is something that we can legitimately be concerned with. I put that to the government as a concern.

MR. SILVER: I just want to call the attention of the members to the phrase in Section 29 as renumbered in the third last line, "or a notice thereof". That is if anybody doesn't want to have their agreement with all the personal details it may contain available for the public, they can merely register a brief notice of it which would not have to contain the details of the agreement. So, I don't know if that helps to solve your problem, Mr. Sherman, but that provision is . there.

MR. CHERNIACK: Mr. Chairman, surely if someone wants to register then they want it to be available to the public. Otherwise why register it. If they don't want the public to know, they don't register it so what danger is there. We're giving them the opportunity to do it and they needn't avail themselves of it. They would only do it if they want it to be public. And if they don't want them to know the details then they register a notice of it.

MR. SHERMAN: There is no danger as of June 16, 1977 but what if registration is made compulsory at some time in the future?

MR. CHERNIACK: Only by legislation can it be made compulsory.

MR. SHERMAN: I know but that is the concern that I raise. Whether this is a prelude to compulsory registration.

MR. CHERNIACK: I'm not going to answer that.

MR. SHERMAN: Well, I think it's a legitimate concern. Mr. Silver has helped considerably by pointing out that there would not need to be full details provided. A notice could just contain brief references, brief details. That helps a good deal. I think it is a legitimate concern that in the area of registration, if it becomes necessary for people to register in order to ensure that those instruments are valid and are not voided due to some legislation in the future, then it certainly opens up wide public access to records.

MR. CHERNIACK: Is Mr. Sherman prepared to guarantee what the legislation next year and the year after will be and any legislation before this. . .

MR. SHERMAN: Unfortunately I'm not. . .

MR. CHERNIACK: That's right.

MR. SHERMAN: And neither is Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I said I wouldn't answer it but I'm just intrigued because I

respect Mr. Sherman's opinions in most cases but in this particular case if it were the desire of a future legislature to make it compulsory, then the future legislature could pass a brand new 29 and a brand new 30 saying "it shall be compulsory". The fact that we pass "voluntary" doesn't make it compulsory later on. I mean it's just so speculative that I said wouldn't answer it and I don't know why I did.

MR. SHERMAN: Well, I agree that it's speculative and I'm pleased that Mr. Cherniack has answered it because he seems to be outraged by the suggestion as I would be if that course of action were taken. And I'm glad that he would share my outrage . . .

MR. CHERNIACK: Not true.

MR. SHERMAN: . . . and together we shall make every effort while we are here to ensure that that course of action doesn't take place.

MR. CHERNIACK: Now Mr. Sherman is playing around. Let's make it clear. I'm outraged at the thought that the question asked, or the concer posed by Mr. Sherman has any validity. I am not taking his point of view either against or for his point of view.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, all that I want to say of course is that for everybody to register, they must have some reason to register, and provides for that. There's no compulsion that they do so and that's the only item that really is an issue at the present time. There obviously are some situations in which it would be considered an advantage by a couple to file a notice or the document. I can't at the moment think of why but obviously there are situations in which that would be the case.

MR. SHERMAN: Well, I'm reassured by Mr. Silver's underscoring of the phrase "or a notice thereof" and Mr. Cherniack's been in the world a long time and he knows people can have concerns for the future and I just register my concern for the future with him.

MR. CHAIRMAN: Section 30 as corrected and renumbered—pass; Part II as amended— pass. Page 20 Motion 16, Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move that Bill 61 be amended

(a) by renumbering Part III thereof as Part IV;

(b) by striking out the words "in a summary way" in the 8th line of subsection 33(1) thereof;

(c) by striking out the word and figures "section 33" in the 1st line of subsection 34(1) thereof and substituting therefor the word and figures "subsection 33(1)"; and

(d) by striking out the figure and word "1 year" in the 2nd line of subsection 34(1) thereof and substituting therefor the figures and word "30 days"; and

(e) by striking out. . .

MR. SILVER: Wait, wait.

MR. JENKINS: Hold it there.

MR. SILVER: There are changes in this motion.

MR. JENKINS: Oh, then I'd better start all over again.

MR. CHERNIACK: Wouldn't we be better, Mr. Chairman, since we all have a copy of the proposed amendments and Mr. Silver has the other one, why don't we deal with it section by section and making the changes as each section or subsection arises.

MR. JENKINS: Okay. I'll move Mr. Chairman, that Bill 61 be amended by renumbering of Part III thereof and Part IV. Is that okay?

MR. CHAIRMAN: Agreed?

MR. JENKINS: All I'm moving, Mr. Sherman, is that Part III be renumbered Part IV.

MR. CHAIRMAN: Agreed? (Agreed)

MR. JENKINS: Mr. Chairman, I move that

(b) by striking out the words "in a summary way" in the 8th line of subsection 33(1) thereof.

MR. CHAIRMAN: Agreed? (Agreed) 33(1) as amended—pass; 33(2)—pass; 33(3)—pass; 33(4)—pass; 33 as amended—pass.

MR. JENKINS: Well, Mr. Silver has some changes to that. If he wants to read it, I'll move it.

MR. SILVER: Clause (c) by striking out subsection 34(1) thereof and substituting therefor the following subsection: Limitation Period

34(1) Where the marriage of a person was or is dissolved by a decree absolute of divorce, or was or is annulled by a decree of nullity, no application shall be made by the person under subsection 33(1) after the expiry of 30 days (a) if the decree is granted after the coming into force of this Act from the date that all appeals against the decree are exhausted; or if no appeals are taken from the date that the time for appeal expires; or

(b) if the decree was granted before the coming into force of this Act, from the date that the Act comes into force, as the case may be.

MR. JENKINS: I would so move, Mr. Chairman.

MR. CHAIRMAN: The amendment as moved? Mr. Cherniack.

MR. CHERNIACK: I just want to get it clear, Mr. Chairman, I don't know if Mr. Sherman has it clear either. Oh, yes, firstly we accept the fact that any couple which had separated prior to May 6th has no status here. So we are dealing only in a case where the separation took place after May 6th but where

the divorce may have been granted before the effective date of this Act. Is that right? We are therefore saying that no proceeding may be commenced after 30 days following the decree absolute or the time for appeal thereof. Is that correct?

MR. SILVER: That's correct.

MR. SHERMAN: I would appreciate it if Mr. Silver would just read it once more because I don't have it in front of me.

MR. CHAIRMAN: I wonder if it would help if Mr. Sherman would come and sit at this end of the table and he could read it directly.

MR. SHERMAN: As I see it, Mr. Silver, it incorporates the 30-day limitation period in place of the one-year limitation period as the original amendment did. But in terms of the language used, it cleans up the whole application.

MR. SILVER: Yes, it differentiates between before and after.

MR. SHERMAN: That's all right.

MR. CHAIRMAN: 34(1)(a)—pass; 34(1)(b)—pass; 34(1)—pass; 34(2)(a), as printed in the bill, at the top of Page 12—pass; 34(2)(b)—pass; 34(2)—pass; 34 as amended—pass. Section 35—pass.

MR. JENKINS: Mr. Chairman, I would move that section 36 of Bill 61 be struck out and the following section be substituted therefor: Receiving order.

36 Where a spouse is dissipating or is about to dissipate or to abscond with shareable assets, or assets in which the other spouse has or is entitled to an interest under any marriage settlement, marriage contract, (then insert the word marital in front of agreement) marital agreement, release or deed to which reference is made in subsection 28(1), or under any confirmatory agreement to which reference is made in subsection 28(2), or under any agreement made under subsection 28(3), a judge may upon the application of the other spouse under section 33 make a receiving order, or such other order as he deems proper, for the purpose of preserving the assets.

Do you have that, Mr. Sherman?

MR. SHERMAN: Yes, thank you.

MR. CHEIACK: There's only one word added to this proposed amendment. I thought it was a mysterious big change. There's only that one word "marital."

MR. SHERMAN: We passed that — I don't mean this Committee — but in caucus. There is no change really, Mr. Chairman, just the identification of the agreement as a marital agreement, so it's acceptable to me.

MR. CHAIRMAN: 36—pass; Part IV as amended. Mr. Jenkins.

MR. JENKINS: I move that Part IV of Bill 61, as renumbered, be amended by adding thereto at the end thereof the following section:

Discretion in extraordinary circumstances.

MR. CHERNIACK: No, , there is a mistake here. Mr. Chairman, that is right. It means we are not changing; we are just going on and adding a new section 37 at the end of the new Part IV.

MR. SILVER: Yes, that's right, in the same part, that is correct.

MR. SILVER: We are adding two sections now and there are some additions to both of them.

MR. CHAIRMAN: Maybe Mr. Jenkins will move this one part at a time and that would perhaps be easiest.

MR. JENKINS: You mean 37(1).

MR. JENKINS: All right. Mr. Chairman, I move the new subsection 37(1) Where upon the application of a spouse under section 33, (add the following) made in respect of shareable assets acquired before or after May 6, 1977, a judge finds that by reason of the extraordinary financial or other circumstances of the spouse or the extraordinary nature or value of their property it would be grossly unfair or unconscionable to require them to share, (strike out the word "shareable" and substitute therefor the words) the assets in accordance with Division 3 or 4, the judge may, notwithstanding those provisions, order that the assets be shared between the spouses in such proportions, other than equal, as he deems proper. —(Interjection)—

I will read that again for Mr. Axworthy: "made in respect of shareable assets acquired before or after May 6th, 1977."

MR. CHAIRMAN: The amendment of 37(1) as read? Mr. Sherman.

MR. SHERMAN: Mr. Chairman' we have some difficulty with the extent of the discretion that is being introduced through this section. Certainly we're gratified to see the concept of discretion being introduced, but it seems very narrow and limited by reason of the specific wording. It would seem that it would have to take a very extreme situation before it could be judged "grossly unfair" or "unconscionable." Unconscionable is a very strong term. So while the clause on the surface seems to admit the concept of judicial discretion, it doesn't in language in fact seem to go very far. I would suggest that a court, a judge would be severely restricted from exercising reasonable discretion if he or she had to start looking for "gross and unconscionable" unfairness rather than just plain unfairness.

MR. CHERNIACK: Mr. Chairman, I want to get into this discussion because I think this goes to the root of the whole concept that we have been dealing with in this Act. I originally was opposed to any discretion. I felt that the bias that could come up would be of such a nature that there would be all sorts of factors brought into the decision which would not be factors which society today would accept. It's not just the Murdoch decision that's wrong. Suddenly we are finding people coming and says, "Well, the court was wrong with Murdoch, but everything else is all right," which is in effect the Conservative position as indicated at the beginning of this Act where they proposed that there be a presumption of equal sharing that could be varied by any discretion used by the court.

I was not really persuaded but our caucus was substantially persuaded that there were extraordinary cases presented in the briefs and privately and individually to people that indicated that there could be something very unfair happening in unusual cases. That being the case, the court should have the opportunity to recognize something that is extraordinary, and I use that word advisedly, which would result in grossly unfair or unconscionable divisions taking place. These are the kinds that were brought to our attention and recognition having been given that there are such things that would be so clearly unfair, we thought it would be advisable to limit the discretion of the court substantially.

Having said that, I have to say further that what to a court may appear grossly unfair or an extraordinary situation, could be something which I would consider rather mild and not grossly or extraordinarily different. Therefore, I have to say that in my opinion, this narrow wording, as Mr. Sherman thinks it is, could be used by a court in a broad way and I am concerned about that. Frankly, I think a court would say, "Well, under these circumstances, we think these are extraordinary and they are grossly unfair," and proceed to deal with it. To me the important thing is that if we start building case law as we will have to when you talk about discretion, there must be a review process where a court of appeal would be able to look over the shoulder of that judge and say, "Well, now, was it extraordinary circumstance; was it grossly unfair?" and second-guess — I don't like that word "guess" — and have a review of the trial judge's decision, applying this kind of a yardstick. I think therefore that for me, there is danger the other way, the way opposite to Mr. Sherman's concern. That is, that there could still be something happening where a court would, using its discretion and using these very words, might deal with something where they bring in other circumstances which are not sufficiently narrow. So I believe that Mr. Sherman and I have quite a different approach. He thinks it is too narrow; I think that it has the elements of being too broad. I would guess that this Section will become a Section reviewed carefully by courts in the future and they may well come back into the Legislature for refinement trends once are established. Therefore, I, for one, would oppose rather vigorously any attempt to broaden it, knowing the nature of the cases that we already have on record, and I do not limit it to Murdoch alone.

MR. AXWORTHY: Mr. Chairman, I think these clauses are also very important it was to our caucus because these particular items which I think much of our own acceptance of the bill hinged upon, and in reading them over, I would want to be guided by some of our previous discussion. We did attempt to be more specific in the meaning of the phraseology that we were dealing with so that we would have some assurance that whatever presumption was being built in was fairly clearly set out. I think that was the nature of our discussion last evening when we made sure that, when we were talking about dissipation, we knew what we were talking about, though the courts would be unclear. That would be the question I would raise about this clause, because even in some of the juxtaposition of words that, for example, when you say "extraordinary financial", well, one could say that an extraordinary financial circumstance would be one of great wealth. Certainly to my mind that would be an extraordinary financial circumstance and would be so defined . . . and I think that would be a very clear meaning under the English language, that extraordinary finances means that generally you have more than what is assumed to be normal which means that you are quite wealthy, and I am not sure those would be the circumstances under which we would allow a discussion to be applied.

On the other hand, what it does not deal with is questions where we are more concerned where there would be severe hardships related to a matter of an equal division of property on a 50-50 split and it was just more the question of hardship that we're concerned about and what came out of it. So, in the sense that I read this particular clause, I was concerned that the version or definition might become quite skewered, and certainly with all the skilled lawyers we have in Manitoba, I am sure they could see the same thing I do in terms of that question of extraordinary financial or other circumstances being the peg upon which you could say, my client is worth $20 million and therefore that means I should have discretion applied.

On the other hand, where there are not questions more specifically related to matters of hardship or participation in marriage . . . we heard the classic case of the ne'er do well husband who didn't participate in the accumulation of assets or in the promotion of the family household, that those would be more of the kinds of discretions that we were concerned about than the other. So I do think that there is some substantial problem with wording and that we should perhaps think about that a little to make sure that the instructions that we do give to the courts when they read the Act would be

very clear.

MR. CHERNIACK: I would welcome suggestions. Frankly, I think that these are as good as any words I could think of — I would like to hear others.

MR. AXWORTHY: Well, Mr. Chairman, perhaps before answering that directly I would like to try and recommend some. But I would come back to the point Mr. Sherman raised, that is if legal counsel here could give us advice. I have been told that the word "unconscienable" has a very definite meaning in the language of the law, that there is a fair amount of case law applied to unconscienable divisions as relating to partnership divisions and so on. I am wondering if the Attorney-General or Mr. Silver or Mr. Cherniack could define for us , what circumstances would they see unconscienable being applied to or extraordinary financial being applied to. What is their understanding of the meaning of those phrases?

MR. CHERNIACK: I'm sorry, I can't help. I can only go by the dictionary, frankly, the definition of contrary to conscience. There is an Unconscienable Transactions Act where there have been such discussions, but that deals with transactions between parties that the court considered were of such a nature where one party had possession of so many facts but could take advantage of the other party. But that is a financial transaction and I don't see that word itself applicable there to be applied here. So, I have to bow out of this and say that I could not help, other than to use the dictionary definition; contrary to conscience would, I believe, be satisfactory to me when it carries with it a grossly contrary to conscience. I think that's what the court would have to look at. I'm sorry, that's all I can contribute.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Well, I am certainly interested. If Mr. Axworthy would like to suggest some variation in wording, because I gather from his remarks that he is concerned that a court might restrict itself to an examination of the discretion based upon the financial or the size of the estate rather than on the fact that there are other circumstances beyond the size or nature of the estate. Well, that is an area that I think we will have to examine carefully. Certainly that is not the intent. The intent is that the type of anomalies that have been referred to insofar as an estate would be concerned, the size of an estate, a gift inheritance, etc., the sort of disproportionality that can be created insofar as that accumulated during the marriage would be something that would be considered. But certainly this is intended to go much beyond that, and to recognize the contribution of spouses, the non-financial ways, to the marriage; and also to recognize the fact that there can be inequities by their very relationship one to the other generated. We had some very unusual cases that had been brought to our attention. So we can review that wording. I don't know whether Mr. Axworthy feels that we should be examining the words "or the extraordinary nature or value of that property", whether those are words that he would feel should be examined as to whether they would be better deleted. I just throw that out to him.

MR. AXWORTHY: Well, Mr. Chairman, I just came away with the feeling that if you look at lines 3 and 4, well really beginning in line 2: "extraordinary financial or other circumstances of the spouses, or the extraordinary nature or value of their property" — the extraordinary value of their property indicates that this discretion is one that would apply only to those who have unusual amounts or values of property. I am much more concerned about cases where they may be related more to the activity or participation within the marriage of one spouse or the other as opposed to this question of the value of the property. That is, you could be rich or poor, that shouldn't matter, and yet that would be certainly the meaning I would draw out of those qualifying phrases.

MR. CHERNIACK: Mr. Chairman, two points. Firstly, Mr. Axworthy refers to extraordinary wealth. I would say that the same words apply to extraordinary poverty on the part of either one as being something that . . . Mr. Axworthy referred to great hardship because of poverty, and I would think that that is covered as well; it covers extremes. But I think what we — and when I say we, those responsible for the bill — did not want to go into was the contributions by the spouses to the accumulation of the assets. That was the one thing we did not want to do. The only example that I think we were prepared to look at was — let us say that the couple is poor, that there is an asset of a very singular nature which is needed by one of the spouses and the children in order to maintain them — I don't know, some corner grocery store or something — where the other party has no opportunity or ability to operate it, say because of that person's having incapacitated himself — that the court would then say that it would be grossly unfair — now I am taking an extreme case of a woman who brought up her children in that little family store — and I am using store rather than house because the marital home is something else — and the husband was out drinking and gambling all this time — that it would be grossly unfair under these circumstances of poverty to give to the husband an equal sharing in that and thus jeopardize the future of these children and the wife; or it could be husband.

I am thinking of that in terms, but not based on the contribution of the parties. To us, that was a vital element that we did not want to bring in because then you are starting to value the washing of dishes as compared to bringing home the hard-earned money, and that we wanted to avoid very strongly. So, having described that, I know that a court could still, using these words — and I suspect any other words — could still in the back of its mind, make the decision based on the contribution to

the marriage or the beating up that one spouse gave the other. I recognize it there, but I still cannot find words that will better improve it. I must say that I would deliberately avoid words that would seem to bring in fault or contribution; that is what I would want to avoid.

MR. AXWORTHY: Yes. Well, Mr. Chairman, I just don't know how far you can get in avoiding it. Let me state the case. We're saying that by using the words "extraordinary financial"or"extraordinary value of property, " he may well be right, that what it will reflect is extremes, rich or poor. It would not, therefore, apply to those who have average means, of whom there is a vast majority and who may have reasons for applying for discretion.

A case in point is one that comes to mind of a woman in my constituency who spoke to me about it, who is married, has two children, is the working member of the family because the husband is — not an unpleasant guy, just doesn't like to work, you know, just one of those people who knows how to . . . and yet she kind of feels that in some point in time in the very near future she is going to have to bring it to an end because it's just getting to be too much of a hardship really to maintain it. Now she has built up some assets, primarily assets as they are now constructed to ensure the children's education. What she's concerned about in these circumstances is that if the 50-50 split comes in, then that gives him a pretty good pretext to take half of the marital home and all the rest of the kind of things; that therefore he would be able to acquire all those assets and that her security and those of her children would be taken away. Now, they have neither extraordinary wealth nor are they extraordinarily poor, but she would certainly have good reason for applying for discretion in those circumstances. I would think that it is the kind of case that is very important — that the definition of what qualifies for application for judicial discretion would fit.

MR. CHERNIACK: Well, if I may, Mr. Chairman, I would like to continue this dialogue a little bit. It seems to me firstly, when we deal with the next section, we will be saying that assets acquired before May 6th, may carry the extra discretionary power of contribution, which is the kind of thing Mr. Axworthy is talking about when he is talking about this husband who is not doing anything. Well, it seems to me that since we are now talking about assets to be acquired from hereon in, that it is limited to these words up above, that now might be the time for that lady to make that kind of decision and to have a discussion with that husband who is not contributing and say, "I want you at this stage to opt out, to agree to opt out of your rights because this is untennable and I want us to have an understanding; not a threat for the future to go to court and fight about it, but it is, to me, a condition of our continued marriage that we have a clear-cut understanding on the way in which our accumulated assets will operate." I think that's fair, and that's why when we deal with the next portion, I will argue that I can understand the contribution being retrospectively reviewed because there was not the opportunity to have that kind of a domestic discussion to define the future arrangement. Am I making myself understood?

MR. AXWORTHY: Yes. Mr. Chairman, if I may reply. It would seem to me that if the next clause, as it does, acknowledges the concept of contribution as being the grounds for discretion or to be considered in it, it would mean that the same should be applied, I think, to this phrase for this reason. That the situation I described is one which I am sure that that man and woman when they first got married probably never envisioned happening. And I would say that there are probably hundreds of couples who are planning marriage who assume, because that's the time when your optimism is at its highest, that everything will just be great and that therefore they will not arrange to opt out; they will stay within the SMR; they will proceed and then a year, three years, four years from the time the bill is passed and the marriage takes place, certain conditions set in that bring about those changes and it would therefore require some basis for discretion being applied. I am not arguing for, in a sense, a widening of the discretion, I am more concerned about the quality of the grounds or the nature of the grounds which trigger discretion; not the wideness of it but the nature of it. And I could see that those kinds of circumstances, that once one is accepted into the standard marital regime and those things begin to occur, then I think it is much more difficult to work out new arrangements, and if there is any dissolution of the marriage, then there may be a basis for discretion being applied on the grounds of that odd notion of contribution.

MR. CHERNIACK: Might I ask Mr. Axworthy whether he doesn't recognize my point, that there is a difference between the splitting of the assets acquired before May 6th and after, in that people can determine, can re-evaluate their relationship now to affect their future and therefore they should now determine their course of conduct as compared with looking backwards and saying, "Well, we should have done something."

MR. AXWORTHY: No, I am quite cognizant of that I think, Mr. Chairman. What I am saying though is, that we recognize the principle for those who are already married and apply to assets acquired before the coming into effect of the Act. But I am saying that there is, the way human relations work, bound to be thousands of marriages occurring once the Act has been passed in which, in the initial phases, there will be a very high degree of optimism about the course of that marriage which will, as the divorce rates show, soon come into frustration. . And at that point or not, then do we still allow

discretion and my point in saying that someone finds themselves in a new marriage under the same circumstance that I have just described. Let's just take a hypothetical couple of whom there are probably many that may end up in the same circumstances, the time comes when there is a dissolution of the marriage, and they find that they can't apply the discretionary application to them, and yet my reading of it is if somebody had extraordinary wealth, they could.

MR. CHERNIACK: Well, Mr. Chairman, I just want to conclude with this. The extraordinary wealth, I relate to extraordinary property, if there's any problem there, okay. But, the question of discretion on even what we have here flies in the face of the recommendation of the Law Reform Commission which recommended no discretion.

MR. AXWORTHY: Even though they're opting out?

MR. CHERNIACK: No, but that's only for the next section, unilateral opting out only for what was acquired up to now, and for that we have the next section to deal with. This section that we're dealing with is for goods acquired from hereon in and , as I read the Law Reform Commission which dealt very extensively with it, they said, "Do not allow discretion. Accept the fact that the couple married now are going to be bound to share equally," and I think it's very persuasive. They spent more time on that probably than any other, and so did we. That's why they said unilateral opting out for up to now and we are saying, "broader discretion including contribution" up to now which is more or less what is the — well, it's less than but not much less than the Conservative proposal or what I might call the Houston Proposal. But, in this section when we're talking from hereon in, the Law Reform Commission said no discretion, and we are already bowing and I am one who agrees with the Law Reform Commission, but we are bowing to the extraordinary, unusual, exceptional cases and I would like to limit it, not broaden it. Mr. Axworthy seems to be tending towards broadening the discretion to include contribution and Mr. Sherman apparently wants to broaden it even further. So far all I'm willing to do is to attempt to spell this out more to keep it confined. I think maybe we're at different directions.

MR. AXWORTHY: : Mr. Chairman, can I just respond on one case to Mr. Cherniack's point. Even the phrasing he used would be more acceptable where he said, unusual, extraordinary different circumstances but taking out the notion of the financial aspect of it I think would be more acceptable.

MR. PAWLEY: Mr. Chairman, if we could just relate to Mr. Axworthy's example. The nature and value of the property that is referred to in his example, is very small in nature I gather. Limited savings, those savings that had been preserved are placed in trust to pay for the education of the children by the mother. So, the financial assets are limited. The circumstances are such that one has not. . .What I'm trying to get at, I'm wondering if the wording of 37(1) would not even cover the type of example that Mr. Axworthy has mentioned. I'm just thinking out loud because of the extraordinary financial or other circumstances, circumstances of the spouses being extraordinary in the example that Mr. Axworthy has mentioned. And the assets being of such a nature that they are very limited, the circumstance being to preserve the funds for the education of the children that are there as a result of the savings by the one spouse. I wonder if Mr. Silver would like to comment on that, whether 37(1) would not include the type of extraordinary circumstances that is referred to by Mr. Axworthy as an example that he quoted to us earlier.

MR. SILVER: What example was that?

MR. PAWLEY: Where the mother had put together savings for the education of the children. . . (inaudible)

MR. AXWORTHY: Not that he's a wastrel, just doesn't do anything. . .

MR. PAWLEY: So all there is is the home and small funds set aside which are intended for the education of the children saved by the mother. anything. . . Would that type of example be one that would be considered as that first example?

MR. SILVER: I would say that the section as worded would include that type of situation. Of course we can't say whether or not that type of situation would be found to be by a judge, such as to warrant interferring with a 50-50 sharing, but I think the wording of the section is such that it would certainly be applicable to it.

MR. PAWLEY: That was my impression — the same that Mr. Silver has mentioned — that the wording would be sufficient to at least allow the judge to consider those circumstances because of the nature of the property which is quite limited in the circumstances, being to attempt to educate the children. Certainly the discretion is much broader insofar as the assets prior to May 6th, but I wouldn't wish to exclude nor as Mr. Silver in his interpretation excluded Mr. Axworthy's example from being possibly covered under 37(1). Of course the problem is, and this is the problem with discretion whenever we have it — what is extraordinary to one judge is not extraordinary to another. That is the whole problem with discretion.

MR. AXWORTHY: Well, it's also the juxtaposition of the words as well. It's also, and I'm not trying to be pandemic about it, but my interpretation of that word is that it's highly oriented towards amount and value of property, as opposed to circumstance and that the rendering of interpretation might be based upon those grounds so that some of the highly complicated heavy estate might well be

acceptable for discretion. Someone who has relatively modest means but still has circumstances that require it, may not be acceptable to judges the way it looks. And if you read it, when it says, extraordinary financial or other circumstance, or the extraordinary nature or value of their property. If you look at the dictionary and meanings of those words, you'll find I think that I'm right.

MR. SHERMAN: Mr. Chairman, on a point of order.

MR. CHAIRMAN: Mr. Sherman, on a point of order.

MR. SHERMAN: Yes, we're obviously not going to finish consideration of this clause before 5:30 and could we have some direction from the Chair as to the Committee's plans tonight. Law Ammendments meets at 8:00 to consider two bills that I think some of us on this Committee have some responsibility for — The City of Winnipeg and the Manitoba Telephone Bill.

MR. CHAIRMAN: I believe it was the intention to reconvene this Committee in this room at 8:00 this evening. I suppose the Committee has powers to vary that arrangement if it's by unanimous consent.

MR. PAWLEY: I'm just wondering how we can handle that. Are we not under the direction of the House to meet here at 8:00?

MR. SHERMAN: My understanding is, Mr. Chairman, that if they have cleared all the other bills before Law Amendments this afternoon except The City of Winnipeg Act and amendments to the Telephone Act and The Statute Law Amendments Act, they should of held those on the grounds that there might be somebody from this Committee who felt they wanted to be there for those bills. So that's the problem.

MR. AXWORTHY: Mr. Chairman, I have the same problem. In both those bills I have some responsibility for representing things, and I'm just not sure how to handle it. I haven't quite figured out a way. While I'm schizoid I'm in personality, I haven't quite figured how to do it physically.

MR. CHAIRMAN: What's your will and pleasure?

MR. PAWLEY: Well, in fact I should also be in Law Amendments when we come to The Statute Law Amendment Bill. I am the sponsor of The Statute Law Amendment Bill.

MR. CHERNIACK: . . . were over fairly quickly?

MR. AXWORTHY: I would think, Mr. Chairman, that certainly The City of Winnipeg Act would not go that quickly. I'm certainly going to ask for a clause by clause examination because there's a number of issues on it . . . .

MR. PAWLEY: Could I pose this question? It would be nice if both Committees could be working together. If there would be a particular area that Mr. Sherman or Mr. Axworthy would want to indicate that they would want to be present for in discussion of the legislation, so that if there are areas that are of less vital interest to them, maybe we could clear up some of those areas, while Mr. Sherman and Mr.Axworthy are in Committee.

MR. CHERNIACK: Well, it does occur to me that we were into this "discretion" which I think is probably the most important and I would think that maybe we could accommodate this way; that Mr. Sherman and Mr. Axworthy and anyone else who has a particular interest in this who would suggest that this be set aside, I'm sure we could finish the Act except for Section 37 in probably no time and then we could get into maintenance, which is a new ball game and possibly then they could get substitutes for the maintenance thing until they can come back to this Committee and then deal with 37 after they come back. Maybe they can come back with wording so that if we can go into Maintenance. . . .

MR. PAWLEY: Or alternatively, if Mr. Sherman wanted to be here at the beginning of Maintenace, there's 72, which is not very contentious I believe, but would probably take up a half hour of discussion.

MR. CHERNIACK: Mr. Axworthy, seems to think that it's workable and as between Mr. Sherman, Mr. Brown and anybody else and the notes they make, I think that I for one would be agreeable that even in the Maintenance section, that somebody present could indicate that a certain section should be set aside for Mr. Sherman or Mr. Axworthy. I think we'd be amenable to that.

MR. AXWORTHY: Mr. Chairman, just to respond. I think it is workable. On the Maintenance Act though, I think in the first couple of clauses dealing with the proposed amendments on the court system, I'd certainly be interested in raising some questions if nothing else. But, as the Attorney-General suggested, if we could reserve discussion on discretion which I think we should try and conclude because I have some further interest about it and then perhaps they could go to Bill 72, and then depending on the timing of Law Amendments is, we can come back in and out for it. . . .

MR. CHERNIACK: Well, Mr. Chairman, could we agree then that we meet, and we finish this bill except for 37, that we go into Bill 72 which I'm sure won't take any time, and that we then maybe adjourn for a few minutes to consult with the two gentlemen who are in the other Committee and ask them if during the dinner hour they could have ready to indicate to us which sections of the Maintenance Bill they would like us to set aside so we could deal with all the others. Mr. Brown will be here. I don't know if Mr. Axworthy can get a substitute. I'm willing to be a substitute. . . Mr. Patrick will be here, well maybe that could be done . . . .

MR. SHERMAN: We're within an hour of completing Bill 61 I think even by almost any stretch of the imagination. We are within an hour of it and it's regrettable we can't do it right now but certainly there are more things I think have to be said on 37 and there might be one other question to be raised. If we could leave it that way and I will certainly make arrangements if I can to have Mr. Graham. . .

MR. AXWORTHY: How about coming back at 7 o'clock?

MR. SHERMAN: Well, unfortunately I can't come at 7, I've got a meeting over the dinner hour.

MR. BARROW: Well, Mr. Sherman, if you can't come at 7, why don't we say 6:30?

MR. SHERMAN: No, I have to leave unfortunately now and I would hate to not be there when the bill finally was . . .

MR. CHERNIACK: No, I don't think we should. If plans have been made . . . I think we have to recognize the interest of the parties to be here. So I think that we could meet at 8:00 and work around 37 and then by that time, if Mr. Axworthy and Mr. Sherman could indicate the sections of the Maintenance Bill they would like held, we could do that and deal with the other bill anyway.

MR. AXWORTHY: Could we ask Mr. Reeves if he has roller skates in his office that could be used for transportation back and forth.

MR. CHAIRMAN: Is that agreed? (Agreed) Committee rise and report.