Legislative Assembly of Manitoba

HEARING OF THE STANDING COMMITTEE

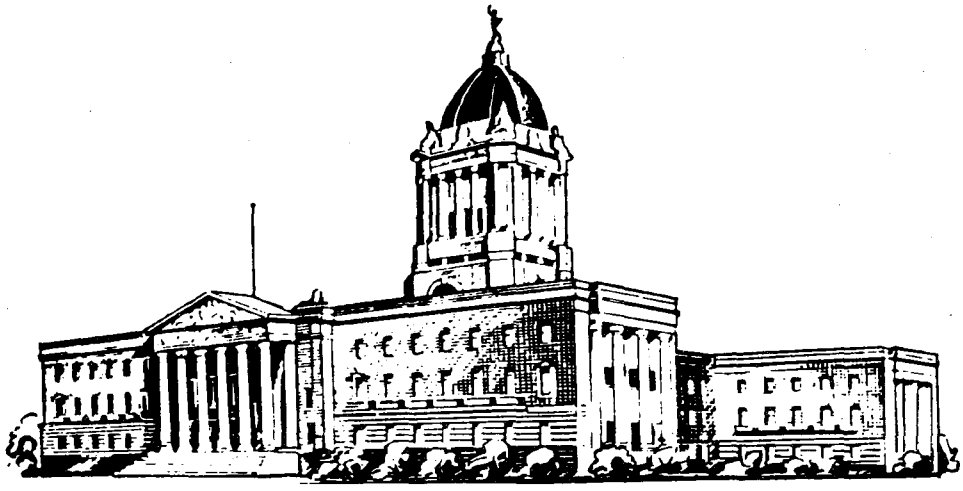
ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. Warren Steen

Constituency of Crescentwood



Monday, July 10, 1978 8:00 p.m.

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HAIRMAN, Mr. Warren Steen.

R. CHAIRMAN: Would the committee come to order please?
The first person for the evening is Maxine Prystupa. Is she present?

IS. PRYSTUPA: Committee members. I just want to relate quickly an incident that happened this 'ternoon. I got so enthralled with the last presentation that was being given this afternoon that entirely forgot that I had a car parked out on Broadway avenue until 6:00 p.m.. It never even ccurred to me until 5:55 that I had better remove that car. When I got out, I discovered that I ot only had not had my car towed away, it didn't even have a ticket. My husband, at supper time, aid you were very lucky. Perhaps Mr. Jorgenson, who wanted favourable briefs had made some 'rangements with the city authorities. Anyway, my name is Maxine Prystupa. For a change, I will e speaking on my own behalf, rather than on behalf of the group, though I'm an active member f some of the groups making presentations.

I may say that I have now attended at least four public hearings on family law, beginning with ıe Law Reform Commission public hearings, and have made major presentations at at least three f them. One would think that by now Manitoba would have an excellent set of family laws. I can nly reiterate that I am very sad to note that this is not the case. Reasonably good laws, far from erfect, that reasonably good laws were enacted in 1977.

If I can be permitted just one brief statement or observation about that: I think that if we can ssess the importance with which this Legislature attaches the views of women of this province by ıe length of the duration of those laws, which were, by the way, the most important laws for reform ›r women, over 50 years in this province, we have to have a very sobering experience indeed. ne was three weeks, the other zero weeks. All of the years of devoted research and gathering xcitement as we witnessed at last a law that would permit us to attend at our daughters weddings nowing that finally they would not be entering into an impossible legal arrangement, flew out the indow last December. This spring we are here to see them buried. I hope not — and that's why m here presenting a brief.

I hope that I can offer some observations that will lock in or key in with some things that the ıembers of the Legislature can relate to that will encourage them to have a second look at those ıws.

When I first saw the laws as they were enacted or as they were presented, I was both disillusioned nd I must say angry. My original intent in the first flash of anger and disillusionment was to come ere and say something like the following.

Last winter we were told that our laws that we had so long sought were being withdrawn only › clear up drafting difficulties and remove possible tax implications. We were assured that the rinciples would not be altered. Some of us knew in our hearts that perhaps this was not the case ut we could not argue against a promise. When we saw the shattering of that dream some of s were sad, some of us were angry, and some became very determined to enter into new levels f political activity.

Until now this law was not a political question. We brought the original laws to enactment in series of political unanimity that I almost couldn't believe, it was really quite beautiful. But that as gone. Instead, we've had wrangling. I'm really sad about this, but whether or not the members f the Legislature are aware of it as yet, the lesson has been learned by women.

In the past we've been trusting, albeit with misgiving, but trusting nonetheless. We can no longer e trusting again, unless we can see positive evidence that this law will not be proclaimed in its resent form, and I certainly hope that it will not be.

Last winter we were told by one member to, "Trust us, ladies, you will like it." At the time I ad the uneasy feeling that that was what rapists sometimes say , and I know the elusion is very

unfortunate, but it makes a point that I hope you will listen to. It says something about attitud it says your feelings don't count, your views don't count. I can force what I want on you, and yc don't even have the right to be angry. You are such an unimportant being that you are even suppose to pretend that you like what is being forced on you. Well, I won't pretend that I like this law - I don't like it, and I cannot say that I like it, but I do hope that after the hearings it will b changed.

On more sober second thought, however, I have decided instead to suggest alterations to th bill, and hopefully offer some insight which will be helpful to you. The foregoing, however, wa deliberately stated to serve as an indicator of how compromised the women who actually believe this government's promise now feel and why their forced learning experience has resulted in suc dissolutionment and anger. Those who are the most angry and those who are the most determine are the very persons who believed that this government was no different than the previou government, that they would retain the principles of the law when that was promised to them, ar they were those who worked the hardest with this government to bring about a good law. If the have had a learning experience, and a very difficult one, we can only say that this Legislature wa their teachers. They now know, or at least they are very much afraid that they will have to wa four years, and perhaps change of government to achieve equity. I wish that that were not the cas I have daughters who may achieve marriageable age before four years come by; I would very muc like to be able to say to them that this law will be withdrawn and a better one replaced with I don't want to be advising them that they have to move to a place like California if they wa to marry, or otherwise to never marry.

The first point that I would like to make is that both family law bills must be viewed as a unit One cannot retain most of one bill and substantially alter the other and believe that the first still acceptable. I argued strongly in the past that both spouses should now have equal responsibilit including responsibility for debt and responsibility for financial independence after breakdown, a well as joint responsibility for the care and the maintenance of children. That, however, was with the context of an equitable and an immediate sharing of all family assets — and that, by the wa included income. .

That means, when you have a situation where you have an immediate sharing of all family asset including income, that means that there is very real jointdecision-making. That means that bo partners can and will have the ability to negotiate with each other on equal terms when one is makir the trade-off that has to be made between such things as home or a business or say universit Sometimes families can't afford all three. And you know, one achieves greater income for a individual, another is a commercial asset, and a third is defined in this instance as a family asse One separate, one family and the other commercial, and yet these are things that are always with the context of the total family income constantly being traded off. Not all families can achieve a three at once and quite frequently one is given up by one or the other of the parties in favo of one of the other things.

And when you have joint decision making where both parties have equal negotiating ability und the law, that can be achieved and we can have a situation where when a marriage does break dow that we can look at all of these things separately, but when you do not, you cannot.

The division put between income and fixed assets — and what I'm referring to as fixed asset I don't know how the law defines it, but for my own purposes I'm defining it, fixed assets are thos assets which are acquired from surplus income are an artifical one. So is the division, I think, betwee family and commercial assets.

As some members of this committee will be aware, not all, I have always argued and felt qui strongly that we needed full community of property, including income, with joint management right Some families choose to invest in education to further the income potential of one or both of th parties, others in homes and assets for family enjoyment, others give up both to invest in a busine enterprise. The total income allocation within a family is a fluid one, and to deem that part of which is allocated to one thing or another under different categories of sharing is really very artificia It gives an unreasonable amount of power to the one party who, if that party has full control und the law, gives an unreasonable amount of power to that individual within a very intimate relationsh and that can upset a very delicate balance.

Everyone remembers the old truism about the farmstead. One can always judge about how th farm wife stands in her husband's view by whether it is the barn or the house that is painted. Or can view family and commercial assets in the same way. It means in effect that one party has th power to concentrate all of the families surplus income into their own hands and to dispose of as he or she sees fit. The two-year back balancing of the accounting is very small potatoes compare to the equal control during marriage.

And at the expense, and possible expense of being redundant, I'd like to read, if I may, abo a page of the original brief that I made many years ago. I know that for perhaps one or two membe of the committee it will be a repetition, but I'd like to do so because I feel that not all membe

f the committee have had the benefit of hopefully of a bit of insight that I feel that maybe you idn't have when the laws were being drafted and perhaps it will give you an opportunity, we think, ome of the precepts that were under consideration when the laws were drafted.

It is of little comfort to a mother of a large family who spent years of scrimping and saving, nd doing without, while her partner has built up a business; who has no guaranteed access to ven the income derived from that business, or even the right to know, for that matter, what the come is, without a specific court order; to know that she may have a future half interest in that usiness if the marriage fails — a right, by the way, which can be denied if the wide discretion auses are retained.

This becomes even more unfair if one realizes that in many instances, women work while they e young, to support a family, while the family business is becoming established, often while they e also caring for the children. It is of small comfort to the mother of very small children, who orks side by side with her husband on the family farm, to know that she has a future half interest that farm, if what she needs right now are more diapers and a decent washing machine and er husband says no, and moreover, is perfectly able to enforce that decision, even if he is spending vishly on himself, or what is more likely, ploughing every cent back into the farm. More precisely, does nothing to stop one spouse from concentrating all of the family assets into his or her own ands, and disposing of them as he or she sees fit.

What happens in the case mentioned above if the husband at age 60 decides to sell the family rm and go off to Europe, or to bequeath it to his son? All right, within two years, if we split up ithin two years, that can be backdated in the accounting. But beyond that, how can the wife's eferred community property regime protect the wife's interest in that business? By the time the ivorce proceedings are under way, the farm, except for the dower, or the homestead, is one.

There is a tremendous psychological advantage to the person within a relationship who can ithdraw the right, for very basic needs, from the other. This can, and does, spill over into other reas of the relationship. Women are constantly being told they should learn to stand on their own vo feet. I am saying, that within the context of a very difficult relationship, becomes practically npossible without knowing that in the end, one has rights and the means to apply them. Without uch rights and means available, it takes a very extraordinary person to stand up to that kind of ressure. No wonder women have learned to become differential to men. The wonder is not that omen don't stand up to their husbands enough, but that given their vulnerable position under the w, that so many of them manage to do so. Men seem to find giving wives access, for example, credit in their own name very frightening. There is a presumption that it will be immediately quandered.

May I ask them for a moment, to put the show on the other foot? Right now, a married woman an get no credit whatever on her own name. A man can get credit to the extent of jeopardizing ie livelihood of the entire family, and if we retain the deferred sharing of family assets, that will emain the case. The only protection that a wife has, is going to court. It's so much simpler to equire joint signatures in an immediate sharing regime; it's very simple, and it doesn't require using p the court's time. It also means that quite frequently differences will then be settled between the arties, rather than having to resort to an outside authority.

Most people of course can iron out those difficulties. It is only those people who can't that are ffected by the law. I see the law as an normative kind of thing, where people know they have ghts, . W they can stand on their own two feethere there are no rights people will, in a bad instance, ule and I think the law has a duty to set the outlines of what form they think society should be. nd people generally attempt then to operate within the confines of what is the law. The law, after ll, defines the parameters beyond which unacceptable behaviour will not go. Okay?

Within families delicate balancing act there always occur between the education for spouses and ildren, between the acquisition of more comfortable living space and investing in a family usiness. . . Under the present law, one person has the right and the power to deny, say education, the other. They can say that the business is more important, or the farm is more important. hat exists, unless we have immediate sharing. That does not really give the other party to the artnership the option of developing the skills to become independent; it does not even give them ie option of developing the psychological skills to become independent. One other concern . . . think that the main point that I wanted to make, because from this long sort of piece going back to what I've said before, is that without control, the presumption of independence becomes a shaky asis for building a new and separate world. Without control during marriage, introduction, for xample, of the sharing of negative balances in the accounting out in the division, can also work ery serious hardship and be very unfair.

If there is control during marriage, then I would agree that those should be retained, but without ontrol — and by that I mean joint ownership and joint management during marriage — those two recepts by themselves can in effect negate, I think, the effect of a lot of what we are intending

to do with this law. It can mean that one party can come out of the marriage, albeit with son assets shared, but lacking the skills that they need to be independent, and by independence, I c not mean the simple ability to survive in this world. I always say that, going back to my own experien and extending it out to other people, is often a really valid basis for looking at the world. Sometim it's an invalid basis, but other times it's not .

I remember that when I was young married person, I remember spending years putting n husband through university, and working at minimum wage jobs at night to do it, and when I graduated we both agreed to this, because that was our joint security. We did not invest in a hom we did not invest in a business, we did not invest in cars, and we did not invest in furniture. W did not invest in any of those things that most other families do, we invested in education. Tl assumption was, of course, that when we could afford it, after my husband had graduated and wh the children were older, that I would then have the similar option. Well, I'm not going to break th marriage up, it's a good one, but just assuming that it did break down, where would I be at a 48, 49-½, or 38, 39-½, with four children, and I have just spent two and one-half years finally findi a good job, after being out of the labour force for 16 years. All right, I have becon independent.

Assume that I broke up with my husband two years ago, and it took me two and one-half yea to find a job — that's not independence. I don't see being maintained by someone else independence either. I think that some of the balancing. . . I think that we have to look then these bills as a package, that if we're going to alter one of them, we have to look at them bot and I would suggest that we go back to altering Bill — 39 is The Family Property Act? 38 or 3 38 — go back to the original Bill 60 or 61, or similarly as the first step, or much of it in a case.

I'd like also to mention a few other basic concerns and then I'll do a clause by clause analys of some of the suggestions for alterations. I think the basic concern, again if I can reiterate, is t lack of joint ownership during marriage. The second one is, independence can be only achiev when you have rights. The third one, pensions — I can see no valid basis for making a pensi a commercial asset, particularly if commercial assets are dealt with in a manner differently fro family assets. The total income from that family goes to build that pension, and how it can described as a commercial asset is totally beyond my comprehension. This is this family's futu security, and this is the security that most working people look to in their old age.

I have some concerns about survivorship rights, but I must confess that I have not looked those clauses very very closely. I wanted to note one improvement, I think, over the previous b and that was the inclusion of bank accounts as a family asset. Another, of course, is the fact th retroactivity has been retained.

In Section 4(3)(b), again, this is the negative balancing. It seems to me that if you have a situati where you have joint ownership and joint control, then the assumption of liabilities of the partnersh by the dependent spouse is valid, but where you do not have joint control and where you do n have joint ownership during marriage, the forced assumption of the liabilities to a negative balan is not fair.

Again, as can be expected from my previous comments, I don't much like any of Section 6(There are some bits of protection there, notably the dissipation, the excessive gifts . . . yes, the are some protections there, but compared to joint ownership during marriage, it is really not t same kind of thing.

I note tuat 6(6), 6(7) and 6(8) only go back two years. It seems to me that if there were joi control during the marriage, there would be no need to do any back accounting.

6(9), in Bill 38, is weaker as far as I can see than Clause 24 in Bill 60. I note that you cann recover from a third party, and again given the negative evaluation of assets, this could be ve bad.

In Clauses 7(1), (2) and (3), it seems to me that the onus is wrong. The burden of proof th the intent of the gift was to one spouse only, should be on the part of the spouse who is claimi it. Am I going too quickly for you to locate the specific sections?

Okay. In Part 2, 13(2), having regard to any circumstances that the court deems relevant, course, I see as being far too broad.

I had a question in my mind, and it came up in discussions with some other people, but it rea surprised me. Someone asked whether or not that in effect means that conduct can be used, cou be interpreted by the court, in varying the sharing of property assets as well as other assets. that's the case, I think that we should look at the drafting of the bill quite seriously.

Another little part in Section 13 again, I couldn't understand what the nature of the assets h to do with shareability at all. I couldn't perceive of any rationale for the inclusion of that claus Perhaps during the questioning someone will enlighten me.

If 13(2) must be retained, and I hope that it will not, I suppose there are modifications that c be added in but my hope would be that it would not be retained at all.

In The Family Maintenance Act8 — I've forgotten whether that's Bill 38 or 39 again (Interjection)— 39. I have a notation to delete clause 2(2) and I'll have to look at the bill to remeer ıy. —(Interjection)— Pardon? Oh, yes, I know why I did. That's in regard to "a course of conduct at is so unconscionable as to constitute an obvious and gross repudiation of the marriage lationship." I think we've had sufficient discussion to note that nobody is in agreement as to what at means and if nobody amongst those who drafted and are present in this room know what that supposed to mean, surely the lawyers and the courts will have a field day and we will be seeing ıthing but appeal, beyond appeal, beyond appeal, beyond appeal, beyond appeal. Even setting ide the fairness of such a clause, we have the whole practical workability of it.

In 5(1), "a court shall consider all the circumstances of the spouses including," again it seems me "shall consider the following factors and no others," and delete 5(1)(f). What has the property ttlement got to do with the amount of the maintenance award? That escaped me. Does that mean at if one spouse gets half of the property that they then have no maintenance award? I wasn't re about that. —(Interjection)— Okay, if it's income producing, perhaps; but if it's not income oducing, then not.

And then reintroduce 5(1)(k), I think, from Bill 60. Again, reintroduce 6(2), (3), (4) and (5) from l 60 regarding the employer, the Crown, etc., to provide information. Again, it seems to me that ving to go to court and get an order to get information has got to be a very awkward and expensive d time-consuming procedure. Over and above that fact is the fact that if one had a simple right, ese matters can then be settled quietly and between the parties, but once one has to go to court, s a very official kind of thing. It's almost like forcing the beginning of a marital breakdown in der to get what should be a basic right to begin with.

Delete 7(2) and substitute original 7(2) from Bill 60. I've forgotten now why I had that in there. have to look at the other clause from Bill 60. The wording of 7(2) in Bill 39 was to my mind dly drafted perhaps — I hate to use those words. It only provides for the event that they have parated by mutual agreement and one has agreed in writing to release the other from liability to accept — and it doesn't refer back to the original circumstances of the Maintenance Order d the original conditions, or have I misread it?

The next, Bill 39 changes the wording of Bill 60 in 8(1) to make the new order or the appeal a new order under different terms than the original order was introduced. I note that we have ny circumstances that the court deems proper," rather than referring back to the original section. again, if one applies to the court for a new court order, the circumstances under which that l be awarded will be different from that under which the first order was awarded and again, I uldn't understand the rationale for that.

t. CHAIRMAN: May I stop you and point out that you've used up 30 minutes. Are you near the d?

s. PRYSTUPA: Okay, I have 3 more sections to comment on and I can be very brief.

t. CHAIRMAN: All right.

s. PRYSTUPA: 8(3), the Reconciliation clause. It seems to me that making provisions for conciliation is good, however, I note that a reconciliation can be forced by the court when only e party agrees to it. Again, I think that that could work hardship. How can you force a reconciliation one party who doesn't want to reconciliate? It seems to me that the clause would have to be anged from "the evidence or attitude of the spouses or either of them," should probably be anged to "both of them."

Again, in Section 15, I believe, to reinclude "subject to Section 13" as in Bill 60. Again that's same kind of situation as I commented on with clause 8(1) in Bill 60.

In Section 21, I note "dropped subject to Section 5 from 23(1) in Bill 60 and substitutes, "having ard to any change in the condition, means or other circumstances of the only other person ected."

And in Section 29, the wording "may" should be changed to "shall." I would have to look at section to recall the reason for it.

l. CHERNIACK: It must be in 25, not 29.

s. PRYSTUPA: Probably. Thank you for your attention. I will answer questions if there are

. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, I have less than a question. Just a clarification. In one respe because Ms. Prystupa has repeated, I think, what others have already assumed and that is th under The Property Act in the definition of the family asset, I've heard a few times a sort of congratulatory note that bank accounts have been included as marital assets. Just to ask wheth Ms. Prystupa understands that what is included as a family asset is savings accounts, chequi accounts, current account at the bank, where the account is ordinarily used for shelter transportation or for household, educational, recreational, social or aesthetic purposes, so there cou be ten different kinds of bank accounts but only the one that is used as a chequing account f the family's domestic needs is included, like petty cash, and to suggest any savings bank accou that's used for the future or for a rainy day or for investment is not a family asset.

MS. PRYSTUPA: Yes, right, and from that you can draw two observations and one is that mak the point further, that the distinction between family and commercial assets for a different kind sharbility is really quite unfair in that ea/ kind of circumstances; and secondly, as I've said for year that I believe that all assets, including income, should be a family asset.

MR. CHAIRMAN: Any other questions? If not, thank you very kindly.

The next person on the list is Linda Gouriluk, is she present? I'll repeat again, Linda Gourilul She doesn't appear to be present. The next one, the Voice of Women, Terry Gray. Is Terry Gr here, representing the Voice of Women?

MR. CHERNIACK: Mr. Chairman, I couldn't help but hear the words "strike them off". I think o practice has been that when people don't come that they're put at the bottom of the list. I assun that's what happening to these.

MR. CHAIRMAN: That will be what the majority of the committee wishes to do.

MR. CHERNIACK: Well, I would suggest right now, Mr. Chairman, that when a person isn't preser then that person's name be put at the bottom of the list and be called before we conclud (Agreed)

MR. CHAIRMAN: The next one, the Manitoba Association of Social Workers, Gail Schnabl.

MS. SCHNABL: Mr. Chairman, honourable members. Speaking for the Manitoba Associatiion Social Workers, I will focus my comments primarily on The Family Maintenance Act, because social workers our attention is daily drawn to people experiencing family conflict. However, we have some specific concerns regarding The Marital Property Act, which will be dealt with first

The Manitoba Association of Social Workers feels that the proposed legislation lacks a stateme of principle of marriage as an equal partnership. While reference is made at one point to spous having a right to equal sharing of assets, under specific circumstances, no where is there recogniti that marriage is a social and economic partnership of equals. Therefore, we encourage the inclusi of a preamble explicitly setting out these concepts.

The Manitoba Association of Social Workers strongly encourages the assumption in law of equ control over family assets throughout marriage. We are pleased to see that the Act does not perm unilateral opting out, but does lend considerable support to spousal agreements. The new definiti of family assets is appropriately broad. We have concerns however, regarding the section s dealir with the marital home as there is no provision for sharing of this asset during the marriage, b only at its dissolution.

Section 6,(1), and Section 6,(2) are contradictory. It is important in our view that spouses ov the marital home jointly and that each is protected by law from the other taking unilateral acti regarding it. Also, it is unclear to us why a distinction is made in Section 11 for the division assets within and without the province.

Despite Section 12's statement of the principle of equal sharing, the provision for wide judici discretion in regard to commercial assets is unjust. In exceptional circumstances as contained Section 13(1), the court could have discretionary powers in regard to the division of both fam and commercial assets. The factors listed in Section 13 (2) will inevitably lead to excessive litigati and effectively negates the principle of equal sharing of commercial assets. These are our prima concerns regarding The Marital Property Act.

The remainder of our brief deals with The Family Maintenance Act, which is of particular conce to the social work community. We agree that spouses have the mutual obligation to contribu reasonably to each other's support and maintenance. Also commendable is the principle that spous have the responsibility to strive for economic independence after separation. However, we a alarmed to note that Bill 39 has reintroduced conduct or fault as an aspect to be considered

etermining the amount of support to be ordered. We reaffirm our position that maintenance on paration must be based on need and not on fault. Maintenance is not punishment. The causes the marital breakdown or the conduct of either spouse during the marriage is irrelevant. Neither ould be considered when determining the amount of maintenance or indeed whether maintenance ould be ordered at all. If an obvious and gross repudiation of the marriage relationship is to be nsidered, then its definition must be narrowly circumscribed as in modern British law.

Also we begrudgingly concede that the 10 points outlined in Section 5(1) could be retained as ctors admissable by the court when determining maintenance. However, these factors, and no hers, should be taken into account, allowing the court to consider all the circumstances of the ouses is much too discretionary, and would probably allow conduct or fault to be included in e deliberations all too frequently.

The Manitoba Association of Social Workers is pleased on the other hand to note that Bill 39, Section 5 (2) explicitly acknowledges that the contribution of the non-earning spouse who engages child care, housekeeping and other domestic service is equal to the financial contribution of the rning spouse. We encourage the retention of this important principle. The Manitoba Association Social Workers is also pleased that The Family Maintenance Act retains the idea of marriage a partnership by re-confirming the provisions for financial disclosure set out in Section 6.

That section which particularly solicits commentary by those of us in the helping professions, Section 8(3) pertaining to coun services. selling We are heartened to see that recognition is given the role of social service personnel in augmenting laws for the resolution of human conflict. though reconciliation of parties per se may not always be the goal of counselling services, nciliation between antagonistic spouses can be achieved by such intervention. The protection of ildren's interests and the avoidance of future litigation are the goals of counselling associatied th marital dissolution.

I would just like to make a comment that I would like to support the comments made by a esenter on Friday evening from the Catholic Women's League I believe, in which she talked about e conselling services of the Edmonton Family Court, and I'd like to support that at this time.

We hope that the members of the legal profession, be they lawyers or judges, will give Section (3) a wide interpretation to facilitate out-of-court conciliation in conjunction with counselling. We ould prefer that the term "conciliation" which has a much wider scope than "reconciliation", be ed in the legislation. If, however, this section was merely included to placate advocates of eservation of family unity, then any terminology is irrelevant because so too will be the legislation. is section must be retained and, in practice, legal professionals must exercise full appreciation its direction, both explicit and implicit, in assisting families in managing conflict.

As social workers, we wish to remind the draftsmen of the bill that where other family-related gislation has included provisions for referral to personal services, as in The Divorce Act, or The C. Family Relations Act, 'privileged communication' is awarded to the counsellor. Perhaps it was oversight on the part of the authors of Bill 39 to have omitted a clause indicating the content court-recommended counselling to be excluded from the realm of admissible evidence.

The Manitoba Association of Social Workers fully recognizes that the enforcement of orders is complex field of endeavour and that co-operation from the Federal Government is required to sist in designing more efficient procedures. However, we do support other presentations which ve recommended that Section 25(1) should read that an order shall require a person to deposit ecurity in the event of default. We are also encouraged that a review committee is currently looking o this whole area and hope that effective enforcement practices will be forthcoming.

Finally, we take this opportunity to restate a point made in our earlier submissions. A title for l 39 might more appropriately be "The Family Relations Act" or some other such name which tter describes its content and function. The current title implies a preoccupation with monetary atters which is not its total intent.

In conclusion, the Manitoba Association of Social Workers reaffirms our hopes that our new family ws will embody the following principles:

1) the sharing of family assets throughout marriage

2) only limited judicial discretion in determining sharing of assets, both commercial and nily

3) the elimination of fault considerations in maintenance decisions

4) the reaffirmation and extension of counselling services

5) the improvement of maintenance enforcement provisions.

We offer our encouragement in this most important task and trust you will carefully consider r ideas and suggestions. Thank you.

t. CHAIRMAN: To the delegate, are you prepared to answer questions from members of the mmittee?

MS. SCHNABL: Yes.

MR. MERCIER: Thank you very much for presenting your brief, Ms. Schnabl. On page 1 in th third paragraph, you indicate that, "It is important in our view that spouses own the marital hom jointly and that each is protected by law from the other taking unilateral action concerning the home. Are you aware that under The Dower Act, the homestead cannot be disposed of or mortgagec or transferred, without the consent of the non-title spouse's signature?

MS. SCHNABL: I wasn't aware of that particular thing. What I was reading it as, was in 6(1), suggests that things can be done to family assets.

MR. MERCIER: Over and above that, under The Dower Act, the homestead cannot be sold, c mortgaged, etc., without the consent of the non-title holding spouse.

With respect to your comments about fault. Do you think there should be a difference in whethe or not fault is considered for a separation as compared to a divorce?

MS. SCHNABL: Well, we're talking about maintenance here, I don't think maintenance shoul consider fault in either instance, as far as I am concerned.

MR. MERCIER: Have you made any representations to the Federal Government because fault i included under The Divorce Act?

MS. SCHNABL: No, no, we haven't.

MR. MERCIER: Thank you very much.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Thank you, Mr. Chairman. Ms. Schnabl, do you feel that the extent of you concern as an association of social workers, is involved in the question of divorce in view of th fact that there is no-fault divorce available? Mr. Mercier has asked you whether you have mad representations about fault in divorce. The fact is that there is a no-fault provision for divorce, i there not?

MS. SCHNABL: I think he is referring to maintenance, or. . .

MR. CHERNIACK: Under The Divorce Act — I see, well, thanks for helping me out — I didn quite understand that from him. Coming back to your brief, on Page 1, you say, "The new definitio of family assets is appropriately broad." Are you aware that the definition of family assets in las year's legislation was everything except commercial assets, whereas in this legislation, commercia assets is everything except family assets? I am suggesting to you that that sort of makes this definitio of family assets more restrictive than the last year's legislation provided.

MS. SCHNABL: Yes, I think what our comments were in relation to that, as social workers w didn't really feel that we were experts in the field of commerce and laws in relation to ownershi of those kinds of things, and we did not wish to attempt to make comments in regard to that

MR. CHERNIACK: All right. Next, you had a little discussion with Mr. Mercier about owning th marital home and the protection by law from unilateral action. Do you see a difference as a socia worker between joint ownership and protection from transfer by the owning spouse? Is there a validit in the difference as you see it?

MS. SCHNABL: Well yes, I think there is. I don't know in terms of action whether as he wa suggesting it makes a difference, but in terms of . . . it certainly is a difference if you own somethin than if somebody just prevents . . . can't do something to something that you own; there's difference. Something that you don't own — correction.

MR. CHERNIACK: You do know that if the home is sold then the ownership still determines wh has the money, or the proceeds.

MS. SCHNABL: That's correct, yes.

MR. CHERNIACK: All right, on the next page, you deal with the concept of punishment as bein

art of the maintenance provisions in the Maintenance Bill. You say maintenance is not punishment, ut the fact is that this bill does give the opportunity for the court to punish.

MS. SCHNABL: That could be possible.

MR. CHERNIACK: Pardon?

MS. SCHNABL: That could be possible.

MR. CHERNIACK: Yes. You speak here on behalf of an association that deals with cases that are nvolved in maintenance. Have you seen injustice caused by maintenance being asked for and rovided where there was fault? I mean, are you arguing on the basis of some theoretical approach, r are you being pretty practical in the aspect of whether or not fault should be involved in deciding n maintenance?

MS. SCHNABL: I personally do not work in a court system, so I am not aware of particular cases here a judge has awarded maintenance based on for instance, poor conduct on the part of the usband, so I can't argue it from that point of view. In principle, I believe that it should be based n need and should not be based on the conduct of either spouse.

MR. CHERNIACK: But you do know that inherent in the wording of this section is that a supporting usband who is at fault in a gross manner, may be penalized by having to pay more maintenance nan may be required on the basis of need.

MS. SCHNABL: Yes, I am aware that's right.

MR. CHERNIACK: You referred to the Edmonton Family Court. Are you aware of how that relates o the proposed family court that was planned here for St. Boniface? Do you have any of these . . ?

MS. SCHNABL: No, no.

MR. CHERNIACK: All right. Now you talk about privileged communication under the conciliation eature. I believe social workers do not have any privileged communication rights in any aspect of neir work.

MS. SCHNABL: No they don't.

MR. CHERNIACK: No. Do you find that creates difficulty in your being involved in conciliation or any other aspect of your work?

MS. SCHNABL: Well, it certainly would create difficulty if it was a court-recommended counselling. he spouses who were referred to the counselling services would not be able to put very much ust in the counsellor if they realized that the counsellor could be subpoenaed to appear in court nd give evidence against them. I mean, counselling is based on a trust relationship and that would ot be the case, in my opinion.

MR. CHERNIACK: I have to plead ignorance and indicate to you that it's my impression that only wyers have the protection of privileged communication.

MS. SCHNABL: I understand though in The Divorce Act, in Section 21, and in B.C. Family Relations ct, that privileged communication is awarded in court-recommended counselling.

MR. CHERNIACK: In The Divorce Act?

MS. SCHNABL: Yes.

MR. CHERNIACK: Thank you very much. Thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Axworthy.

MR. AXWORTHY: I would just like to raise some questions about this phrase "the obvious and oss repudiation of the marriage relationship." If you were asked by a court officer to give your

opinion as a social worker on what would be considered to be an obvious and gross repudiati of the marriage relationship, are there circumstances to your mind that you think you could be at to provide a proper definition of what that means?

MS. SCHNABL: I don't think I would attempt to define that.

MR. AXWORTHY: So as a social worker, you don't think it is possible to define "obvious and gro repudiation of a marriage relationship."

MS. SCHNABL: Well, what I'm saying is I personally right now would not attempt to make a definiti for that. I think it could be defined by example.

MR. AXWORTHY: Well, okay. As a professional in a situation where you have been going throu counselling or dealing with a family relationship and you were asked to give your opinion, is it possit to single out a circumstance or a case where one partner or the other made such a blatant and I think the word is bizarre — example of a gross and obvious repudiation, that you think y could isolate that and say that is the reason why the marriage is has broken down. Would y feel capable, as a professional, to make that kind of judgment?

MS. SCHNABL: Are you asking whether that gross piece of behaviour would be the reason th the marriage had broken down?

MR. AXWORTHY: Yes, or the repudiation of the marriage.

MS. SCHNABL: I would find it very difficult to say that it was the cause of the marital breakdo but I think a piece of behaviour might be defined as being grossly inappropriate, yes.

MR. AXWORTHY: Yes, but you would have to say it would be about as difficult as the cou presently have in trying to find what gross negligence is in a traffic case.

MS. SCHNABL: I would find it hard to define.

MR. AXWORTHY: So the point that I'm trying to elicit is that if this is a basis or a criteria determining support of maintenance, it would require some severe stretching on the part professionals working in the field, both to define it and to probably honestly portray something being a gross and obvious repudiation and give their advice so to the court.

MS. SCHNABL: Yes, because I suppose it very much varies on one's own individual values a . . .

MR. AXWORTHY: I think that was the point that I was coming to, that it wouldn't be a professio judgment, it would be a value judgment based upon your own sense of morals or whatever particu set of values or traditions that you might hold, religious or otherwise. Would that be more the ba for making that judgment as opposed to making a professional objective judgment of it?

MS. SCHNABL: I think it would be hard to make a professional objective judgment. I would fi it hard to do, yes.

MR. AXWORTHY: Thank you, that's one point I wanted to make quite clear.

I just wanted to ask then really a question, more of an elaboration. When you're talking abo the admission of evidence being admitted is part of Bill 39. Could you elaborate more exactly wh you had in mind in that area?

MS. SCHNABL: Well, if the court were to recommend to spouses that they have counselling a they were to go and have counselling and then they were to proceed with court — let's assu they did not get reconciled — and they were to proceed with court and the counsellor could subpoenaed to appear in court and would have to give the content. Perhaps, in the counselli process it might emerge that one of the couples had engaged in adultery and if the social work were subpoenaed and obliged to give evidence, that would be a very difficult situation. If coupl knowing that that was part of, or one of the options that might happen, I would feel that they wo find it very difficult to be open with the counsellor and the result of that might be that the counsel might not be able to help.

IR. AXWORTHY: So you're simply requesting here some protection in the law for that kind of . .

IS. SCHNABL: Yes, and protection for the people as well, that they could share things and not ;el that this had to be brought up in court at some later date if they proceeded in that irection.

IR. AXWORTHY: Okay, thank you.

IR. CHAIRMAN: Mr. Mercier.

IR. MERCIER: Are you aware of any circumstances in Manitoba under which a social worker has een subpoenaed to give evidence which has been gained as a result of attempts at :conciliation?

IS. SCHNABL: I don't know a particular instance, no.

IR. CHAIRMAN: Any further questions? If not, thank you very kindly.

Call Mrs. Muriel Smith. I know she's here. I might remind Mrs. Smith about the 30 minute time nit. I do know her from other sources.

IRS. MURIEL SMITH: Can I count on you for a signal?

IR. CHAIAN: All right.

IRS. SMITH: Mr. Chairman, members of the committee, I am speaking to you as an individual tizen but I'm also a member of several of the groups that you've heard from already tonight and ully support the position presented by the YWCA, the Manitoba Action Committee, and the Coalition n Family Law.

I would like to add my half to the animal parade that you were treated to on Saturday by my usband, Murray Smith. Since married partners like to think in twos, perhaps I can illustrate my omments by suggesting to you pairs of animals just like Noah's Ark. Let me stretch the comparison little. My husband used his animals to demonstrate our concern about the nature of the instruction ven the courts relating to the sharing of family and commercial assets. I would like to suggest iat this law can perform a service to married people akin to that performed for posterity by Noah ith his Ark, who, I recall, when the rains came and flooded all the land, ushered the animals vo-by-two onto the Ark and how did he pair the animals? Not an elephant with a kitten, an angora tten at that, or a tiger with a dog, but cat with cat, dog with dog, tiger with tiger, and elephant ith elephant. In a way, that's what we're asking for in these laws, some reasonable guarantees iat marriage partners will experience equality of status, legal and economic status as well as social atus so that we can avoid the unworkable pairings of elephants with mice, or of tigers with puppies. larriages may vary as the animals do but within each marriage the principle of equal status should evail.

Coming relatively low down on the list of speakers, presents me with a problem because so uch of what I have to say has already been said over and over again. My argument on so many the points I would like to make is not with the other presenters of briefs. Have you not been ruck by their unanimity? My argument is with those of you in this committee and in the House ho have the power to make the changes in the law. I challenge you to act in good faith, to uphold ie principles of equality you say you support and to do all in your power to increase the probability iat those principles will be clearly understood and applied in the courts. If you do believe in equality, ien you will do all you can to improve the law. If you do not, then you will kindle yet further the es of suspicion that already burn in the hearts and minds of the people who have presented their iefs to you during these hearings — you have no intention to legislate for equality in arriage.

Surprisingly, no briefs have as yet been presented by those people who opposed the bills a year go. Is that accidental? Are they indifferent, or are they satisfied that the current bills protect their terests adequately while the people you are hearing here are virtually unanimous in finding that eir interests are not clearly protected. This possible conflict of interests goes far beyond the usual arty differences. The concerns of women as a group cross all party boundaries. They don't go eyond most party philosophies, but they do go beyond most politicians' current understandings their party philosophies. Principles relating to equality, security, freedom, and community found all party philosophies have been understood by most practicing politicians to apply mainly to en and the working lives of men. We, the women, from all the political parties are urging you,

all of you, Liberals, New Democrats, Progressive Conservatives, to make the quantum leap to protec the rights of all Manitobans to live in a fair and just society.

I'm older than many of my colleagues among the women. I've lived most of my life accordin to the traditional sex role attitudes and patterns. I've also changed my attitudes and life pattern as I've come to understand and accept the strong claims that women are now making to equa treatment before the law. I understand their frustration, the anger, and the disappointment felt b so many of my younger colleagues. They have tried so very hard and they believe so deeply i the justice of their cause. They cannot understand why their arguments are not accepted becaus they've had very little feedback from many of you. The only reason they can think of for you unwillingness to change is that you really don't care about equality and so they are angry and som even cynical.

I have one further hope, one further prospective to offer. I used not to understand these question of equality and so I lived by traditional patterns and thought they were right, proper and worth But I've changed my views because many many people have taken the time and the effort to g through with me in detail the whys and the wherefores of the new perspectives. They've share with me and dialogued with me, they've pushed and prodded me until now I share many of the insights and to have a few fresh ones of my own and it's in that spirit of wishing to share an naturally to persuade that I appear before you tonight.

There are commendable sections in the two bills. They do represent a step ahead, not of th laws passed in June of 1977 when the New Democrats held the majority in the Legislature, bu ahead certainly of the family laws which pre-dated June, 1977. Nevertheless, I don't want to offe a report card, A-plus for this, A, B, C, or D for that, or failing grade for something else. Instea I am going to restate the rationale for laws which would fully reflect the concept of equal partnershi in marriage in its social, legal and economic aspects and then evaluate the current bills in the ligh of that concept of full equality.

Law is notoriously slow to change. Throughout history this has often been a blessing becaus law provided a stabilizing influence in a society where everything else seemed to be in flux. La has been predictable. One could count on its staying put, reliable, throughout most of one's lifetime The pace at which law changed did more than offer stability to society, it provided some value safeguards as well, or so the common wisdom led us to believe. 3

So long as the principles in the law match the prevailing beliefs by which men and women live there was widespread acceptance of the laws of the land, but what has been happening to ou society the last few decades? There's been social change of an unprecedented nature, not onl have people's beliefs and understandings changed, so have the conditions of their lives. The la of the family, which assume the man to be the provider and protector, knowledgeable in the way of the world, while the woman was the dependent, not too worldlywise, less strong helpmate a home, that law has become painfully outdated.

The earlier law assumes separate roles and different status for men and women. It justified th dominant rights and responsibility of the male to hold the social, economic and legal power. Th strong and manly male lived out his life knowing he had the responsibility to look after his wif when he received her, like a prized new possession, in marriage from her father. He accepte economic responsibility for any children that they might jointly have and he accepted the responsibilit to care for her at or near a public welfare level should they separate, and conditional on her goo behaviour until she should be taken off his hands by a subsequent husband.

On the other hand, the dutiful, depende nt female accepted her right to be maintained throughou life in return for which she promised to love, honour and obey and to perform housewifely an motherly duties so long as the marriage would last. If it broke down, the most she could expec was to be minimally maintained, either by her ex-husband or by the state until she could agai find another man to become her husband.

The laws reflected the dominant social ideas and patterns of life, except perhaps for the poo whose lives were always patterned more by economic necessity than by the socially acceptabl customs of their more propertied fellow countrymen. And since the law has generally concerne itself more with the justice of property division than it has with the meeting of basic human needs the fact that it was out of step with life as it was actually lived by the poor, was not too evider or deemed significant, but in the past few decades, we've seen enormous social change in the belief men and women have about themselves and their relationships in the family, and too, in the actua conditions in which they live. As to their beliefs, with the greater insights we now have into huma personality and the nature of human potential, more and more people recognize that men and wome may differ as individuals but there is no way in which their basic abilities to think, decide, wor and shoulder responsibility are determined by their sex. As a result, most people now accept tha men and women in our society should have equal rights before the law in the social institution and in their economic relationships.

As to the actual conditions in which men and women live, some changes have affected me

ıd women equally. Both live much longer and enjoy better health. Surer methods of birth control ·fect both sexes, particularly in their family relationships. Families are smaller, partly because of ırtility control, partly because of a recognition on the global scale of the need to limit population. oth men and women receive more nearly equal opportunities for education, increasingly more omen join the paid labour force, either by choice or economic necessity. They do not as yet have :cess to equal pay for work of equal value and job ghettoes are still a dominant feature of the bour force.

On the home front, housework is simplified through labour-saving devices, the availability of ·ocessed food. The chores of cooking, cleaning and shopping are increasingly shared by men and omen and day care services for young children are slowly offering some families a way to raise ıildren responsibly, while the parents continue in the paid labour force. In every way, increasing ımbers of Canadian families are moving in their beliefs and in their actual living conditions towards ɔcial and economic equality. It's clearly time for the laws affecting families to be reformed to reflect ıis new reality.

What is the new reality? For most present-day Manitobans it's that marriage is a partnership ətween equals who co-operate in the family activities of breadwinning, housework and child care a great variety of patterns. The law should therefore presume that these marriages are 50-50, ɔcial and economic partnerships in every sense of the word, and only recognize other than 50-50 ·rangements if there is a special contract defining the differences or if there is, as determined / the courts, an extremely atypical situation.

An additional reason for the law to enshrine the principles of equality is that there is no surer ay to bring home to each male and each female in society that there is a legal presumption of ɔcial and economic equality and that the economic well-being of one sex will no longer be based ı the unpaid labour of another without that other person sharing in the accumulation of ssets.

I ask you to consider the variations on a theme we often hear: "My wife helped put me through ɔllege." "I didn't want her to work once we had a family because I thought I could support her ıd that the children needed someone at home." "My wife doesn't have to work." "My wife doesn't ind if she's poorly paid and lacks the usual fringe benefits, after all, she's just working for pin oney." Or, "My wife doesn't want work, she's quite content at home."

I ask you to consider how easy these views change over in the employment sector to justifications r paying women less for the same work men do, for denying them training opportunity, for not ·omoting them. I ask you to consider how subtly on the homefront these attitudes lead to a woman eling, first, an obligation to stay home and to care for the children, and then later, to a feeling guilt if she's ever to challenge a male for a job, and often as well, to feelings of fear and insecurity she is ever expected, when the children are grown, or because of changed circumstance, to move ıt into the labour force. If there's not to be a clearly equal valuation put on the contributions women ake, of their time, energy and skills, however are we to dispel the myths of male superiority and ·ivilege throughout society?

Getting down to specifics in The Marital Property Act. No. 1, the retention of mutual opting out, ıragraph 1(f), is a feather in the government's cap. Why not go the full way now towards providing e means to make this process safe and secure, ensure that each spouse has independent legal ıdvice.

No. 2, deferred ownership of the family home and assets. Of course deferring the ownership all assets has permitted simpler legislation. Simplicity is indeed a virtue, unless the more important ·inciple is being sacrificed, that of equity. Why shouldn't both spouses have decision-making powers, int management rights during the marriage. Surely a partnership of equal adults should presume e practical wisdom of determining who is better qualified to make which decisions and the llingness to put into contract form, in advance, any management arrangement which departs from e 50-50 split.

No. 3, a question is raised in the definition of the family home, 1(e). Is the 320-acre homestead, e use of which is guaranteed to women under The Dower Act, effectively reduced to the home ıd the immediate area necessary for the use and enjoyment of the home by virtue of this new ɛfinition, or are use and ownership distinctly different issues. According to 24(1), no right granted / The Dower Act, is supposed to be taken away. I've had some of my confusion on this cleared) by earlier discussions, but I would like some further clarification.

No. 4, the addition of the bank account, 2(d)(ii) being used for family purposes, the addition of at to the family assets, appears to be an advance towards equality, but how significant is that lvance, (1) when control over its use is vested in one spouse only, and (2) when the other side the use principle may well be that only the bank account is to be shared equally, while the ımmercial asset bank accounts and investments are to be deemed to belong more to the ɔney-earning spouse, because customarily he is the one who will be seen to use those funds in way that the spouse at home does not.

In addition, why should the pension, insurance and family-type investments not be deemed famil assets rather than commercial. Surely by any measure, these components of a family's financi assets relate more closely to the family's domestic affairs than to their commercial ones. If ther is any rationale at all for separating family and commercial assets, should not these funds be see as essential components of both spouses' income security? No. 5, I think it's commendable tha according to 2(1), the legislation is to apply retroactively to all married persons in Manitoba, tha the definition of habitual residence has been clarified under 2(1)(b) and (c), and that the date c applicability of the legislation remains May 6, 1977.

No. 6, under assets 4(1), there may be ambiguity in the line, "while married to but living separat and apart", we were wondering how this would apply to persons who lived apart for a period c time while either spouse was away from the marital home for temporary employment.

No. 7, the permitting of judicial discretion 4(4), to permit a negative value in the combining c appreciation and depreciation values and in the calculation of net worth, item 10, once again, seem to expose the non-earning spouse to a liability with no parallel right of management throughou the duration of the marriage. The courts may, in actuality, be able to weigh the relative merits i such cases fairly, but there's no evidence to support such an expectation. As a matter of fact, th evidence that we've found seems to be in the opposite direction, with the court awarding subsistenc level settlements based on need, reducing that still further if there's any indication of fault, an showing almost no recognition for the years of unpaid labour contributed to the famil partnership.

No. 8, 6(3), supports the right to joint use of assets, but revives the old principle of separat ownership and management. It isn't a problem that we admit in a harmonious marriage, but it' a principle that doesn't seem to enhance the non-earning spouse's sense of worth and equa contribution.

Under No. 11, the foreign asset is said to be sharable with only the force of "may". We wonde why it isn't "shall".

No. 10, perhaps the key sections of the entire Act are numbers 13(1) and 13(2), relating to th sharing of family and commercial assets and separation. They should be seen in relationship a a package. Equal sharing of both is to be presumed according to 12, but the court has discussio to vary in each case. We're wondering why the two types of asset are treated differently, not a was the case in the suspended law, because family assets were to be immediately sharable an commercial assets only on a deferred basis, but we suspect because the expectation is that th court will deal with these assets in a different way, and will that be a problem. I've been listenin very carefully to Mr. Spivak's explanation and defence of the presumption and onus principles, an I hope that his predictions are accurate. But I've also been listening to Alice Steinbart where sh raises the question of rules of construction, and suggests that because these two are put in separat paragraphs, they may in fact be dealt with very differently.

I guess we're feeling it's possible that they won't be treated similarly and we're afraid — I gues what we're wondering is, the courts may, with one statement of presumption of equality, value unpai work in the home and raising children as equivalent in worth to work perfomed in the marketplac in a businesa, professional practice or farm. It may change but I guess we're asking is it really likel because of the entire weight of tradition and practice. Both private and public life has always value the work that men have performed in money terms and what women have done for free i non-monetary terms only, or when these tasks, such as teaching, nursing, cleaning, cooking an child care have moved into the area of paid employment at substantially lower value than an objective measure of the skill, effort, responsibility or working conditions would indicate was fa and equitable. I guess this is the reason why we're very apprehensive about whether the court will understand the equality presumption in that context.

Marketplace monetary values just don't take account of the principle of equality. On the contrar they are systematically based on a pattern which is discriminated against women. I noticed a recer Stats Can release that put the average value on unpaid work in the home at $6,000, and one ha of the population I think said "That high", and the other half said, "That low".

However much Mr. Mercier has been assuring us to the contrary with his case examples to sho that women may in some cases deserve more than 50 percent of the marriage assets, or t demonstrate that the fact is to be taken into account when deciding whether to vary the equal sharin presumption, the suspicion — we have to put it more strongly — the fear that the supporters c equality have that the courts will interpret most of the factors they are entitled by law to conside in their discretionary action will be to the disadvantages and non-earning or less well-off spouse I hope we're wrong but that is the source of our fear and suspicion.

Let me elaborate. Under 13(1), the reasons for varying the 50-50 forumula for family assets ar that it would be grossly unfair or unconscionable having regard to any extraordinary financial c other circumstances of the spouses or the extraordinary nature or value of any of their assets. I a perfect world where we can presume no sexist bias from the courts, I agree that the law whic

permits the widest possible judicial discretion is likely to be the most just because the court can be closest to the individual case and can most flexibly adapt itself to individual circumstances. I understand, I think, the government's desire to trust judicial discretion but the question I put to you is this: What evidence have you found to bolster your belief in the wisdom of the court in relation to these particular issues? How to compare the claim of the spouse who is contributing unpaid labour to the partnership, to the claim of the spouse who is bringing home the pay cheque. I haven't found much reason for optimism but I would be pleased to hear if there is some.

We tend to find only a systematic skewing the other way. The unpaid spouse is presumed to be a needy dependent whose claim to share is based on a combination of need and good behaviour, not on right as as an autonomous equal partner. How much difference will the presumptionof of equal contribution and the onus of proof resting with the spouse who wishes to vary really make?

A MEMBER: Quite a bit.

MRS. SMITH: The arguments that Ms. Steinbart has been presenting at least throw doubt in our minds on the outcome.

Another issue where we're concerned is which spouse is more likely to acquire the extraordinary assets which are to be exempted, inheritances aside because they've already been exempted. The spouse who stays at home to care for children? We don't think it's very likely.

Under 13(2), the reasons for varying the 50-50 formula for commercial assets are very broad. As a matter of fact, any circumstance the courts deem relevant can be considered. These include several, I find, by implication disturbing. 13.(2)(h) suggests that the nature of the asset should be considered. Well, what relevance has the nature of the asset got to do with whether or not its value should be shared? If an earning spouse has acquired a building or some land because he or she was free to carry on a business while the home front was being cared for by a spouse at home, the spouse at home was precluded from developing such a business because his or her time, skill and energy were tied up there. Now why should that spouse pay a penalty for living in a society where the marketplace dictates one form of human laboir should be rewarded, and often rewarded quite handsomely, while another form of human labour should not. Is it not time for the Legislatures of the land, with Manitoba in the forefront, to provide economic justice where the marketplace cannot?

Would the committee consider relating the phrase in 13(1) "grossly unfair or unconscionable having regard to any extraordinary financial or other circumstances of the spouses or the extraordinary nature of their assets" — actually I wouldn't mind that last one just disappearing, that last phrase — but would they consider relating that to 13(2) so that the courts will be in no doubt as to the intention of the legislation to very equal sharing of commercial assets only in the most extraordinary circumstances?

Would the committee also consider the advisability of limiting factors to be considered by the courts to those listed rather than specifically allowing any factors to be considered? If the intent is agreed upon, why not state it clearly and unequivocally so the courts will be in no possible doubt about the equal sharing principle from No. 12 applying to both family 13(1) and commercial assets 13(2)?

Do you wish marriage to continue on an exploited cheap labour basis? Surely not. 13(2)(i) does introduce as an arguing point for lawyers the relative contributions of the spouses but how do you think the courts will weigh the relative contributions without specific guidelines from the legislators? The courts, I submit, are slow to change and somewhat biased towards tradition. It is logically possible that they will suddenly become progressive and insightful into this particular problem but, as I said before, the record to date does not give cause for optimism.

I think Mr. Spivak said this afternoon that there has been no jurisdiction where the equality of presumption has been in operation so we shouldn't judge it before it has had a chance. I feel that there has been no positive evidence from any other jurisdiction, perhaps the onus should be on the legislators to make it beyond a shadow of a doubt what the intention is, to give a little more guidance to the courts.

There is a final factor in 13(j), namely, "any other circumstances relating to the acquisition, disposition, preservation, maintenance, improvement or use of any asset." Can you imagine the litigation that can be developed around those ideas? No one will know in advance what the court decision is likely to be. Even, I imagine, as case law starts to build and you get your precedence, there's so many factors there that will make an individual case different that I can see for years and years every lawyer feeling that there is some validity in going to court with their case.

Any and every detail about who did what to build up commercial assets, with one spouse possibly being found to have stayed home and done nothing, will be trotted out. The spouse who stays home performing the duties of "just a housewife" will, I submit, not likely stand an equal chance when

appearing before judges who are still predominantly male and steeped in the older values worshipping women and protecting them but not necessarily sharing with them. Why base a leg argument on the use of an asset? Surely what is in question is the length of time each partn in the marriage spent in the partnership. Each person lives only once. If X number of years hav been spent in the same partnership, it is X number of years out of each person's life. Why shou they not share the acquired assets equally on separation? Either marriage is an equal partnersh or it is not. If business practices can't stand this degree of uncertainty, then perhaps it's time thos practices were changed. The spouse at home has for too long borne the brunt of being the or left out in the cold. Why should one partner bear most of the risk and very little of th power?

It is, in my opinion, the value of a person's time that is important. It is the presumption th child care and housekeeping tasks performed mainly by one spouse, tasks which may absorl presumably by agreement between the marriage partners, as much of the lifetime and energy one spouse as the building up of commercial assets does of the lifetime and energy of the oth spouse. They are equal in importance to the marriage as is the task of money earning performe by the other spouse. Again, either marriage is an equal partnership or it is not. If the intention the government is to promote the concept of equality, why not take the extra step and make th intention clear and unambiguous.

With regard to The Family Maintenance Act, on the face of it not much has been changed. Ther has been one positive addition. The judge has the right to refer the marriage partners for counsellin if there seems to be even the remotest chance of a reconciliation. So long as this procedure coul not be repeated over and over at the request of only one spouse, it seems a reasonable and, hopefull a constructive proposal. To avoid this clause being used as a means of delay, however, would not be advisable to make recourse to reconciliation dependent on the mutual consent of bot spouses?

MR. CHAIRMAN: Mrs. Smith, are you almost at the end?

MRS. SMITH: Yes, I have two more points on this.

MR. CHAIRMAN: All right.

MRS. SMITH: With regard to the confusion as to whether conduct under 2(2) is to apply to 5(relating to the quantum of a Maintenance Order, and as to whether conduct before or after separatic is the relevant consideration, and as to whether conduct includes fault as traditionally understoo is there not room for clarification? It's my opinion that fault during marriage should not be a relevai consideration and that conduct after separation should only be considered if the recipient spous is not making every reasonable effort to become self-sufficient economically. Whether or not th person is co-habiting, should not be relevant because the presumption should no longer be ther that the male person has the responsibility to support the female person with whom he may b co-habiting. Each person's economic rights and responsibilities should be determined independent of their sexual conduct after separation.

It is regrettable that no further progress has been made on the enforcement of Maintenanc Orders. I have no new arguments to present in favour of better enforcement. They are the bas ones about a recipient spouse needing the security of regular, albeit small, payments. There ar the additional arguments relating to the net cost to the public if Maintenance Orders go unenforce Since many Maintenance Orders are barely over welfare level in the first place, the temptation the recipient spouse to shift to welfare, which is at least predictable, is great. The cost and both of further court action to pursue an errant spouse are deterents to the individual taking further actio Meanwhile, the public pays and the errant spouse escapes the responsibility. I think the idea having three maintenance payments in advance to cover possible delay and give a little bit mor time to pursue an errant spouse could be considered.

We were wondering also why there couldn't be a public enforcement agency that would guarante regular payment to the recipient spouse, at least up to a certain ceiling, while it uses the informatio systems available now through social insurance listings and the income tax records to pursue th defaulting spouse.

Although I am generally satisfied with the bill insofar as what it says in and of itself, I don find I can accept accept it because of its relationship to the The Marital Property Act. The tw were originally designed as a package. If there's been a 50-50 split of all assets accumulated durin the marriage, then limited term maintenance to facilitate the earliest possible economic independenc makes good sense. If, however, there is going to be a wide range of judicial decision with regar to property sharing, limited term maintenance could end up by being a dangerous principle.

I thank you for your patience and would welcome questions, particularly on the clarification

ntent with regard to sharing of commercial assets. -

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Fine, thank you very much, Mrs. Smith, for your brief. With respect to that particular section, Section 13(2), the first factor — and again, I think you've heard the discussion earlier on where Mr. Spivak and I have made the point that in Section 12 there is the clear right to an equal division of assets and that under Section 13(2) the onus would be on the person who considers it to be the 50-50 split to be inequitable to prove that.

Now, going on to the first suggested factor, the unreasonable impoverishment by either spouse of the family assets, if, for example, you had a situation where the spouses separated on a certain date and that would be the evaluation date under Section 15, and that period of time went on for some time and the wife had left the marital home — which does occur in many instances — and the husband unreasonably allowed the marital home to deteriorate and thus its value was decreased substantially, would you not consider under those circumstances that that should be a factor to be taken into account in an equitable division of commercial assets?

MRS. SMITH: Well, I don't think it would be necessary if you had broken the family assets and the commercial assets down the middle. You're saying that one should get compensation for neglect by the other?

MR. MERCIER: Yes.

MRS. SMITH: Frankly, I think that's probably going beyond what most women would consider fair. Vinnie Fung earlier today said that one of the problems with people who are on separation is that they don't feel they're being dealt with by a fair law, it adds to the whole trauma of the event. People know if they don't have very many assets and they don't really expect impossible shares. I think the principle of equal sharing, allowing for a lot of the vagaries of human behaviour, is the most that I would expect. Now maybe I haven't fully understood your question, but . . .

MR. MERCIER: Well, I have said that in the past that the vast majority of cases, I believe, would be settled 50-50. We are talking about the minority of cases, and I'm talking about a possible situation under this particular factor where, as a result of the husband's deliberate and neglectful conduct, the value of the family assets deteriorated substantially, and I'm suggesting to you that under this factor that could be taken into consideration and that a 50-50 split could be deemed to be inequitable, that consideration could be given to that deliberate conduct. Are you suggesting that that shouldn't occur?

MRS. SMITH: Well, perhaps if I turned it the other way and say that there was a woman and young children left in a home, perhaps the man had left, and the lawn didn't get cut and the garden didn't get done, and the painting didn't get done, and the roof repaired because she had her hands full and not enough money. That house, its value could have been said to decrease, and yet I don't think it would be fair to penalize the person in that situation.

MR. MERCIER: And I would agree with you, under the circumstances, no fault could be construed against the wife.

MRS. SMITH: You are saying that really the commercial assets could be divided 70-30 in favour of the needy spouse.

MR. MERCIER: Yes.

MRS. SMITH: Well, I still think that the limit of what I would ask for is 50-50. It is the principle that I feel strongly about, because I think that what we are afraid of is that any principle which could be used to give the one spouse more than 50 in one case, could be used to get less than 50 in another, and I think that we feel if we have the 50-50 principle, that's our best security.

MR. MERCIER: I've indicated, and I'll say it again, that in the vast majority of the cases the asse will be divided 50-50; we are talking about a minority of cases.

Let me move on to (b) : the amount of the debts and liabilities of each spouse, and th circumstances under which they were incurred. That's a situation where a husband, unknown the wife, incurrs large gambling debts at the race track or otherwise, and pledges a personal fami asset as security to borrow money to repay those debts, and it's only upon separation that th

comes to the knowledge of the wife — would you not agree, under those circumstances that sorr consideration should be given to the manner in which those debts were incurred and it should b taken into consideration in an equitable division of the assets?

MRS. SMITH: I guess I could go along with that. But the problem I would have is that, if you had joint management of family and commercial assets all along, and full sharing of informatio these sorts of problems wouldn't occur nearly so often.

MR. MERCIER: Under Paragraph (d): the length of time the spouses have cohabited with each oth during their marriage. Let's assume a possible situation where a young wife, and we've heard th mentioned by a number of people, works at minimum wage jobs in order to pay her husband way through school; foregoes any career training she might have had an opportunity to take; ar immediately after graduation a family arrives and she misses out on this opportunity to establi her own career and her own income-earning capacity. The marriage goes on for some time, ar a division of assets is to occur under a separation after 25 years. The husband's earning capaci is not affected by that separation, but the wife's earning capacity is affected substantially by h 25 years out of the job market, as a result of the sacrifices she made. Do you not feel that th should be a factor to be taken into account in an equitable distribution of commercial assets

MRS. SMITH: Well, I think if you followed it through all the way you would get 75 percent goir to the female and 25 percent going to the male, because the woman would have foregone incom she would have foregone her job training, job seniority, confidence that people get in the workforc I think there's not a woman in this audience that thinks she stands a tinker's damn chance of ev getting something like that, and the 50-50 principle is — there is some acceptance of marriag for better or worse — the only principle I think that we feel is the just one, is the 50-50 split acquired assets. If we start weighing and measuring all these things, one judge is going to weig the factor one way, and another judge another.

Now, I don't pretend to understand all the vagaries of case law precedent, it just seems to n that it would be very hard, given all those factors, that you could ever say that one case was exact like the other, and therefore, was a good precedent. Every one of our married lives follows a somewh different pattern, even if you put it into a computer, I don't know if you could come out with good answer. That's what worries me. Once again, I think that our philosophy all along has bee that we'll accept a lot of risks in terms of not getting our mathematical share of what we deserv looking at all the details, if the 50-50 principle is there. I think we feel that that's the best securi to cover the majority of marriages.

MR. MERCIER: Was that clapping for me or you?

MRS. SMITH: We'll share it 50-50.

MR. MERCIER: We'll share it 50-50. I think it would be more equitable if you got 75 percent ar I got 25 percent.

MRS. SMITH: But I like to share.

MR. MERCIER: I think you said during your presentation that perhaps you had unfounded fears; hope that I don't misquote you. But I do want to point out once again that in drafting this legislation, here's a presumption of 50-50 sharing, that it is the intention that the onus is on the person who alleges that a 50-50 sharing of the commercial assets is not equitable to show that; and that I could go on under almost every factor to suggest possible circumstances in which 50-50 sharing was not equitable, while at the same time repeating myself that in the majority of cases, the intention and the practice will probably be that there will be a 50-50 sharing, but in a minority of cases, something other than that might be the equitable sharing.

MRS. SMITH: My question to Mr. Mercier is, have you any evidence at all of this presumption being used in law and judges suddenly grasping a new principle and applying it?

MR. MERCIER: Yes. Very recently, in Ontario, in the case of Silverstein vs Silverstein, which is the first written judgment under their new Matrimonial Sharing Act — there, just to refer to the case for a moment, the judge went into a division of commercial assets, which under the Ontario legislation there is no presumption of equal sharing, but in order to resolve the matter he stated, "I'm convinced that the Legislature did not intend the court to be entitled to exercise any broad discretion to divide family assets in accordance with what an individual judge may think is fair and equitable. The rule of law now is that there is equal sharing of family assets." That's all their presumption is in Ontario, but here, of course, is a presumption of equal sharing with respect to both family and commercial. And he went on to say , "the court should exercise its power to depart from that rule only in clear cases where an equity would result," so that in the first recorded decision under that legislation I'm pleased to see the kind of statements that we have by the judge in this particular case.

MRS. SMITH: Did the female person contribute labour or money to the commercial assets?

MR. MERCIER: Labour.

MRS. SMITH: Well, that's a different side to it.

MR. MERCIER: The reasons are plain, if I can just find it. He said, "It is my opinion that her assumption of the major share of the responsibilities for child care and household management had a material effect upon Mr. Silverstein's ability to acquire the St. Claire Avenue West property . . . so he clearly recognized that the so-called non-economic contributions of the female spouse.

MRS. SMITH: Would you accept the same criteria being put in for 13(1) and 13(2) so that there's no risk on — as I understood Alice Steinbart's presentation on Rules of Construction — and again, I never heard of Rules of Construction before two days ago — but that, in law, if there is the one principle of presumption of equal sharing, and then you have two different categories of things which are to have that principle apply to them, and there's quite different wording in each, isn't a judge likely to say, "Hey, the intention was to deal with them quite differently." I would feel more secure and if your intention is equality, I don't know why you would object. If you put the same wording to cover each section, then the judge would have to deal just with these specifics.

MR. MERCIER: I have notes of Ms. Steinbart's comments beside this section, and I intend to discuss when the committee goes through clause by clause consideration of the bill, after hearing the delegations.

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

MR. PARASIUK: Yes, the Attorney-General has raised the Silverstein case a couple of times, an I'm not sure if any of us are certain whether he means that the Silverstein case dealt with the divisio of family or commercial assets. I've never had that made clear, and I wish he would make tha clear.

MR. MERCIER: It dealt with both.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, I just want to take the opportunity to ask Mrs. Smith if she understand where the judge quoted by Mr. Mercier got the idea that the Rule of Law provided for equal sharing because he's implying, by reading it, that there is such a Rule of Law? And I'm wondering if Mrs Smith ever heard of the case of Fedon, which is a Manitoba case, where the Rule of Law that M Mercier or the judge in Ontario referred to, wasn't applied. —(Interjection)— I'm asking Mrs. Smit if she has any idea where this Rule of Law came from that Mr. Mercier is quoting about?

MRS. SMITH: I think Mr. Mercier was responding to my query as to whether he knew of any judg who had made a very big move forward to show that he understood the principle of equal contributio that we were talking about and I think his answer was trying to demonstrate that in Ontario, eve where there's no presumption of equality, so in a sense it's a weaker law than ours, there was thi equal division arrived at. I hope you are right. I know you can't foretell what the judges in the wisdom are going to decide, but I would ask you once again to try to make your intention as clea and as unambiguous as possible, because I think that's what we're asking for, and I tried to outlin as clearly as I could why we've been frightened and suspicious of the wording that currently is i the bill?

MR. CHERNIACK: I understood Mr. Mercier to be giving you a description of a hypothetical case and I'm glad that we got a preview of some of his notes on the various subsections. He gave yo some sort of a case of a gambling debt, which was paid by the obtaining of security against family asset. Am I correct that you seemed to think that this creation of a gambling debt was som sort of adverse conduct which should be chargeable against the husband? Did you seem to agre with that kind of an idea?

MRS. SMITH: As I understood the principle in the previous law, there was allowance for som kind of dissipation . I've forgotten the exact words that were used — for conduct within, was the previous 5 years of the marriage — that they could be chargeable against the spouse wh perpetrated them as part of his share. My own feeling about gambling is that regardless of wha you call it, it is jeopardizing the family situation and full justice I suppose would say, okay, the ma should pay 20 percent off his share because he's gambled away 20 percent of the assets, he shoul only get 30 percent and the wife get the 50; frankly I would be satisfied if they split 50-50 the 8 percent that remained. The real thing is that so long as both spouses don't have management right during the marriage of both sets of assets, these kinds of situations are going to come up agai and again, because there won't even be the ordinary cheque and balance that would occur betwee spouses. If the woman thought that the man was gambling away her well-being, I think there woul be much more hopefully reconciling discussion between them to prevent such a thing.

MR. CHERNIACK: I have heard that gambling like alcoholism is an illness that some people cannc control too well. Under those circumstance, if that is the case, then the point you are making, a I understand it is that joint ownership during the marriage will assist both parties to a marriag of dealing with that kind of an illness. I believe that that is the response that you gave to Mr. Mercier is that right?

MRS. SMITH: Yes. I think the greater trust that comes from a really equal-sharing partnership an open information is more likely to provide the kind of support that the person, whether he is sic

or just stupid, gambling is going to require.

MR. CHERNIACK: Thank you.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: Mr. Chairman, through you to Mrs. Smith, the examples put forward by Mr. Mercier for 13(2) are pretty good examples from the woman's point of view, but wouldn't you agree that you can create a great deal of litigation. Every one of these cases or every one of these examples has to be argued and that is opening up the hornet's nest, because you can turn each one of those examples the other way. You can look at the man accusing the woman of playing bingo all the time, all she did was play bingo. She bought lottery tickets and you get involved in that type of incessant argument, and this is what I thought this type of legislation was to clean up. But you can't have a situation like that where the table can be turned the other way. You can have other situations where the wife spent too much on clothes, spent too much on the hairdresser, spent too much — and that's the type of other case you can have presented.

With respect to the woman who has been married for 25 years and worked for her husband, I would think that you could envisage a case where you can have the man come along and say, "I've only been married to my wife for five years, she's only had one or two children". He won't possibly mention the three or four miscarriages that she might have had, so, again you have the converse argument being made. So, rather than simplifying the situation, what you will be doing with 13(2) is complicating it very much and inviting people to argue. Do you agree with that?

MRS. SMITH: Yes, I do. I think that probably 98 percent of the judges sitting on the bench would probably agee too. I think they're going to be given the most extraordinarly complicated set of laws to try to administer and they're going to have to make judgments, which in the final analysis are going to be very subjective about moral behaviours , domestic behaviour, the whole thing, and frankly, I think the responsibility of legislators, although they can never predict exactly how their laws are going to be interpreted to make them as clear in intent as they possibly can, and I would hope that speaking of onus, the legislators would accept onus for clarifying the basic principles in which they want these cases to be decided, and not toss quite so much complexity to the judges.

I do think that - - someone has just passed me a little comment here — all of marriage is a gamble, we're only trying to even the odds, is really apropos, because I think throughout we haven't been asking for an "eye for an eye, tooth for a tooth", the last hairsbreadth of equity in terms of if you toted up everything that he did and she did and then tried to equalize it, we don't want precise justice of that sort. I think we're saying, we conceive of marriage with all its ups and downs as a 50-50 partnership, for better or worse, but when you end it, divvy it up 50-50. I think that's our sort of philosophical position on it, and I think that a lot of the rest of this is — I realize some of the details have to be worked out — but I think the rest is quibbling. In a way I could see all of 13(2), all the subsections being removed and some general statement of equitability, gross and unconscionable behaviour alone would justify, other than a 50-50 split. I think that would express what we're trying to get at.

MR. PARASIUK: Would you be prepared to have the same type of discretion allowed in 13(1) for family assets, that is the same type of discretion that's allowed for the division of family assets, would you apply the same to commercial assets since the government is saying that basically they don't see any great difference between the two?

MRS. SMITH: I think that would be a good idea because then it would be clearly evident that the same principles were applying to both sections and the No. 12 presumption of equality could be seen to apply equally. You wouldn't get, you know, where the judge would quickly say, "family assets 50-50, commercial assets, ah, he put in the time, he acquired the assets, he looked after them, he took special interest." I know that is an exaggerated statement. I think with all the examples you've raised, Mr. Mercier, you're trying to get us to imagine a case where the woman would get more than half and then if that's fair, we should accept that the man should sometimes get more than half. I think what we're saying is that marriage is risky, but we're prepared to take the ups and downs and share them. We think the best way to deal with it is to share equally at breakup. can't think of any other way to say it.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Yes. Mrs. Smith, during the course of your brief you had under 13(2)(h), questioned the relevancy of the nature of the assets. Are you of the view that this clause may very well be

used to provide a court with a finding due to the fact that that asset, a business or a farm tha is operated by the husband, will remain so and will not be included in a 50-50 type of distributior The very wording "nature of the assets" provides that avenue and that type of determination.

MRS. SMITH: Yes. I think because it's a focus on the material aspect of it, and not on the wor that went into it, and as we said since the original problem that we started with was unpaid labou by one spouse and paid labour by another, the only way you can balance them out is to shar the common proceeds, and if you start going into the nature of an asset, you're going to have you know, the quilts that Gramma made and passed down are going to go the feminine way, an the gas station or whatever that he built up is going to go his way.

If someone could give me an example of an asset the nature of which would be considered unde this, that wouldn't have this sort of connection to his work or her work, and therefore be inequitable I'd like to consider it, but. . .

MR. PAWLEY: Like you would consider for instance farm machinery would be very obviously a asset that would be considered as husband's asset, since he is in control of those assets as operatin those assets, tractor, combine.

MRS. SMITH: Well, you might, unless you had a judge raised on a farm by a very enlightene mother or a female judge. I mean, that's the whole thing, we don't know how the judges will weig those things, all we know is that traditionally the vast majority of them have had a very sex stereotype view of the world. That quote that got wrongly attributed to Mr. Justice O'Sullivan, and actuall I remember digging up in some law books came from Mr. Justice Deniset, that the judge woul not take the money, property and assets away from the man because he loved them more tha anything else in the world, and he might have an emotional reaction. Well, you know, women hav been having emotional reactions in the past few days, and for years because they've got the sho end of the stick the other way. Now, I'm sure Mr. Deniset spoke and acted in good faith. If I didn think that I don't think I would be here in the spirit in which I'm here. I don't think the judges ar bad people or you know, consciously chauvinistic. I think they're expressing the view of the worl that was common years ago. It's the view that I grew up with, but I don't think it's the view tha is now common. —(Interjection)—

Well, you said that I didn't. There's hope for you too. Ask some Conservative and Liber women.

MR. PAWLEY: Mrs. Smith in respect to 13(2)(a) "unreasonable impoverishment by either spous of the family assets," do you recall the legislation of last June, a provision that dealt with squanderin Mrs. Smith?

MRS. SMITH: Yes, I guess that's the one I was trying to recall.

MR. PAWLEY: And would that particular clause not have dealt with the concern expressed by th Attorney-General dealing with the gambling debt or could it not have if that gambling debt wa run up in a reckless and totally irresponsible manner?

MRS. SMITH: I think the reason that it's been put in here is that's where the extra money t compensate is going to be found. It's not going to be found in the family assets. I don't think matters what you call it. What I'm worried about is the principle that can be used one way to hel one woman out of a hundred, while 99 women get that same principle turned against them in anothe setting. That's why the 50-50 principle is the thing that we think on balance, given all thes complicated factors that exist in people's marriages is, at this time in society's development, th best way to go. Maybe in time we can go to full judicial discretion and get a full weighing of ever individual case, but I think we feel that given the state of awareness of people, the 50-50 principl is far and away8 the best and the most advanced one to go on.

MR. PAWLEY: Would you share my views that 13(2)(h) and 13(2)(j) are the two largest escape clause among the 10 factors listed?

MRS. SMITH: Yes, (j) includes everything.

MR. PAWLEY: A general catchall in case the item is missed under the . . .

MRS. SMITH: It includes everything, but it also has leading words, "acquisition, dispositior preservation, maintenance, improvement or use of any asset." Well, in 80 percent of the case

hat's going to be the male person dealing with the farm, the business, the profession and the female von't be directly involved in those factors, so is she not to have a share? That denies the whole rinciple of partnership. What you've got is a kind of schizophrenic bill that says one thing one lace and a conflicting thing in another place, but sort of leaves it to the judges to sort it out, nd frankly, I think it's too much to expect of them.

MR. CHAIRMAN: Mr. Spivak — or Mr. Mercier, first.

MR. MERCIER: Mrs. Smith, with respect to that factor (h), could I suggest to you that it might efer to these kinds of circumstances where, supposing that at the evaluation date, the husband perated a small business which, as of the evaluation date, due to economic conditions, had a very ow value. The husband and wife were separated for some time prior to the division of assets but t that time — let's assume the business which may be a manufacturer's agency — had the right o the sale of something that was a fad at the time like, let's say, hula hoops, and all of a sudden s a result of this change in economic circumstances of the business, from the date of valuation o the date of accounting — this is the kind of thing that would be considered in the nature of he assets and taken into consideration in an equitable sharing. ecause if the valuation as of the late of separation were used, the female spouse may be entitled, under a 50-50 sharing, to much ess than the actual value of the business as of the time of the accounting, due to the nature of he business and the increase in value which has taken place.

MRS. SMITH: Well, is there any other partnership where that is taken into account or aren't all ther partnerships that it's the luck of the draw. If you set a certain day at which you're going to ivide, you take your luck with the market.

MR. MERCIER: Do you think marriage is just a legal partnership?

MRS. SMITH: No, no. If there was a guarantee that you gained when the thing went up as well s when it went down.

MR. MERCIER: When you went down, right.

MRS. SMITH: You know, I guess what I'm saying, I think what you've designed here is almost a ill that's 20 years too soon. I think when our economic thinking . . .

MR. MERCIER: We'll still be here.

MRS. SMITH: . . . and our social thinking are developed to the point where we can get this kind f information and map out the fluctuations of the value and also relate it and count on an equal aluation of male and female contributions, sort of overcome this sex-stereotyping we've lived with, f those two circumstances came together, maybe the courts could do a pretty good job on 13(2). just think it's terribly premature. I don't know if you've ever had to argue pay levels for women n job areas where they're predominantly female employees. It's extremely difficult to get a group f men to want to give fair valuation to that work. You know, a day care worker. The feeling is t's work that doesn't take much skill, that it is something Grandma did without any special education r training, a little over minimum wage. And yet those of us who have done that kind of work know he kind of training it requires, the kind of effort, the kind of responsibility, the kind of mixture of skills. And like, without blaming men for not being able to value that equally, very few of them have ever stayed home and dealt with children so they don't actually know all the skills that are involved. think it's that men and women in our society have by and large had such different experience hat they haven't had an opportunity to fully appreciate what one another does. I guess because he legal system has been predominantly occupied by males and it has dealt mainly with the male world of money and property, those values still permeate the thinking of many of the legal people. No better or worse perhaps than anywhere else in society, but we're saying this law is an attempt o overome some of that and therefore we don't like to put a lot of hope in the broad judicial discretion hat you've introduced. We're fearful of it.

MR. MERCIER: You believe then that there is a judicial bias against women?

MRS. SMITH: Unaware, yes.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Mrs. Smith, would you acknowledge there are laws that are complicated and th there are laws in which judges in dealing with it have some difficulty? Would you not say that t criminal code is a reasonably difficult code for the judges to deal with?

MRS. SMITH: No, I'm sure it must be.

MR. SPIVAK: Would you not say that tax laws are complicated and judges have to deal and interpı that law?

MRS. SMITH: Yes.

MR. SPIVAK: Would you not say that labour law is complicated and judges have problems aı have to interpret and have to exercise their judgment on it?

Well, if you recognize this and you recognize that there are laws that we live under that a complicated, that have been developed and altered and changed by legislatures and by parliamen over the years and, in fact, have caused reversals of what existing trends were at a given tim would you not acknowledge that those changes having been made by legislation, that in effect tl judges interpret the law as it then stands?

MRS. SMITH: Yes, that's why I want to see the best, clearest, most unambiguous law come fro the legislators because you guys make the law.

MR. SPIVAK: All right. Now I want to come back to something else. Are you prepared acknowledge that there should be a discretion on the part of a judge with respect to the 50-5 sharing?

MRS. SMITH: If there's the same language applied to family and commercial.

MR. SPIVAK: No, I'm not talking . . .

MRS. SMITH: Some discretion, some discretion?

MR. SPIVAK: No, I'm not talking about the Act. I want to understand whether you believe thi there should be a discretion on the part of the judiciary to be able to alter the 50-50 sharing

MRS. SMITH: I started out thinking no, because it was too big a risk, and I was won around t the wording such as appears in 13(1) and I think comes from the law of last year by being assure that it gave adequate protection and could only be interpreted with extreme cases. Naturally th proof of the pudding will be in how it gets . . .

MR. SPIVAK: Yes, but the point is you were prepared then to acknowledge "grossly unfair or unconscionablen, as being discretio that the judge would have to exercise his discretion to be abl to fit the meaning of those words as to a division 50-50. Would you not acknowledge that eve in those cases that the judge would then, by the very nature, look to the detail of the marriag in being able to arrive at a judgment of grossly unfair or unconscionable? I mean, there's no wa in which . . .

MRS. SMITH: Yes, but if the same criteria were applied to family and commercial.

MR. SPIVAK: No, I'll come back to it in a second. I'm simply asking you, would you not acknowledg that the judge, and you have a fear of the judge, you have a fear of the past history of what ha happened to judge, but would you not acknowledge that in accepting grossly unfair an unconscionable, that the judge, by the very nature of the investigation that would be required i order to determine whether there should be an alteration of the 50-50, would of necessity hav to examine a whole range of things, many of which you've discussed in front of this table toda So the question really then really from your point of view is your fear that legally there will be distinction between 13(1), and 13(2) includes more than 13(1) in the sense that the words are nc the same and inequitable does not have the same meaning and that really is your fear at this poin because you've accepted that there should be discretion and you've accepted that . . .$

MRS. SMITH: Limited, yes.

MR. SPIVAK: . . . well, but limited — but I ask you again, grossly unfair and unconscionable, woul

ou not acknowledge that the judge in determining grossly unfair and unconscionable would have, y the very nature, have to review all the aspects relating to the marriage to be able to determine judgment and exercise his judgment. And, as well, he will have to determine and it will be etermined by case law, the kinds of precedence that will be set and established in the way in hich grossly unfair and unconscionable develop within the legal system.

IRS. SMITH: Maybe we've been permanently jaundiced by comments that what Mrs. Murdoch id was only what was normally expected from a farm wife. Now, I know the arguments in the Murdoch ase, that the judges only had a certain kind of legal argument to go by, but those remarks that ney made were quite their own inventions and they revealed their own perception.

IR. SPIVAK: But again, will you acknowledge that the law did not state that there would be 50-50 haring on commercial assets when there was a marriage breakup?

IRS. SMITH: Well, all right. We were, I suppose, persuaded that it would only permit variance ith great difficulty. Now maybe we were persuaded then and you are trying to persuade us similarly ow. Frankly, I don't have that kind of expertise to know. I'm not a lawyer and I don't know the aditional interpretation of those words. You know, I guess all I can do is present to you our fears nd suspicions and ask that you do your level best to prevent the kind of biased interpretations nat I've tried to outline, this whole evaluation of the work women do. It isn't just, you know, it's uch a pervasive part of the society that it's not . . . And it's asking a lot of the judges to suddenly et insight into that and be trusted to do it.

IR. SPIVAK: Well, can I ask you. You've used this word several times. You said "unpaid work" eferring to the wife, the unpaid work. Can I ask you where in the Act is unpaid work referred o?

IRS. SMITH: Okay, it is referred to specifically in 13(2)(i), but it doesn't tell the judge how to weigh nat. It says it's a factor.

IR. SPIVAK: But it also says that it would be inequitable. It doesn't say that that in effect to e given effect. It is to be given effect if it's inequitable. Now inequitable has some meaning.

IRS. SMITH: What meaning does it have?

IR. SPIVAK: I think Mr. Mercier has given you a situation in which there can be a reversal to ne bias that you believe will occur, that it may very well be inequitable for the husband to be able o have 50-50 sharing on the commercial asset. The reality is that it is not standing there by itself. he judge is not dealing with that. He is dealing with it clearly with the word "inequitable."

IRS. SMITH: I think judges are human beings and I think they have values that come out of their wn social experience and our understanding of the whole economic role of women is that one f the reasons it has been seen as a problem is suddenly there is a new awareness of a problem hat we weren't aware of before. Now, I don't know — judges are mainly older people — I don't now what guarantee we have that they move along in their social thinking. I hope they do, but don't think they have been the pillars of progress and change, certainly on women's issues. I know f no evidence that they have been able to pick up on that quickly. I have found them only belatedly ort of coming along after the issue has been raised and pushed and whatever, you know, and naybe that's the only way it is going to happen here, that whatever legislation you pass is going o go into the courts and we will all be watching very closely to see what the decisions are. Frankly, wouldn't like to be one of those judges. I just ask that you give them as clear an outline of your ntent as you possibly can.

IR. SPIVAK: Have you any other solution other than the judges?

IRS. SMITH: Well, clearer legislation.

IR. SPIVAK: But we acknowledge that legislation, if you are going to allow a discretion, will have o be determined by somebody or some group. Now, have you any other suggestion other than judge?

IRS. SMITH: I would make sure the instructions I gave the judge left no doubt that we were to alue the labour of each equally and it was the labour and time spent in the marriage that far

all these other words of "nature of asset," "acquisition," "disposition," "preservation," ar "maintenance." Those are the words that I think are really dangerous.

MR. SPIVAK: Do you really want the legislation to talk in terms of labour rather than say th spouses each have the right to have their assets divided equally? Which is more explicit and whic gives the better presumption and which will give the judge the direction, because you have alreac acknowledged that there can and should be a discretion under a certain circumstance. So I'm askir you, is it not better to say spouses each have the right to have their assets divided equally tha to talk about labour or anything else that would give some comparative value.

MRS. SMITH: Well, it's based on the labour and time spent in the marriage and that's why I'i worried about all the sub-headings which seem to relate to something else.

MR. SPIVAK: Again, we go back. You acknowledge the judges have difficulty but have been abl to interpret and have been able to deal with the discretionary aspect in the interpretation of Crimin Law, Labour Law, Tax Law. Surely you must acknowledge this point, that once it is stated spouse each have the right to have their assets divided equally, that the discretion will be exercised wit the recognition that presumption is there and the specific provision that there is an onus on th part of the person claiming that it is not to be 50-50, that they have to prove it. Surely at thi point, and I'm not coming down to the question of whether the wording could be changed or no I'm coming back to the basic provision. Surely at this stage, if you have no other way other tha through the interpretation that has to be undertaken by the court or by a judge, forgetting abou what has happened in the past, one has to acknowledge that the only way we can deal is by th direction that is given through the legislation and the expression of the legislative will through th language of the bill, and the understanding that the court has to exercise it, and the history c the courts who, in dealing with all legislation, not just marital property or family law, have had t give to trying to interpret what the will of the Legislature is. I say to you that it is not a questio of the unpaid values being assessed and equated, it is an acknowledgement that we start off wit the premise that spouses each have the right to have their assets divided equally.

MRS. SMITH: Well, then why put all the factors?

MR. SPIVAK: That is something that we are going to have to debate again in this committee whe we get back to the wording, when we go through it clause by clause, and I think Mr. Mercier indicate that we will be discussing it again. I simply say to you that you have acknowledged that there ha to be a discretion; you have acknowledged that the words, at least' "grossly unfair an unconscionable" are all right. You, I think, accepted that that would be all right in 13(2) and tha would be all that is necessary. But there is a distinction, I think, with respect to the commercia assets and that the indications here of specifics are things that are not just easily identifiable a everyone would suspect, and that there is a need for recognition in those cases that the equit has to be provided and the judges are going to, someone is going to have to make some decision Now, there have been certain examples cited. There will be other examples cited when we get int committee stage, and I think that that we can only deal with on that basis. That's all that's intende here. It is not the suspicion that a lot of other people have had and have expressed here.

MRS. SMITH: Well, I hope you're right, but I don't know. I mean (i) and (j) to me are very wid open. Could you give me an example on (j) of what possible little scenario could b applicable?

MR. SPIVAK: A series of mixed trusts, in which the beneficiaries are children but the actual paren in this case — so it could be the husband or the wife — have actual control, in which the trust' nature will change by the very nature of the exercise of the control by the parent.

MRS. SMITH: I think you've lost me on that one.

MR. CHAIRMAN: Any further questions to Mrs. Smith? Mr. Mercier.

MR. MERCIER: Would you prefer a jury?

MRS. SMITH: I have a lot of belief in statute law trying to state the principles on which these case are to be dealt with and that's why, I guess, more of us spend our time trying to either becom legislators or influence legislators than we do sitting on the judges' doorsteps. We figure they have to deal with what you give them, so what you give them is crucial.

MR. MERCIER: You ask for an example under (j). Let's take a hypothetical situation where a wife ot only works at home and does all the housework, raises the children and the family and, at the ame time, operates a commercial business, say, an insurance agency, while her husband is on alary. Would you not think that under those circumstances and after a separation and an accounting, nat it would be more equitable that the wife receive greater than 50 percent of the insurance usiness?

MRS. SMITH: No, I don't think so, because the two of them are spending the same amount of ime; one of them in the business, the other in the combination of home care and insurance. She nay be spending more time by working more at night, and so on, but I'd buy that risk. I'd say narriage is a 50-50 deal, and it's between the two people to work out who earns, who takes care f the children and the family. The principle is 50-50 sharing of whatever is accumulated during he time you spend together, and therefore the precise control of money, or business, or assets o me is not the important issue. It's the fact you share your combined increase in assets during he period of time you live together, and if you want to vary that you write a contract.

MR. CHAIRMAN: Any further questions to Mrs. Smith? Seeing none, thank you, Mrs. Smith.

I have been asked to ask the members of the committee if they might grant leave so that a Mr. Lamont, who has to leave town first thing in the morning and will be away for some time, could ıddress the committee. Do I have leave from the committee? (Agreed) Mr. Lamont. Mr. Lamont, vould you give your full name?

MR. CHARLES E. LAMONT: Mr. Chairman, gentlemen.

MR. CHAIRMAN: We have a 30-minute time limit for each delegation.

MR. LAMONT: I apologize to whoever I have usurped, whose position I have usurped. Unfortunately I do have to go out of town and won't be back for some time.

The last time I appeared before you, we were in the middle of a very large contract and I had significant problems with my banker suggesting that perhaps my wife should come down and sign along with me, in order that he is secured, in the event of marital breakup. Now, he hasn't phoned me this time. On the other hand, there is a significant change in the position at our bank. I am going up, hopefully, to wind up the contract.

But in that context, first of all, I'll be perhaps a little critical in that I think that you have created an awful lot of the problems here by your definition of the term "commercial assets", because as far as I'm concerned you've defined as commercial assets many things which I regard as family assets. In that context, I can cite the example of someone who lives in an apartment and accumulates stocks and bonds, as opposed to someone who lives in a house and accumulates a summer cottage. I don't see how you can logically argue that the stocks and bonds are commercial and that the summer cottage and the home are family assets. I think I can cite an example that reasonably proves my point there in that I know of a couple who salted some money away. Basically their intention was to provide for the education of their children later on. And when they discovered that, first of all, the interest that they were accumulating on that money was barely keeping up with the real depreciation and the purchasing power of that money, as Trudeau debases the coinage, and, worse than that, they discovered that they had to take the interest on that money, add it to their personal incomes, and pay tax on it. They then said, "We will build an addition to the cottage, which will appreciate in value as the coinage is debased." So how are you going to differentiate between the two, I don't know' but I think it has caused this problem. Because you have had a number of very intelligent and articulate people appear before you, who I think haven't go a clue as to what I regard as a commercial asset, and in that context I regard my shares in a small, private company as a commercial asset.

Now, if you suggest, as some speakers have suggested, there has got to be a 50-50 division without discussion on marriage breakup, the judge would have to, I think, give my wife half of my shares and frankly, I am telling you, he is giving her half of nothing at all, because we don't have to pay dividends. When you've got a commercial operation where the real assets of the operation are the background, the experience, the intelligence and so on, and so forth, of the operators of the . . . , giving somebody shares in it — an outsider shares in it — doesn't give them anything at all.

So that I think that by defining stocks and bonds, which I regard as a family asset and I think many of the people that have come before you regard as family assets, they are complaining that these are being defined as commercial assets. But when you get into limited companies, limited private companies, and you get into partnerships and you get into sole proprietorships where the

real commercial value is in the operators and not in the physical assets, by giving the wife ha of the individual's, either share, partnership or proprietorship, you are are giving her half of nothir at all. So that there has to be judicial discretion, and I will go on and I'll repeat if the courts a going to be fair in the event of my marriage breakdown, they are going to have to have discretic if they are going to be fair. If they are going to be equal and they give her half of my shares, the they give her half of nothing at all, and it's crazy.

In addition to that, it has been suggested, particularly by the previous speaker, that there b joint management of the commercial assets. Certainly, in our case, you would shut the compar down. We have a number of shareholders, most of whom are employees of the company, and every time we go to make a financial commitment to purchase something we have got to get a the wive's signatures, you shut us down. And if one of the partners or one of the shareholde leaves because he is annoyed at us or something like that and we then can't either get his signatu or his wife's, you shut us down again, and you have destroyed my position as manager of th company. —(Interjection)— I see.

MR. CHAIRMAN: Order, please. Carry on, Sir.

MR. LAMONT: This, I think, is my point, that I think you have wrongly included what I regard a family assets in the commercial sense. In the process, you have brought an awful lot of very articulat people down here, who don't really understand what, in my feeling, commercial assets are. I don think stocks and bonds in public companies are commercial assets at all. I regard those as famil assets, and they have readily assessible values on marriage breakups. I mean the stock marke tells you what they are worth. How can you possibly put a value on a company — the insuranc company or insurance agency, for instance — when the insurance business is really dependent o the individual who is selling the insurance. It's impossible, because all the individuals . . . Okay you've got half the value in it; he pulls out and starts something else and the wife has los everything.

You cannot legislate equality. We are not equal. All you can legislate is fairness and justice. That' all I've got to say. No questions?

MR. CHAIRMAN: Just a minute, Sir. Are there any questions to Mr. Lamont on hi presentation?

MR. MERCIER: No, I was just discussing the submission of Mr. Lamont with Mr. Cherniack an I don't know how you could stop that or introduce any provisions in the Act that would preven that. Perhaps those people who have presented a submission. . .

MR. LAMONT: The only way you can be fair to my wife is under The Family Maintenance Act not under The Marital Property Act.

MR. MERCIER: That might be considered a circumstance which would justify an application to var a maintenance order.

MR. LAMONT: It is the reason why you require judicial discretion under the commercial property part of it. It's absolutely essential you have judicial discretion under it. I don't see how you car function without it in probably thousands of family situations where you don't have vast blocks and apartment blocks and commercial buildings, and you don't have stocks and bonds, and you don' have all these various fixed physical things, where the basic assets of the operation are in the operators. The only way that the wife is going to get justice — whe she may not equality but she will get justice — is if the judge can vary. And to suggest that the judge can't have discretion is crazy, because you are going to be extremely unjust for a hell of a slew of women in this province.

MR. CHAIRMAN: Any further questions to Mr. Lamont? Seeing none, thank you, Sir. Faith Kerstetter.

MRS. FAITH KERSTETTER: Mr. Chairman, members of the committee.

MR. CHAIRMAN: Perhaps you can twist that microphone around a little bit so it's closer to you.

MRS. KERSTETTER: Thank you. My name is Faith Kerstetter. I appear before you as a private citizen, who is concerned about the equality of women. The bulk of my comments concern judicia

liscretion and the sharing of marital property.

Before proceeding, however, I wish to express my qualified support for The Family Maintenance ıct. I am particularly happy that that Act bases support primarily on need rather than on conduct nd that it gives each spouse the right to know the other's financial affairs. I hope that the phrase conduct'' that is so unconscionable as to constitute an obvious and gross repudiation of the ıarriage relationship will be interpreted very narrowly.

As to the Marital Property Act, I believe that the broad judicial discretion allowed in the division ıf commercial assets may very well defeat the basic presumption of the whole bill, that is, that ıssets should be shared equally.

I feel as if I should throw this out, after hearing everything that has gone before, but I will add ı few comments about what Muriel Smith was talking about.

I note, also, that since pensions, bonds and insurance policies are included as commercial assets, he division of commercial assets is certainly of concern to the average, low and middle income amilies. As Mr. Lamont said, perhaps this should be changed and these assets should be considered amily assets.

My proposal concerning judicial discretion is that all assets, both family assets and commercial ıssets, should be divided equally and that the courts may vary that distribution only if the court ; satisfied that a division of those assets and equal shares would be grossly unfair or unconscionable, ıaving regard to any extraordinary financial or other circumstances of the spouses. Thus, I would ·liminate all reference to the nature or the value of the assets in 13(1) dealing with family assets ınd in 13(2) dealing with commercial assets I would eliminate all clauses except (g). (g) says whether ·ach spouse has assets to which this Act does not apply, and I would make that clause more restricted ›y simply terming it ''extraordinary financial circumstances''.

The right to equal sharing is based on a very important idea that should be kept in mind examining ·very section of this bill. That idea is that a man and wife are equal partners. Theirs is a many-faceted elationship but an economic partnership is part of that, and the fact that one partner may have ·arned more money outside the home and may have title to most of the assets does not justify ·onsidering the other partner's contribution to marriage any less important.

The principle of equal sharing is stated to be the basis of Bill 38, but in certain clauses, there ·eems to be another contradictory principle operating. The two clauses I am referring to speak of he nature of the assets. 13(1), the last phrase, which says — this is the judicial discretion and amily assets — the extraordinary nature or the value of any asset may be considered, and 13(2)(h), ın the nature of the assets. Now, Mr. Mercier has just given an example of 13(2)(h); I really didn't ınderstand it very well — I'm still not sure that I do. Now, I'm not sure how these clauses might ›e interpreted, but I am sure that the nature of an asset has nothing to do with whether it should ›e subject to the principle of equal sharing. I'm still not sure of that at all. The third clause that ·ontradicts the principle of equal partnership is 13(2)(j), which we have just been talking about. Here here seems to be the idea that the spouse who acquires or maintains a particular asset may, on hat account, have a right to a greater than equal share in the division of property. Now, this idea s a direct contradiction to the first idea, that spouses are equal partners, no matter who acquires, naintains or owns a particular asset. Jesus said, ''You cannot serve God and mammon.'' Well, you ·an't keep the principle of equal sharing and include clause 13(2)(j) either.

I would also propose dropping clauses 13(2)(a), (b), (c), (d), (e) and (f), because I think the ·ircumstances they outline have been dealt with very adequately in other parts of the bill. I do not eel as strongly about this now that I have heard some of your examples, Mr. Mercier. When I read hrough the bill, I interpreted it pretty well on my own and I saw that there was provision made or dissipation already, so I thought 13(2)(a) may be unnecessary. I saw that debts and liabilities vere already to be deducted before there was any division made, and I thought that if family assets ınd commercial assets were lumped together in division, and the judicial discretion were the same, vell, surely, the debts and liabilities are going to be taken off first. Am I right? And then, after hose are deducted, there will be a 50-50 split made.

Now, I'm with Mrs. Smith, because I think that 50-50 is the most we want here. I think if a husband ıad gambled away a whole lot of money, that would surely fall under grossly unconscionable vhatever-it-is, the clause that I'm referring to. Couldn't that be considered that the division of equal ·hares would be grossly unfair or unconscionable, having regard to any extraordinary financial or ›ther circumstances? That would be an exceptional sort of case, I would think, if someone had ırossly dissipated assets.

Now, what does it mean, the court may consider any spousal agreement between the spouses? Vell, perhaps, I thought, this could mean that, suppose there had been a spousal agreement which ıad been very unfair, and the woman had got very little from it, or the man had got very little from ·. Well then, the court could change that; is that correct? Is my interpretation correct? Well, this ıgain, I think, could be considered grossly unfair or unconscionable conduct; this could be considered ınder that clause. Perhaps I'm trying to make it more simple than it could be, but my main point

is, why should one type of asset be considered any different? If sharing is to be equal, shari is to be equal. Why should the discretion be different than the other asset? That, I have very gre difficulty in understanding.

I also do not understand why the date of the acquisition of the asset had anything to do wi it, because it's already clearly stated in the Act that only assets acquired during the marriage a going to be shared. Perhaps you could clarify that one for me.

Now, I figured (i), which does seem to protect the woman, about the assumption of housekeepi responsibilities and child care being considered, I considered that unnecessary if there is going be equal division. I didn't think that protection was necessary, if a woman was assured of a tru equal division. In fact, what I basically have said is that most of 13(2) is repetitious and some it is dangerous because it contradicts the basic principle of the Act. My proposal then, is that assets should be divided equally and the court may vary that distribution only if the court is satisfie that a division of those assets in equal shares would be grossly unfair or unconscionable, havir regard to any financial or other circumstances of the spouses. I do not believe the nature of t assets to be shared has any relevance at all.

I also wish to express my disappointment about deferred sharing of family assets. I think fami assets should be jointly owned during the marriage. Before attending these hearings, I was n well-acquainted with the arguments in favour of deferred sharing, that is, Mr. Mercier's argument Now that I have heard those arguments and now that I have heard that immediate sharing is workir well in a number of European countries, as well as in eight states of the United States, I can se no good reason why equal sharing of family assets should be deferred in Manitoba.

Thank you.

Are you going to give me an answer to the question that I had about the date of acquisitior Is this in order, for me to ask a question?

MR. CHAIRMAN: Not really. If the Attorney-General wishes to clarify something, that's h prerogative. Are you finished your presentation?

MRS. KERSTETTER: Yes, I am.

MR. CHAIRMAN: Oh. All right. Mr. Mercier.

MR. MERCIER: Mrs. Kerstetter, thank you very much for your presentation. You referred to th nature of assets at the beginning of your . . .

MRS. KERSTETTER: At the beginning, yes.

MR. MERCIER: I gave one example previously; let me give another one. Supposing the majorit of the commercial assets are contained in stocks, and again, as of the date of valuation, the dat the parties separate, if the stocks have a low value, but subsequently, as of the date of the accountinç and after a period of separation, the market has improved considerably, and the value of thos stocks has risen considerably, then assuming that stocks were registered in the name of the husban — it could be either way — is it not equitable that because of the nature of these assets, tha the increase in value be taken into consideration as of the date of accounting?

MRS. KERSTETTER: Yes, I think that's fair. Do you not think that would be considered under th clause, that "share in equal shares" would be grossly unfair or unconscionable? You don't thinl that could be included in such a clause?

MR. MERCIER: Not necessarily. It would depend, I think perhaps on the amount involved, and th percentage value of the estate that that increase in value takes. I think it could vary a great dea from one marriage to another.

MRS. KERSTETTER: Is this type of circumstance the only type you envision under the nature o assets?

MR. MERCIER: Well, I referred to another one previously where the business — and gave thos two examples.

MRS. KERSTETTER: Okay. Thank you.

MR. CHAIRMAN: Mr. Cherniack.

R. CHERNIACK: Thank you, Mr. Chairman. Mrs. Kerstetter, I can't help but wonder at your ceptance of this example of Mr. Mercier, when he talks about two values; one is the date of paration which is the valuation date, and the other is the date of accounting, which of course later. Wouldn't you think that if the wife is given what is the rule of the law, and that is, one-half e asset, that she owns one-half of that stock, or one-half of that business, whether it goes up down in value, or has gone up or down in value in the interval, she still owns one-half of whatever is, and therefore, why is it a matter of great speculation as to what might have happened as the nature of the assets since whatever it is, she owned half? In other words, had the stock ne up in value, or gone down in value, and if she owned half, she owned half. It seems to me at what this . . .

RS. KERSTETTER: She owned half as at the date of separation, you mean?

R. CHERNIACK: No, if she were awarded her half, retroactive to the date of separation, she would ll have that one-half at the date of accounting, unless Mr. Mercier contemplates that there would a value placed on it and she wouldn't get half. But she would indeed get a piece of paper saying, his is worth X dollars compared with something else that you will receive in place of that X dollar lue." And therefore it seems to me that you still have not received the proper explanation as why the nature of the asset affects the amount to be given to her. Either she gets half of that set or she doesn't — doesn't that seem to make sense?

RS. KERSTETTER: Well, I don't know, because I know some assets are not simply going to be vided chop in half — it's going to be a matter of evaluating them and then giving people equal lue, not necessarily giving half of an asset. So, I'm confused at this point.

R. CHERNIACK: But then, wouldn't she still be getting half? Wouldn't the judge be saying, "This your half, and there is a value which is to be determined on the accounting." But that doesn't ange the principle of half. You see, what Mr. Mercier is talking about under 13(2) is a variation m half, and it seems to me that regardless of the nature of the asset, be it a pencil or be it building, an apartment block, half is half. And the value may change, but it's still half. And I'm t wondering whether you and I, listening to Mr. Mercier, are not being led down some kind of alley, a red herring of some kind, saying the nature of the asset, which may be a stock going or down in value.

RS. KERSTETTER: I don't know.

R. CHERNIACK: I don't either.

R. CHAIRMAN: Any further questions to the delegate? Seeing and hearing none, thank you very ndly.
Berenice Sisler.

RS. SISLER: I have the briefs, Mr. Chairman. $

R. CHAIRMAN: All right, the Clerk will distribute them. Are they briefs that you can read in 30 nutes or less?

RS. SISLER: . . .

R. CHAIRMAN: Good.

RS. SISLER: While they're being distributed, I would apologize for the mistakes on the ntispiece. You will notice that the date says June and of course should read July. I made the sumption that the Committee to whom we would be speaking would be the Committee on Law nendments and that is in error, so I apologize for these errors, Mr. Chairman.
Perhaps the press would like copies to read along.
Thank you.

R. CHAIRMAN: Could you proceed, please.?

RS. SISLER: My name is Berenice Sisler, and I'm appearing as a private citizen. Members of e Committee, it is with fatigue, frustration and some fury that I appear before the Committee to esent my seventh submission on Family Law. It has been a tiring three-and-a-half years, as I am

sure all of you tonight would agree. It has been and continues to be frustrating to perceive th inequities in the laws governing marital relationships, to recognize the principles needed in law correct these inequities, to discuss and explain these principles over the three-and-a-half year perio to have those principles enacted into law, to have the laws suspended, and now to have the principl either eroded or entirely deleted. Given the frustration inherent in this lengthy, exasperating proces perhaps I may be forgiven the fury I feel. I am angry, angry that we must continue to wait for fa just, and equitable legislation for married persons, angry that the government has seen fit to cat to self-centred interests, angry that the government lacks the courage to take the initiative to brir enlightened and just law to Manitoba.

The Premier assured us in the House on June 17, 1977 that, "There has never been any questic on our part that there should be joint and equal sharing as between spouses." The Attorney-Gener informed us on November 29, 1977, "We wish to maintain and protect the principle of equal sharir between marriage partners." He went on to say, "Our purpose is to ensure that this principle applied clearly, understandably and unequivocably." Again, "Let me assure the Members of th Assembly that this government is committed to the principle of equal sharing between marriag partners."

On May 29, 1978, the Attorney-General stated in the House, the legislation he was introducir was based on the presumption that assets acquired during marriage should be shared equal between spouses. This sounds commendable, until one asks the questions: What assets? Whe shared? The answer to those questions completely refute the contention that this legislation is base on a principle of equal sharing. I believe the government has deceived the public in its declaratic that the principles of the legislation enacted in June, 1977 would be honoured and retained. Eithe there has been deception or the government does not understand the meaning of equal. My dictiona defines the word equal as alike in quantity, degree, value, uniform in operation or effect. Equal a word similar to the word unique or to the word pregnant. Situations are unique or they are n unique. Women are pregnant or they are not pregnant. Conditions are equal or they are not equa Conditions for spouses under this legislation are anything but equal.

The legislation is filled with exceptions to the rule upon which it is supposedly based. Th exceptions defeat the rule. Subsection 13(2) of Bill 38 lists 10 factors the court may consider t vary equal sharing, and if this doesn't give the court enough leeway, the court is also at liber to consider, "Any circumstances the court deems relevant." This could include the conduct spouses. If the government doesn't intend that conduct be a factor in the sharing of commerci assets, Bill 38 should state this. It is my understanding that in no other area of law is an owne of assets denied those assets because of conduct. A murderer is not denied owner of assets becaus he or she commits murder.

The exceptions listed under Subsection 13(2) seem to be either redundant or irrelevant. The have been excerpted from both the family assets and commercial assets section of the Ontario Ac and combined in the Manitoba bill under the section referring to commercial assets. There is n presumption of equal sharing of commercial assets in the Ontario Act. To apply the conditions the Ontario Act, which does not state a presumption of equal sharing of commercial assets, to th Manitoba bill which does, seems to me to effect an abortion of the philosophy of the Manitob bill.

An examination of the 10 factors in Subsection 13(2) reveals some interesting possibilities. Claus (a): "The unreasonable impoverishment by either spouse of the family assets." Does this mean tha if a husband spends an inordinate amount of family savings on an electric train collection that th court should award the wife a larger than 50 percent share of the net value of the husband's business If this is desirable in law, why would she not obtain a larger than 50 percent share of the famil home under similar circumstances.

Clause (b): "The amount of the debts and liabilities of each spouse and circumstances in whic they were incurred." Under Subsection 10, debts and liabilities are deducted from the total inventor of assets. The result is not to be a negative value unless the court decides otherwise upon receivin an application. Why is Clause (b) necessary? Are some debts acceptable and others not? Is th morality of the court the guideline?

Clause (c) is considered in Section 5(1), (2), and (3). Clauses (d) and (e), which refer to the lengt of time the spouses have cohabited or lived separate and apart from each other. These factor may be relevant to the determination of maintenance orders, but are completely irrelevant to th sharing of assets acquired during the course of a marriage. The law should differentiate betwee a spouse's claim to support and a spouse's right to receive an equal share of the matrimonia property. A claim to support depends on the need of one spouse and the means of the other spouse A right to share equally in assets acquired during the course of marriage, arises by virtue of th marriage relationship, which is a partnership. Why should assets be shared if you have been marrie 15 years, and not shared if you have been married eight years? Assets should be shared simpl because you were married.

Clause (f): "The date of acquisition of each asset." This factor seems irrelevant if the basis for aring of commercial assets is equal sharing. If the asset is purchased two years after marriage, the asset to be shared equally, and if purchased 10 years after marriage, not to be shared? What the intent of this clause? Will the court decide the intent? Surely this is the duty of the gislature.

Clause (g): "Whether either spouse has assets to which this Act does not apply by reason of eir having been acquired by way of gift: or inheritance and the value of those assets." Elsewhere Subsection 7(1) and (3)' the bill states that the Act does not apply to an asset acquired by way gift, trust benefit or inheritance unless it can be shown that the gift was intended to benefit both ouses. Is (g) intended to contradict 7(1) and (3). Does (g) mean that the court will decide that u have enough through gifts and inheritances and don't need your share of the commercial assets cause of that? If this exception is kept in the legislation, it will mean that the right of the donor the gift is violated. If the court rules that because of gifts or inheritances, you should not receive percent of the assets, the difference will go to the other spouse. An unintended recipient will nefit and indeed the difference may go to subsidize the asset of which the court has denied equal aring. Gifts and inheritances are not assets acquired by the combined efforts of a married couple ring the course of a marriage, and hence are not relevant to the procedure to divide assets acquired the spouses during that marriage.

Clause (h): "The nature of the assets." Does this mean that some assets are shareable on a -50 basis and others are not? What kinds of assets are not shareable on this basis? Is the court make that decision? This clause strikes at the heart of Bill 38. The tone of the bill is not one open, honest sharing on an equal basis. The tone is one of mistrust, of guarding what is mine. qual sharing will depend on what is being shared. It is difficult to understand why people marry they don't intend to share. Marriage, after all, is not a matter of "I, me and mine" but of "we, and ours." If I wish to guard what is mine, I can make an agreement with my spouse, or I can oose to stay single. Marriage is not a separation but a joining together. The law ought to reinforce e joining, not the severance.

-(i): "The effect of the assumption by one spouse of any housekeeping, child care, or other mestic responsibilities," etc. This clause neglects to mention a spouse who in addition to rforming the domestic responsibilities, also works in the labour market for wages. These wages e usually used for family support. When so used, the income of the other spouse, the major wager rner, may be freed to purchase commercial assets, thus the wages of one spouse are used for mily support and family assets and those of the other spouse may be used for commercial assets. hat possible justification is there for treating the sharing of these assets differently when the arriage breaks down? The government owes the public a lucid answer to this crucial estion.

(j), the catchall clause. It seems designed to have been inserted to give the court complete leeway arriving at a decision, just in case the other clauses didn't do so. If past experience is any measure, will be used to vary 50-50 sharing against the non-earning spouse.

Case law resulting from endless, contentious court battles will no doubt determine over a very ng period of time what these clauses mean. It is indeed unfortunate that the government chose reject the main recommendation of the Report of the Manitoba Law Reform Commission that sets acquired during the course of a marriage be shared equally at marital breakdown. The vernment has not made a good case for the inconsistency and the conflict of philosophies in ill 38. If equal sharing is the presumption for all assets, why is there such a difference between e discretion allowed with regard to family assets, and that allowed with regard to commercial sets? In answer to Mr. Spivak's remarks, I would ask, if broad judicial discretion is viewed as desirable procedure, why is it not applied to family assets? On the other hand, if equal sharing the presumption, and it is a certainty that the judge will make a decision on this basis, why are e 10 plus factors there? What purpose do they serve, if not to vary? One can only conclude that e government had no intention of allowing equal sharing of commercial assets.

The Attorney-General stated on December 8, 1977 that he recognizes, "The value of a woman's ork, whether that be in the home or in the marketplace, as equal to that of a man." If this is , why broad judicial discretion in an area where men are more likely to own assets, and limited scretion in the area where joint ownership is more likely? The Attorney-General seems preoccupied ith giving a female spouse "greater than 50 percent of division of commercial assets." Of course, the Attorney-General points out, the larger sharing would be contingent upon her involvement the initiation and operation of a business. I sense that there is no perception of marriage as partnership. Commercial assets are perceived as the husband's, or in rare cases, the wife's, and any case not shareable on a 50-50 basis. All the lip service in the world will not alter the reality the effect of Subsection 13(2). It doesn't require a mathematical genius to ascertain that the stances in which the Attorney-General's example will occur will be few in number.

The Attorney-General concludes that because of the esoteric example he cited in the House on

May 29, the legislation, "Will go further to protect women's rights than previous legislation." H misses the point of our struggle. The struggle has been for equality, not for a larger than equ share of the pie. We do not want protection. Indeed we have been subject too long to the protecti racket. We want equal rights and responsibilities.

The example the Attorney-General used to justify more than 50-50 sharing might equally be us in reverse to deny the female spouse equal sharing. To my mind, the male spouse in the examp would be unjustly treated. In the hypothetical case cited, both spouses start an insurance agenc One spouse — does it matter whether it's the husband or the wife? — obtains a salaried j elsewhere. The question is, how should the assets be shared at marital breakdown? According the recommendation of the Manitoba Law Reform Commission, the assets of both would be totalle the debts of both deducted, the spouse with the greater amount would share half of the differen between the amounts remaining to each. The two would then pursue their separate way, each wi an equal share of the assets acquired during the course of their marriage, one working in t insurance agency, the other in the salaried job. What is unuust or unfair in that?

Unlimited judicial discretion does not guarantee a right to equal sharing. Indeed, t Attorney-General himself pointed out that, "Circumstances will vary from case to case." This lea me to deduce that the decisions will also vary from case the case.

The Premier, on December 2, stated with regard to the suspended legislation, "It would increa the business of every lawyer in Manitoba by at least 25 percent." Subsection 13(2) virtually guarante that every case of marital breakdown in which there are commercial assets involved will be conteste No lawyer worth his or her salt would recommend otherwise. The fact is that the proposed legislati will foster, if not more litigation than the suspended legislation, certainly as much. And what w be the lot of the dependent spouse, usually the wife, when the court is given the right to enterta any circumstance deemed relevant? What is the basis for a judicial decision? Let us consider few statements by judges in matrimonial cases.

"Unhappily, her demeanour and personality do not persuade me to credit her story." "He ga his evidence quietly, one might almost say placidly, and his answers came spontaneously. Her answe often had an element of calculation in them. She gave the impression that she was playing to wi while he gave an impression of almost indifference to the outcome." It doesn't require mu imagination to know why they performed their roles differently, does it? And of course, the no famous, or infamous one, "The court concluded that the husband loved money, assets and proper more than anything else in the world; to take such things away from him would undoubtedly provo a great deal of emotion."

These statements indicate why women fear broad judicial discretion. Past experience reveals th the courts do not consider the contribution of the spouses to be equal. The courts have awarde property to the titleholder. Given the freedom in subsection 13(2) the courts would, I predict, contin to do so. Mr. Justice Judson, in a Supreme Court judgment in Thompson vs. Thompson sums up with clarity, and I quote: "If a presumption of joint assets is to be built up in these matrimoni cases, it seems to me the better course would be to attain this object by legislation, rather tha by the exercise of an immeasurable judicial discretion." I would ask you to note the wor immeasurable.

Lawyers know that different judges, given the same information, arrive at vastly differe conclusions. Given the judge's conditioning in a society which values money and power, both ma domains; given a society where male and female stereotyping prevails, the result of judicial discreti will not be equal sharing. If the government truly wants equal sharing, as it says it does, it will stri subsection 13(2) and apply the same limited discretion to commercial assets that it has for fami assets.

Not only does the legislation ensure that there will not be equal sharing at marital breakdow it does nothing to ensure equal sharing during marriage. All sharing is deferred until marit breakdown. The reason for this is that immediate sharing poses problems. The problems th Attorney-General lists as reason for deferred rather than immediate sharing are:

(1) no other province in Canada has immediate sharing;

(2) tax problems;

(3) creditors' rights;

(4) interference in the lives of married persons.

With regard to the first of these, that no other province in Canada has immediate sharing, would have been better for the women of Manitoba, had the Attorney-General shown some of th leadership of the late Robert Kennedy, who, when faced with problems, stated: "Some people loo at things the way they are and ask, why? I look at things the way they have never been, and as why not?"

Problem (2): In response to the problems posed by the federal taxation, I would like to rea into the record excerpts of a letter I received on June 2nd from the office of the Minister of Financ of Canada. "In his April 10th budget, the Honourable Jean Chretien proposed a change in The Incom

ax Act to deal with the transfers of property made under provincial legislation relating to marital roperty. The proposed change is reflected in Bill C-56, the legislation to implement the budget roposals, which is now before the House. The In:come Tax Act, when amended, will ensure that capital gain will not arise on the division of the property pursuant to provincial family law whether ıe division occurs upon a marriage breakdown or during the marriage. If the Government of lanitoba decides to proceed with its proposed Marital Property Act, no capital gains tax should rise upon the coming-into-force of the Act, or upon any subsequent transfers of capital property ursuant to the Act. I can assure you that the Federal Government is very conscious of the need ɔ accommodate the family law reforms proposed by a number of provinces."

A clause in Bill 38 stating that immediate sharing of family assets would be contingent upon ıe coming-into-force of federal legislation would suffice to cover the time gap between the ɛgislations of the two levels of government, and I believe that's now out of date — I believe the ɛgislation has been passed.

Problem (3): Creditors' rights. It is sad to have this red herring fished up again. It is difficult ɔ believe that no credit is granted in the states of the United States which have community of roperty. If there was a commitment to honour marriage as a partnership of equals, a way would e found to allay this concern. I cannot believe that Manitoba is so deficient in legal capability that ıis problem is insurmountable.

Problem (4): Interference in the lives of married persons. All legislation, of course, is an ıterference in people's lives, an attempt to regulate something. The government is not loathe to ıterfere in an assessment of conduct of spouses; surely this is interference of the most gross nature. he government is interfering in people's lives in The Devolution of Estates Act: Why, when a spouse ies intestate, does the state interfere in the decision about the disposal of the estate, and why oes it interfere in a manner contrary to the general pattern? Why doesn't the surviving spouse utomatically receive the estate of the deceased spouse?

The point is not interference, the point is how that interference affects lives. If I rob a bank, ıe law interferes in my life by recommending and enforcing penalties. These are seen to protect ociety, although I might be upset at the interference with my wants. If a married couple acquires ssets during the course of a marriage under Bill 38 the law will interfere by retaining separate wnership of assets during marriage. This bill robs the non-titled spouse, usually the wife, of joint wnership during the marriage, and then makes certain that the chances of that spouse sharing qually at marital breakdown are minimal. We have interference now; interference which has resulted ı injustice and inequity. The point is whether the law interferes in a way that is fair, just and quitable.

It has been suggested that immediate sharing of family assets will lead to marital breakdown. et me suggest that the reverse is true. The equal right to the use and enjoyment of the home nd family assets as set forth in 6(2) and (3) of Bill 38 are meaningless to the non-owning spouse ho is dependent, feels inferior because that spouse has no status as an independent human being, ho has no say in purchases and no economic security. The owning spouse may be generous, but enerosity will be a favour given, not a right to an equal share. Financially independent persons annot fully appreciate the loss of self-confidence and self-esteem which the financially dependent erson suffers. Bill 38 gives the dependent spouse the right to apply to court under 6(6) if dissipation f assets is required. However, the bill does not suggest how that can be done if the spouse owns othing in the marriage and hasn't the financial resources to hire a lawyer.

Bill 38 is no help to the very people who need it. Those without assets will be no closer to equality uring their marriage than they are under the present laws.

I regret that the government has introduced fault into the factors to be considered in granting maintenance order. It is hoped that the courts will understand the meaning of subsection 2(2) conduct that is so unconscionable as to constitute an obvious and gross repudiation of the marriage ɛlationship." While most attention has been focussed on this puzzling statement, I have more oncern about the wording of the preamble to subsection 5(1), factors affecting order, which gives ıe right to consider "all the circumstances of the spouse, including the 10 factors which follow." oes this statement mean that we are back where we started from? The Attorney-General assured ıe Legislature that the court would be bound by subsection 2(2) in a consideration of conduct. a judge may consider conduct "if, and only if it is within the ambit of the conduct contemplated ı subsection 2(2)," why doesn't Bill 39 spell out the limits the Attorney-General claims exist? I have ɔ faith that a competent and imaginative lawyer would not persuade the court otherwise. Does make sense that a husband who, to use an example put forward by the Attorney-General, refuses ɔ leave the home of his parents to set up a marital home and by so doing exhibits a gross repudiation f the marriage relationship? Does it make sense that this husband should pay double or triple ıe maintenance needed by the wife? If the conduct clause is to apply at all, it must apply in all ıstances. If it is to penalize the dependent spouse, it must surely penalize the independent spouse. ɔ apply the clause to one situation and not to the other is a case of blatant discrimination. I would

hope that the Attorney-General was misquoted in a Tribune article in which he said "I don't th a woman will get more maintenance because of the husband's repudiation of the marriage contra but the husband could pay less because of her repudiation of it." If the Attorney-General was quot correctly, the intent of the conduct clause becomes all too clear. The intent is to punish the depend spouse, usually the wife — so much for our concern for women.

If the government must have retribution, if the government must have its pound of flesh, let t government design another way of exacting it. Why does the law concern itself with maintenar in the first place? Presumably because there is need for maintenance, because it serves a purpo What is that purpose? Surely the purpose of maintenance is to attend to the economic need aris from the non-earning roles performed in marriage. The goal of maintenance should be self-sufficier in the shortest period of time. For some, there will be need for short-term maintenance to all time for training for re-entry into the labour force. For others, there will be need for long-te maintenance. Consider the case of a couple married for 35 years. The wife worked in the labo force while the husband completed university. Subsequently, she remained in the home, by mut agreement, and raised three children over a period of 30 years. The wife is now 55 years old. T couple does not own a home; the car is in the husband's name, as are a few bonds. The cou under subsection 13(2) of Bill 38, rules that the net value of assets are to be shared on a two-thir to the husband, one-third to the wife basis. It is evident that maintenance will be needed by t wife as her share of the property settlement amounts to $5,000.00. The husband is able to p maintenance. The court finds that by virtue of subsection 2(2), her maintenance should be reduce What are the alternatives open to this woman? I suggest there is but one, namely, welfare. As taxpayer, I see no reason why I should bear a burden that both belongs to the partners of t marriage, and can be borne by them.

Maintenance based on conduct confuses the issue. It presupposes the cause and effe relationship between economic need and behaviour. In fact, people who behave abominably m or may not have economic need. People who behave admirably may or may not have econon need. There is simply no relationship between behaviour and economic need.

The Attorney-General refers to individual responsibility. If there is none prior to the maintenan order, is there likely to be any subsequent to it?

If fault is a factor and a court battle ensues, is it likely that the spouse owing maintenance v pay it? Not according to Canadian statistics that reveal that in 75 percent of cases, there is defa in collection.

Now, having rejected the majority position of the Manitoba Law Reform Commission regardi equal sharing of assets acquired during marriage, it is interesting that the Attorney-General cho to quote the minority position of the report regarding fault. He dwelt on the minority statemer in some detail, leaving the impression that most fair-minded people would agree with this view. fact, he makes the sweeping statement that "the response is unanimous. To exclude conduct determining an order for maintenance would simply be unjust." He then goes on to credit tho supporting the minority position with the insights of sociologists and psychologists, although th are lawyers, and that is not their field of expertise. They claim that no-fault maintenance wou demean the status of marriage and undermine the basic unit of society, the family. Where is t evidence for this assumption? I would claim the reverse is true, that fault-finding demeans marria and undermines the family.$

Because lawyers defend and interpret the law does not mean that they should determine wh is in the law any more than any other group, per se. This should be the realm of the Legislatu responding to the wishes and pressures of the public. It has become obvious to me, as we ha struggled with the relationship between economic need after marriage and behaviour during marriag that most lawyers, because of their training and past experience, are predisposed to accept fa as an essential concept in all legal adjudications. It is not a relevant concept in determini maintenance orders, and when it is not considered, the advantages are many. There is a great chance of reconciliation; there is a reduction in litigation with resultant lower court costs; there less bitterness between spouses. Increased hostility is avoided. There is less stress for childr involved, fewer contested divorces, less difficulty in maintenance collection, less burden on taxpaye because of better collection possibilities, rapid interim relief where needed, more rational terminatio of marriages that have broken down.

The Attorney-General expressed concern that children involved in marital breakdown where fa was not considered would be influenced to disregard individual responsibility in marriage. Th influence, to my mind, which would be detrimental to the child, would be knowing that one pare was legally at fault, or the involvement in testifying in court against one or both parents, therel adding to the guilt, insecurity, and emotional upset the child experiences by virtue of the marit breakdown. The reality of reduction of maintenance for the spouse caring for children will have far greater detrimental effect on the child than will the imagined lack of sense of responsibili expressed by the Attorney-General. Ask the child whose mother is on welfare.

I would not agree that the court should have discretion to permit a sharing of debt to a negative ue at marital breakdown. I note that there are no guidelines for the court in Subsection 10(2). an conceive of no logical reason why a spouse who had no voice in the decision to incur a debt, ɔuld be required to share it beyond the point where the net value of the assets of the debtor ɔuse is zero.

While I agree with the government in its decision to apply the law to all Manitobans, to reject ilateral opting out of equal sharing, and in its decision to accept the sharing of all assets acquired ring the course of the marriage, I cannot agree with the limitations put on the sharing of commercial sets by the introduction of broad judicial discretion, the deferred sharing of family assets, or the e of the fault concept in the determination of maintenance orders. These factors give the ge-earning spouse, usually the husband, the advantage, and penalize the wife, with the end result ıt the partnership of marriage is not recognized.

I am puzzled that the legislation did nothing to improve the techniques of maintenance collection cause we were told that this was the reason the government rejected The Family Maintenance t while they were in opposition.

I feel sorrow for the government because it lacked the foresight to see that change of the kind have been urging is inevitable. When I lived in Kentucky in the early 1950s, blacks were restricted law from eating in the same restaurants as whites, from patronizing the same movie theatres. ecently attended a meeting in the deep south and found no legal barriers to the civil rights of ıcks. Changes which were inevitable have taken place. This, too, will be the story of women's hts in Manitoba. We, too, will overcome.

R. CHAIRMAN: Mrs. Sisler, will you answer questions?

RS. SISLER: Yes, I would be happy to answer questions.

R. CHAIRMAN: Mr. Mercier.

R. MERCIER: Mrs. Sisler, thank you once again for presenting a brief. I am not going to ask u any questions about Section 13(2) and the presumption and repeat the comments that I made rlier to Mrs. Smith.

With respect, though, to The Family Maintenance Act and the conduct that may be considered ere and pointing out, as I've said on a number of occasions, that financial need is the basis for order and that the reference to conduct is discretionary and they only go to quantum if it is be invoked by the judge, let me refer to a statement by a judge in one of the cases that I offered support for the interpretation of the words used in Section 2(2). The judge in the case of Harnett rsus Harnett stated in part, "It will not be just to have regard to conduct unless there is a very bstantial display between the parties on that score." Mr. Justice Ormrod, the Court of Appeal Wachtel versus Wachtel used the phrase, "obvious and gross." In this phrase, I think the "gross" scribes the conduct, and "obvious" describes the clarity or certainty with which it is seen to be ɔss. The conduct of both parties must be considered. If the conduct of one is substantially as d as that of the other, then it matters not how gross the conduct is, they will weigh equally in balance. In my view, to satisfy the test, the conduct must be obvious and gross in the sense ıt the party concerned must be plainly seen to have wilfully persisted in conduct or course of nduct calculated to destroy the marriage in circumstances in which the other party is substantially ımeless. I think that there will be very few cases in which these conditions will be satisfied.

Considering again then that the financial need is the primary test, that the reference to conduct discretionary, and that this is the kind of interpretation that has been applied to those words, you still have any objections to including that principle in the bill?

RS. SISLER: Yes, I certaintly do have, Mr. Mercier. I have read the case description that you ve just read and the other ones as well. I see that there is no relevance at all, as I pointed out, tween behaviour and economic need. As I said, some people behave well and they may or may t have economic need, or they behave poorly and they may or may not have economic need. lon't see that there is a relationship between the two.

I think I do not believe in fault in maintenance orders for three reasons. The first is because my religious convictions. I do not believe in vengeance. The second is because of my sense of tice. I do not believe that any court can really determine the relationship between married couples. went to court now, there is absolutely no way that a court, a lawyer, or a judge, or two lawyers d a judge, could determine the conduct that has gone on in our marriage in the past 30 years. ee that because that cannot be done with any degree of accuracy, I don't see that there is any tice in so doing. The third point that I would make is that I am against fault because my common ıse tells me that there is absolutely no point in it, that it is counterproductive and it's very

I think you have heard a lot of people in the professional field here in the past while in the hearin tell you this very same thing, that it serves no purpose. As I say, if the purpose that it serves vengeance, I cannot accept that. If the government must have that vengeance in, I would sugge that it seek it in another way, that it punish in another way, not that it take food from the mout of mothers and children — as it will do. You yourself have indicated that it will not triple or doul the maintenance of women, that, however, women might be penalized because of that. I think th requires a real explanation because I think there is a double standard there and I feel that th only serves to penalize women and children. Perhaps you could put the mother in jail on Sunda I don't know. Another way of doing it, other than taking . . . What we are talking about is rea bare sustenance. We're not talking about trips to Hawaii. We're talking about that woman and h children having bread on the table every day. That's what we are talking about.

Maintenance orders are not pie in the sky money at all. They are very very small orders. I hea of one just the other day here, that a woman was getting $50.00 a month. You know, you ca really go very far on that.

MR. MERCIER: Well, Mrs. Sisler, you can grossly misinterpret the legislation as much as you wi and I can't stop you. I have said that financial need is the primary test. Now, you can carry along the line as much as you want and people may believe you or may not believe you, but yo statements are absolutely contrary to what I have said.

MRS. SISLER: Mr. Mercier, I am sorry, I don't mean to appear to be antagonistic in this. I ha a strong, a deep conviction that this is wrong, and you'll pardon me if I have seemed to have be very over-anxious in this. I don't mean to be discourteous at all. I can appreciate that there is anoth point of view. You asked me my point of view. I cannot accept, for my religious convictions, r sense of justice, and my common sense, that having fault serves any purpose whatsoever. You ask me, and I had to answer honestly.

MR. CHAIRMAN: Are there any further questions? Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I want to commend Mrs. Sisler for a very very excellent brief a I certainly take exception to the Attorney-General's efforts to attempt to discredit it by suggesti that you have grossly misinterpreted the law. I think that you have, through your brief, ve perceptively indicated the weaknesses in the existing law.

I was very interested, on Page 4, your reference to the letter that you had received from t Tax Department. The Attorney-General keeps advising us that there are still tax difficulties a problems and difficulties that he has had in respect to receiving correspondence from the Minist of Finance in Ottawa. I am very interested that you apparently have received information that has been as readily available to the Attorney-General. Did you obtain that information . . .

MRS. SISLER: Yes, I happened to be in Ottawa in February and I spoke to Jean Chretien a asked him about this and because it was a conversation in passing, I thought I should follow up with a letter, which I did, and in the response it is noted that my letter is March 8, and wi all fairness to Mr. Mercier, I did not receive a reply until June 2. However, I think if he had start last October, I think he might have got one by about February. But I have the letter here if anyo wishes to see it. There is the letter. It can be copied and copies circulated, if you like.

MR. PAWLEY: What I am most interested in is the reference in the letter from Mr. Chretien th the Capital Gains Tax would not arise in the division of property pursuant to division occurring eith during the marriage braeakdown or during the marriage.

MRS. SISLER: Or during the marriage. Yes, I thought that was quite significant.

MR. PAWLEY: So you would interpret that to mean, then, that immediate vesting would not crea tax problems of family assets.

MRS. SISLER: I think that's how I would interpret it. I'm not a tax expert. I think that that is h I would interpret it though.

MR. PAWLEY: Were you present when Ruth Browne presented her brief the other evening?

MRS. SISLER: Yes, I was.

MR. PAWLEY: Would you concur with her evaluation that the Attorney-General may, in fact, ha

eated tax problems by his own actions by providing for the possibility of Capital Gains Tax on e transfer of a summer cottage, for instance, due to the fact that the summer cottage no longer, der the proposed legislation we have before us, will be immediately vested?

RS. SISLER: As I said, I'm not a tax expert but I have found that in other matters, and particularly tax matters, Mrs. Browne is very well versed and I certaintly would concur with her until I had ıer evidence to the contrary.

R. MERCIER: Mr. Chairman, on a point of privilege . . .

R. CHAIRMAN: Mr. Mercier.

R. MERCIER: . . . I indicated to the Legislature when I concluded debate on second reading ıt my understanding was that all tax problems had been resolved with one exception, that being ıt there was still a tax problem with respect to having two principal places of residence.

R. CHERNIACK: That's not a problem, that's a . . .

R. MERCIER: Well, it can be a problem with immediate sharing, and I indicated that in concluding bate on second reading.

R. PAWLEY: Mr. Chairman, we're going to have to debate Mr. Mercier's point of privilege at me subsequent time, but . . .

R. MERCIER: I don't have to, but maybe you do.

R. PAWLEY: . . . certainly insofar as the letter that Mrs. Sisler has received, reference is made immediate sharing, can be also resolved during the course of the marriage, that there need be waiting until the termination of the marriage.

I was also interested in Page 10, Mrs. Sisler, in respect to your pointing out to us — it's the ıt time that this has been pointed out — that insofar as negative value, that no guidelines are ovided for the court's attention. Do you consider any guidelines as being feasible in this section, do you feel that the entire reference to the judicial system should be deleted from that ction?

RS. SISLER: I do not believe that there should be sharing of debts to a negative value at all, the reason that the spouse who stays in the home does so by mutual agreement and has a ht to share in the assets acquired during the course of the marriage, because that's an arrangement reed to; that's not a legal requirement by sex. A woman is not required to stay in the home, she has a right to share the assets. But I see no reason at all why a wife who probably doesn't ve any money anyway but has had no decision in incurring the debt should share that debt. So ould wish to have that section deleted. However, if it's not going to be deleted, I think it must much more specific than it is.

R. PAWLEY: Then on Page 6, Mrs. Sisler, you indicate the fact that you feel that litigation will increased. Yet, contrary to last June, we received very few submissions from members of the ıal profession. Could you offer any opinion why, despite the obvious fact that there would be an crease in litigation, widening of discretion on certainty, that we have received so little response ım the legal profession in contrast to last June?

RS. SISLER: I think I would prefer, Mr. Pawley, to leave that to everyone's imagination.

R. PAWLEY: That's all.

R. CHAIRMAN: Mr. Parasiuk.

R. PARASIUK: Mr. Chairman, through you to Mrs. Sisler, I was very impressed with your analysis 13(2) and you indicated in some discussion with Mr. Mercier that you had in fact read some the cases that he had referred to. Are you familiar with the Silverstein case? Have you read through ıt particular case?

RS. SISLER: No, I haven't. I have just read a newsspaper clipping of the Silverstein case. However, ould point out my assessment of it for what it's worth' and as I'm not a lawyer it probably isn't

worth too much. However, I will give it a try. I would say her case is unusual in that she work in the business and probably if she had not contributed she likely would have received less. S only received 50 percent because she contributed labour to the business, and it wasn't becau of her presumption of any kind, but because that was a specific ground for awarding it. I thi she got 25 percent for the home and 25 percent for the contribution to the business — for h work in the home. So I think that that was not based on a presumption of equal sharing. Of cour it wasn't because that's not in the law. So it isn't really relevant to our situation, because of t difference in presumptions. I think she got that because of a specific instance.

Now, of course, as I say, I'm not a lawyer, but that would be my sort of mathematical reasoni of it.

MR. PARASIUK: From what I have been able to just glean from that case because I have o seen a newspaper article myself, the woman got 25 percent because she was a good homemak and 25 percent because she had worked in the business, which means that had she not work in the business but had been a homemaker, she would have only got 25 percent of the commerc assets which would seem to me, and I was wondering if you would concur, is a repudiation of wh Mr. Mercier has been saying when he in fact is using that case.

MRS. SISLER: I think that's what I was trying to say, that she didn't get 50 percent of the commerc assets.

MR. PARASIUK: Right. So really that case does not reinforce the concept of 50-50; it reinforc the concept of 25-75.

MRS. SISLER: Yes, and also I think it's very dangerous to have discussion about a differe situation, to make analogies between situations. That's why I think this whole 13(2) section is poo done, because it brings clauses from a bill that does not have presumption of equal sharing, a bill that does have presumption of equal sharing, and my common sense tells me, that there something quite wrong in this, that you can mix clauses from a bill that has an entirely differe philosophic basis.

MR. PARASIUK: Since you have looked at 13(1) and 13(2) very closely, in your estimation is the a very large difference between the two? One is the limited discretion with respect to family asse and the other is discretion with respect to . . .

MRS. SISLER: Well that, to my mind, is the question that I think that I would really like Mr. Spiva because he has mentioned this so often, and Mr. Mercier to answer to the public. I cannot understan if judicial discretion is the miracle it's tooted to be, why that isn't applied to family assets. I can seem to get that through my head. Why is there a difference in the way the two kinds of asse are treated? I just can't understand that.

MR. PARASIUK: I can't understand that either. Excuse me, Mr. Chairman, but Mr. Johnston h indicated that he understands what the difference is. Perhaps he would be able to help y out.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: Yes, I was just indicating, Mr. Chairman, that Mr. Johnston has indicated th he does know what the difference is between 13(1) and 13(2) and since we have had some tin on that, I am wondering if he would be prepared to enlighten the other members of the committ and the members here, and the general public here, if he does have an explanation.

MR. CHAIRMAN: Mr. Johnston.

MR. JOHNSTON: Mr. Chairman, I will decide when I will explain anything, not Mr. Parasiuk.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: Well, I guess that we're supposed to be kept in secret then, until some later stag until such time that Mr. Johnston will reveal the unknowable right now. —(Interjection)— Quite easi quite easily. Can you explain it?

MR. CHAIRMAN: Mr. Cherniack.

R. CHERNIACK: Mr. Chairman, firstly I'd like clarification from Mr. Mercier. I was going to ask s. Sisler to file the Chretien letter and then I was going to ask them to get an opinion from the gislative Counsel, but now I understand from Mr. Mercier — and I didn't before but that's not portant — that he has now withdrawn any suggestion of tax problem other than the one relating two principal residences. If that is the case, then I don't know that we need. . . .

R. CHAIRMAN: Mr. Mercier.

R. MERCIER: I did when I concluded debate, Mr. Chairman.

R. CHERNIACK: Yes, well, it was not clear to me.

R. CHAIRMAN: Could I interrupt, Mr. Cherniack, would you like the letter that Mrs. Sisler referred tabled? Do you think it would be helpful to the committee?

R. CHERNIACK: Well, it couldn't hurt the committee. It was really that I was going to ask for . . .

R. CHAIRMAN: Mrs. Sisler, would you leave a copy of that letter with the Clerk?

RS. SISLER: Yes, I think I have copies with me. If not, I could mail them. Oh, I will be back re; I will bring them. —(Interjection)— I was fantasizing that this whole exercise was over.

R. CHAIRMAN: Mr. Cherniack.

R. CHERNIACK: I must say that I am sure Mrs. Sisler will be back more than once, and certainly three or four years from now. I was even thinking, Mr. Chairman, if there is some way that I n get Mrs. Sisler to replace me on this committee I think she could do an excellent job here, it maybe you will take into consideration what means we could use to get her here. —(Interjection)— ou will run her or, well, anybody who runs her is doing well.

Mr. Chairman, may I take advantage of the opportunity to thank Mrs. Sisler and others for a te which I received a little while ago, which I find embarrassing but very pleasant to receive. It's the record now, Mrs. Sisler, you sent me a note.

Mr. Chairman and Mrs. Sisler, dealing with the case of Harnett and Harnett, which Mr. Mercier ferred to, you will recall — I have his summary of it and I wanted to deal with that from the andpoint of what a court would consider to be — what is the term? — gross and obvious, when gave that definition from the case. As I understand the facts from his own note, it's a case of couple married in 1954, each 25 years of age, some 14 years later the wife adulters — that's new verb for me — the wife adulters with 20-year-old youth in matrimonial home. Husband didn't ow. Next year the husband discovers adultery and throws the wife and 20-year-old youth out home. Then he goes on to say — this is what intrigues me — wife's conduct short of being oss and obvious, at least in comparison with that of husband, who was emotionally and physically usive to her.

Now, it seems to me that the reverse could be interpreted, and you have read enough now to ve some idea yourself. It seems to me that we could say that had the husband not thrown her t and been emotionally and physically abusive to her, that this conduct would have been determined be gross and obvious. That is that after 14 years of marriage, the wife has committed adultery d the husband didn't know.

Now, I am concerned about whether, in your opinion, this would be considered a repudiation the marriage, and therefore carrying with it the punitive aspect of no maintenance, which would ve been needed according to Mr. Mercier's first requisite that maintenance shall be based on ed. But had she committed adultery on an occasion with a person and her husband didn't know, parently that would be, by this, considered to be gross and obvious. Would you consider that be . . . ?

RS. SISLER: Well, I was going to say that perhaps it may be obvious but not gross. However, that the husband didn't know, it wasn't even obvious, was it?

R. CHERNIACK: That's right.

RS. SISLER: I am sorry, but I really am very, very sincere about the fact that I do not believe fault maintenance. I believe in no-fault maintenance and I don't think all the instances in the

world will change the principle. As I have worked through this, I have come to realize that th are two ways of approaching making a law. There is a way of looking at all the individual cas and, as a former mathematics teacher, you will forgive me if I make the analogy, a mathemati one. I think that way of looking at things is an arithmetic way. It's a way of saying that three a four is seven. Now, that's the kind of thinking that you do in a courtroom, where you try to p the facts together and make them come out to equal something you want them to equal, or someth that seems right, like three and four equalling seven. I believe that when you frame laws, your think must be much more conceptual than that. It must not be on an arithmetic level; it must be, if y will, on an algebraic level. It must be on the level that X plus Y equals Z, on the level of a princi that applies to all the cases. And you see you can tell I taught school, can't you? I am waving hands in this pedantic way.

MR. CHERNIACK: Mrs. Sisler, I, for one, am very happy that you taught school and are able continue teaching school when you are right here with us, and we can learn from you.

MRS. SISLER: Well, I believe that there is a very basic difference in approaching the framing laws, and I believe that you must approach it from the point of view of what principle is in it, r this case out in wherever that that instance is the one that we must look at. I think we have look at the principle, and leave it to the lawyers to fight the individual cases in court.

MR. CHERNIACK: Thank you, Mrs. Sisler.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: I move that committee rise.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: Mr. Chairman, could we find out when we might be meeting aga tomorrow?

MR. CHAIRMAN: I was just going to mention to the members of the committee that Mr. Jorgens told me at supper hour that the House would sit regular hours tomorrow morning and tomorr afternoon, and that this ' committee would reconvene tomorrow evening at 8 o'clock. Is th satisfactory? Committee rise.