

***Leatherdale v. Leatherdale*¹: Family Law — Division Of Non-Family Assets.**

The Supreme Court of Canada interpreted the Ontario Family Law Reform Act² and found a spousal interest in property not found by the Ontario Court of Appeal. The majority, per Laskin C.J.C., allowed the wife a share of non-family assets denied to her by the Court of Appeal. Estey J., dissenting, would have allowed her still more.³

The case has some relevance to the New Brunswick *Marital Property Act*⁴ for by substituting the appropriate sections some light may be thrown on how the Supreme Court of Canada would view the New Brunswick Act in a proper case.

In *Leatherdale* the husband and wife were separated and the family assets were settled. The wife applied for a share of the non-family assets. The trial judge allowed the wife a one-half interest in approximately \$40,000 worth of Bell Canada shares under section 8 of the Ontario Act.⁵ The Ontario Court of Appeal allowed the husband's appeal on the ground that the wife did not bring herself within section 8 of the Act as she had not contributed to the acquisition of the shares.⁶

The Supreme Court of Canada allowed the wife's appeal in part, having found that she had contributed within the meaning of section 8 as a wage-earner during nine of the eighteen years of the marriage. However, the majority of the court held that her work in the home, by itself, did not constitute a contribution to the acquisition of the shares in Bell Canada and consequently reduced the original award by one half. On that point Estey J. disagreed. He felt her work in the home was a contribution within the meaning of section 8.

To apply the case in New Brunswick one must substitute certain provisions of the New Brunswick *Marital Property Act* for the provisions of the Ontario *Law Reform Act*, as follows:

Ontario section 4 — see New Brunswick sections 2, 3, 7, and 8

Ontario section 8 — see New Brunswick section 42.

¹(1982), 45 N.R. 40 (S.C.C.).

²*Family Law Reform Act*, Statutes of Ontario 1978, c. C-2 hereinafter called the Ontario Act.

³*Supra*, footnote 1.

⁴*Marital Property Act*, N.B. Acts 1980, c. M-1.1, hereinafter called the New Brunswick Act.

⁵*Leatherdale v. Leatherdale* (1980), 19 R.F.L. (2d) 141 (Ont. H.C.).

⁶*Leatherdale v. Leatherdale* (1980), 118 D.L.R. (3d) 72; 19 R.F.L. (2d) 148 (Ont. C.A.).

The Supreme Court of Canada said that the Ontario Act embodied two completely separate schemes; one according to section 4, the other according to section 8.

Considering section 4 of the Ontario Act in its totality it is apparent a division of family assets could be made that was equal or unequal. Further, if such division of family assets results in an inequitable distribution of property between the spouses, a court could use subsection 4(6) to order a distribution of non-family assets to correct the inequity. It seems quite clear that under subsection 4(6) no division of the non-family assets could be made unless an inequity would otherwise result.

The scheme for division of property under the New Brunswick Act is very similar to Ontario's section 4. Section 2 stipulates that child care, household management and financial contribution are of "equal importance in assessing the contributions of the respective spouses."⁷ Section 3 sets out the events which will "trigger" the division of marital property, these being: divorce, a declaration of nullity or marriage breakdown.⁸ Section 7 provides for an unequal division of marital property in certain circumstances⁹ and section 8 for a division of non-marital property in order to prevent inequity.¹⁰

It should be noted that both of the schemes described above provide for a distribution of property between husband and wife, taking into consideration the uniqueness of the family relationship.

Ontario's section 8 sets up an entirely different system by which the non-owning spouse can obtain a proprietary interest in certain non-family assets if that spouse has "contributed work, money or money's worth in respect of the acquisition" of them. There seems to be no limit as to the timing of an application under section 8 and property is to be divided according to the principles of resulting trust, ignoring the domestic relationship. It would seem that section 42 of the New Brunswick Act comprehends the same principles.

Although Ontario's section 8 and New Brunswick's section 42 provide similar criteria for assessing what constitutes a contribution, the Ontario section is limited to property "other than family assets" while the New Brunswick section applies to "any property".

In *Leatherdale*, Estey J. dissented on the question of what amounted to a contribution to the acquisition of non-family assets. The majority of the

⁷Compare subsection 4(5) Ontario Act.

⁸Compare subsection 4(1) Ontario Act.

⁹Compare subsection 4(4) Ontario Act.

¹⁰Compare subsection 4(6) Ontario Act.

court, through Laskin C.J.C., felt that work in the home by itself would not amount to a sufficient contribution. Mr. Justice Estey could see no valid reason why household management should not, in the appropriate circumstances, qualify as such a contribution. Indeed, his approach seems to follow the reasoning of Laskin's dissent in *Murdoch v. Murdoch*¹¹ and the majority decisions in *Rathwell v. Rathwell*¹² and *Becker v. Pettkus*,¹³ — the cases which developed the application of trust principles to the marital relationship.

It is clear on the other hand, that the work done by Mrs. Murdock, Mrs. Rathwell and Ms. Becker can more readily be seen as generating income than the household duties performed by Mrs. Leatherdale. This approach is analogous to that taken by Madam Justice Wilson in the Ontario Court of Appeal (as she then was) in *Young v. Young* where she stated:

While I am sure that the wife's assumption of the child care and household management responsibilities contributed in some measure to the assets the couple were able to acquire, maintain and improve during the marriage . . . I am not satisfied that it played any larger role than the husband's dedication to his role as provider.¹⁴

In other words more than a contribution to the marriage by performance of household duties is needed to come within the terms of Ontario's section 8. In view of Madam Justice Wilson's statement in *Young*, echoed by the Chief Justice in *Leatherdale*, the contribution of the non-owning spouse must have a closer relation to the actual acquisition of the particular non-family assets in order to meet the statutory requirement.

In applying the *Leatherdale* case to the New Brunswick Act it is probable that the Supreme Court of Canada would find that section 3 provides a scheme for equal division of marital property, section 7 for unequal division and section 8 for a division of non-marital property to prevent an inequity.¹⁵ It should be remembered that Ontario's subsection 4(6) and New Brunswick's section 8 are identical. Further the Supreme Court would probably see New Brunswick's section 42 as an entirely separate scheme whereby an interested person could apply for a division of any property at any time during or following a marriage.¹⁶

¹¹(1973), 41 D.L.R. (3d) 367 (S.C.C.).

¹²(1978), 83 D.L.R. (3d) 289 (S.C.C.).

¹³(1980), 117 D.L.R. (3d) 257 (S.C.C.).

¹⁴(1981), 120 D.L.R. (3d) 662, at 667 (Ont. C.A.); 21 R.F.L. (2d) 388, at 393 (Ont. C.A.)

¹⁵Indeed this was the approach followed by the New Brunswick Court of Appeal in *LeBouthillier v. LeBouthillier* (1982), 39 N.B.R. (2d) 20.

¹⁶Note however s. 42(8) of the N.B. Act prevents an application under ss. 42(1) "with respect to any property where an application or an order has been made respecting that property under Part I." This sub-section may suggest some inter-relation between s. 42 and the above-mentioned sections. However, the purpose of 42(8) may simply be to prevent a multiplicity of court actions respecting the same property.

This, however, would not seem to be the approach taken by the Appeal Court of New Brunswick in *Bank of Montreal v. Kuchuck & Kuchuck*.¹⁷ Stratton J.A., speaking for the court, indicated that s. 42 would not be available unless there was a marriage breakdown. He said,

... the scheme of the legislation is to continue the separate property regime between spouses until a marriage breakdown occurs. If this is correct, it would, I think, be unreasonable ... to permit a creditor to apply for a determination as to the ownership of the marital home when the spouses themselves could not do so until there was a legally recognizable marriage breakdown.¹⁸

It should be stressed, however, that the question before the court in *Kuchuk* was whether or not a creditor could use section 42 in order to force the sale of a marital home under a writ of execution. To allow such an action would certainly, as Stratton J.A. rightly points out, run counter to the scheme of the Act as the marital home is recognized as the most important item in the category of marital property. Therefore, it is perhaps still open to the New Brunswick Court of Appeal to divide non-marital property under section 42 in a case where there has not been a marriage breakdown.

An important question left open by the Supreme Court of Canada in *Leatherdale* was whether the Ontario Act provided a complete code or if it was still open in considering non-family assets to apply the doctrines of resulting and constructive trusts. The Chief Justice, in the last paragraph of his judgment, left that question unanswered. However, Estey J. expressed his agreement with the Chief Justice that the statute law prevails.

Perhaps the best view is that the statute will prevail where there is any conflict between the common law and the statutory provisions. The issue is complicated by the fact that the reform legislation in both Ontario and New Brunswick was enacted before the Supreme Court in *Becker v. Pettkus*¹⁹ adopted the principle of constructive trust as it relates to marital property. Therefore, a question arises as to whether the codification of resulting trust in section 15 of the New Brunswick Act excludes by implication the use of constructive trust in relation to property disputes between married persons in New Brunswick.

Although few, if any definite conclusions in regard to the New Brunswick *Marital Property Act* can be reached from reading the *Leatherdale* case it is clearly important in attempting to ascertain the scheme of the *Marital Property Act* particularly in relation to non-marital property and the fate of the doctrine of resulting and constructive trusts.

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¹⁷(1982), 40 N.B.R. (2d) 203 (N.B.C.A.).

¹⁸*Ibid.*, at 218.

¹⁹*Supra*, footnote 13.

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