Legislative Assembly of Manitoba

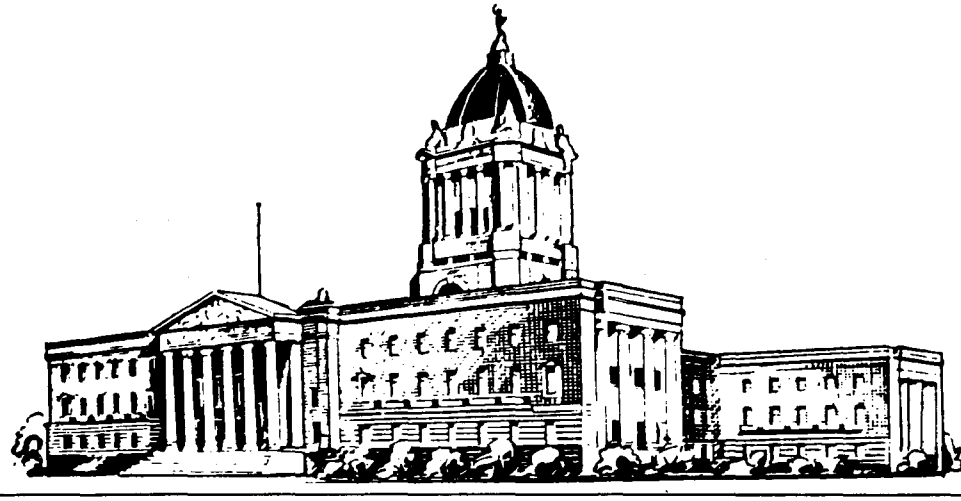
STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. Warren Steen
Constituency of Crescentwood



Wednesday, July 12, 1978 2:30 p.m.

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Hearing Of The Standing Committee
On
Statutory Regulations and Orders
Wednesday, July 12, 1978

Time: 2:30 p.m.

CHAIRMAN: Mr. Warren Steen.

MR. CHAIRMAN: Members of the Committee we have a quorum. Shall we come to order. We can start where we left off yesterday or this morning. Is there a person present by the name of Kay Harland? I'll ask again — a person by the name of Kay Harland? Not hearing or seeing anyone answering to that name. . . Mr. Kenneth Emberley.

MR. EMBERLEY: My name is Kenneth Emberley, 387 Truro Street in St. James in Winnipeg.

Mr. Chairman, ladies and gentlemen, I request special permission to read a ten sentence, four-minute introduction to partly explain the reasons for my brief and the attitude you detect in so many of the briefs. But this will be a little bit out of the line of the terms of reference and I want to know in advance whether I am going to be told to sit down and stop talking.

MR. CHAIRMAN: Yes, it is agreed. Would you carry on please?

MR. EMBERLEY: Thank you kindly, Sir.

The government's total failure to provide any enthusiastic inspired leadership into the new energy shortage with cheerful support and greatly expanded funding for four more years of the Legislative Building's solar energy experimental project, is one of many sources of disappointment.

(2) The government's continued tinkering with the City of Winnipeg Act weakening citizenship participation through RAG and community committees, reducing citizen rights on zoning appeals, where they have a right to oppose bad planning.

(3) The continued government policy of refusing to grant powers to allow us a mayor with some power for stronger leaderhship is clear, and refusal to consider the transfer of 10 or 15 percent of provincial tax revenues to the cities and municipalities as the first priority of any Constitution reform in Canada.

The refusal to attempt any correction of the cruel manipulation of the city into technocrat designed administrative units of 60,000 to 90,000.

MR. CHAIRMAN: Mr. Emberley, can I stop you for a moment?

MR. EMBERLEY: Yes, Sir.

MR. CHAIRMAN: You have myself and I think most members of the committee somewhat puzzled. This particular committee on Statutory Regulations and Orders are hearing presentations on approximately four bills, the main two are The Marital Property Act and The Family Maintenance Act. Is that what your presentation is going to be about or are you going to talk on the City of Winnipeg and other. . .

MR. EMBERLEY: Yes, Sir. I just have a two-page, ten-minute presentation. I am through with the introduction now.

MR. CHAIRMAN: I see. And you will be discussing The Marital Property Act or The Family Property Act.

MR. EMBERLEY: Strictly and only The Family Property Act.

MR. CHAIRMAN: All right, would you carry on then please.

MR. EMBERLEY: Re family law bills on Marital Property and Family Maintenance. One does no have to have special legal training or superior educational background to recognize what many people consider a bad piece of legislation.

For more than 20 years Manitobans have watched anxiously and with disappointment for smoother progress into the second half of the 20th century. Anxiety and disappointment we have had in generous amounts and progress in small amounts.

Everyone in this room is contributing in his or her own special way to the liberalizations and progress which many feel is an irresistable long term trend. May I please quote briefly from a professional analysis of the growth of democratic government?

The development of our immensely successful system of government we enjoy did not happen quickly or easily. It took place over 1,200 years in five or six countries in Western Europe. It was almost never deliberately legislated, but grew through slow evolution as the results of sometimes very ordinary and sometimes quite unique forces.

''Almost none of the participants knew the work in which they were involved. Sometimes people doing bad things for the worst reasons brought the best results through causing a positive reaction to the very harmful things they did. In that way we all have an opportunity to contribute to progress in government.

In the last few years we have heard of famous court cases, involving small fortunes in lawyers fees, which have recorded women who worked like slaves to help their husbands build a family fortune, and were dealt with legally, but without any justice, when it came to sharing in this jointly created fortune.

In recent years there has been increasing pressure to treat women, as well as other racial groups Negroes and Indians, as if they were all decent human beings with full rights of citizenship, and to fairly equal treatment, not only in the courts, but in the city, town and the country in our daily life.

The library is full of the slow stuling buling progress to real equality, and after this bill is dealt with there will be another record.

To use the technical legal terms we are all so familiar with, I understand your proposed legislation will guarantee women full rights to their natural fields of skill and tradition, in bed, in the kitchen and a legal right to pin money for permanents and hair ribbons.

The right to financial support for a woman will depend on her good moral character and her willingness to continue to care for her children skillfully and devotedly, while behaving in a chaste manner. Financial support for women with children will continue to depend on an inept and clumsy system designed, some say, by men to benefit many men, who wish to punish their spouses, to punish their offspring, who are shiftless, who want to use their money for business or for new sexual adventures.

Within the past month I saw a report in the Winnipeg Free Press on research in the matter of business executives families. The key items reported were under a double title. As I remember it first it said that many very successful business and professional men reach their peak in their chosen careers because of very hard work for long hours and a single minded pursuit of success that allows no distractions. Many of these men have little time to think about or care for their families, especially children. Many very successful business people look upon their business as a personal creation that is quite uiique and could not easily be duplicated.

Part of the public relations image of many very successful men is to be able to, convenient and at intervals, display a very beautiful wife, well educated, well adjusted happy children, cared for heading for success in the accepted patterns.

The second part of the title described a special kind of woman who made a career of being the spouse of a very successful business and professional person, professional man, naturally. Her chosen career, which required considerable intelligence, lots of hard work and a rare combination of beauty, personality and character, was to be the household head, and besides her own natural duties, to assume many of the husband's and the father's duties towards her children so they could be happy and successful as people.

I think this research was trying to tell us something, and I ask you to try and help me figure out the message and translate it into good law. I understand that your legislation, as presently set out, is to clarify that money, stocks and bonds, life insurance, and business assets, are ''man things. It will also clarify the Victorian ideal that the mattress, and the pots and pans, and the house to dust and clean, are ''women things.'' I humbly suggest that your legislation is a little bit less than the best we should expect from a group of representatives of the people of Manitoba.

It is true, judging by past Acts that have come through the Legislature, we don't always know if we should hope for fairly decent legislation; once in a while we should not have to be disappointed. To say it in basic English, you should consider the radical concept of the 1970s that began to appeal to progressive and imaginative people with a conscience more than eight years ago. Women are people and should be classed as decent human beings. True, they are beautiful and sexy, naturally

ut they are also intelligent, valuable, helpful partners and friends in a marriage and should be treated s such. We even have businesswomen in the Law Amendments Committee, they tell me.

The master-servant relationship of authoritarian male-dependent female is this legislation's ındamental concept and is in keeping with the best ideas of the 1900-1910 period. A woman should ave some rights to all the assets created during the marriage. Maybe if 50 percent is too high figure for you to accept, you could begin with 27-¼ or 19 percent. I had to cross out from my rief 11-¼ percent because I found out from reading the Free Press last night that the average 'omen in all the lawsuits in Canada end up with 12 percent of the family assets, and so I didn't 'ant to make the legislation worse. Forgive me for crossing it out.

It is obvious your generously expanded day care program to help children grow into worthwhile 'ouble-free assets will reduce women's dependence on separation allowances, and this should be source of pride. What allowances most women do receive today are a source of almost constant 'orry, fear, insecurity, crippling dependence and forced continued communication, with what mounts usually to a disliked and unpleasant person, in their view. I have known and had dealings 'ith women who are trying to collect separation allowance, and if you ever knew of an inefficient, ustrating, humiliating experience this is a perfect example. To say it in basic English, a government epartment should pay separation allowances and then use the usual RCMP and Unemployment ısurance Commission files to keep track of the ones who are supposed to pay, and collect it from ıem.

I thank you for the courtesy you have extended in allowing us to present briefs. Believe me, am sincerely grateful. These briefs are in effect, really two devices rolled into one, an Environment npact Study and a cost-benefit study of your proposed legislation on marriage. I don't suppose nyone here has thought way back to the similar hearings in the middle 1970s when the impact nd costs of certain legislation were quite often accurately predicted by briefs, even though those resenting the briefs had little information or resources for their studies. Isn't it about time that ıe government began preparing broadly based environment impact studies and cost-benefit studies n all major proposed legislation that is supposed to improve our lives. So often your new laws ffect tens of thousands of people when instead of real improvements they only hassle us in a different ay and the same people go on making money out of the changes, for themselves and their ives.

Respectfully submitted, Kenneth Emberley.

IR. CHAIRMAN: Mr. Emberley, would you permit questions from members of the committee?

R. EMBERLEY: I beg your pardon, Sir?

R. CHAIRMAN: Would you permit questions from members of the committee?

R. EMBERLEY: Naturally, Sir. I'll try to answer them.

R. CHAIRMAN: Are there any members of the committee that wish to ask a question? Mr. arasiuk.

R. PARASIUK: Yes, Mr. Emberley, are you aware that 75 percent of the Maintenance Orders ght now aren't enforced? That's the general estimate that we've received. Are you aware of that hen you made your recommendation that the court pay out maintenance and then use the means at the court or the state has at its disposal to pursue the enforcement of these Maintenance Orders om individuals? Were you aware that the problem was as great when you made your proposal, nich I agree with?

R. EMBERLEY: I'm aware that the present system is much more than inadequate and I'm sure ere are many people here qualified to recommend improvements. You've surely heard many commendations from women who have gone through the ordeal, and possibly men who have gone rough the ordeal of being dependent on a successful woman. I appreciate you mentioning those ercentages, thank you.

R. CHAIRMAN: Any further questions? Seeing none, thank you, Sir.

R. EMBERLEY: You will notice several supplementary items which are self-explanatory. I do not sh to waste the committee's time. It just concerns democracy and freedom. Thank you ndly.

R. CHAIRMAN: Thank you, Sir.

Rosalyn Golfman.

MS. ROSALYN GOLFMAN: Shall I wait until they're passed out?

MR. CHAIRMAN: No, you can start. They'll catch up with you.

MS. GOLFMAN: Mr. Chairman and members of the Legislature. I am here today for the first tir because I have concerns regarding the proposed family law legislation. You will be pleased to kn that I have shortened my original brief because many of my concerns have already been expresse in the past few days. I will limit my comments regarding family law to the area of judicial discretio My brief is echoing the concerns of previous speakers. I would like to express my gratitude to th government for allowing the public to come and express ideas and concerns. I would like to belie that a government that is committed to democracy will also be committed to the principle democracy and equality between spouses.

I feel that marriage should be an economic and social partnership of total equality betwe spouses. Each spouse contributes differently but equally in order to maintain the family unit. The chosen roles are viewed with equal responsibility and equal rights. The right is theirs by virtue being a partner in the marriage. The responsibility is that both of the spouses should mutually ar constructively decide areas of responsibility for each. The contribution of a spouse working in t home, though different than the wage earner, is of equal value to the marriage partnership as t spouse who works outside the home and should be thusly rewarded. The non-wage earning spou sets an emotional and secure climate to allow the other spouse the freedom to pursue a care I support the concept of immediate equal sharing between spouses of family assets during the cour of a marriage and of commercial assets at the termination of a marriage. However, I am concern about the scope of judicial discretion allowed for in the proposal in this legislation regarding t equal sharing of commercial assets upon marriage breakdown.

Our government has repeatedly stated that they are committed to the principle of equality betwe spouses. The new bill, instead of commitment, proposed an assumption of equal sharing with su broad, vague and irrelevant scope for judicial discretion that it repudiates and abandons any equ sharing.

The clauses admitted in Section 13(1) and (2) in Bill 38 lists 10 circumstances which admit ju about every possible argument why the judge should vary from 50-50 sharing of commercial asse I feel that this wide discretion will destroy the assumption of equal sharing. Such broad judic discretion will prompt the stronger spouse into court in every case and increase litigation. Howeve it will do little for equal sharing.

I would like to quote Mr. Mercier when he said, "An arbitrary, inflexible system of judic decision-making is not a basic part of our legal system, nor should it begin to play that role no Flexibility within the bounds of equity is the cornerstone of our judicial system and so it shou remain." I believe that judicial discretion has a place in our legal system but not when it appea to be so undefined and vague. I don't believe that limited judicial discretion on equal sharing w lead us down the slippery slope and ignore particular circumstances of individual cases. I feel th marriage should be an equal union to be one, and that one is not the man, but both spouse

I would like to see Sections 13(1) and 13(2) deleted from Bill 38 and limit discretion to ra hardships or grossly unfair circumstances. If 50-50 sharing is written into the law and the discreti to vary is limited, the judge must apply the law as the legislature has written it. In the past fe months I have discovered, by speaking to lawyers and judges, that many of the clauses represent in the bill are open to vastly different conclusions.

One of the original criticisms of the original law reform by the present government was that t bill would increase the use of accountants and lawyers. Now any consciencious lawyer should to court to properly represent their client under the proposed legislation. Bill 38 is regressive comparison to last year's law reform. It is vague, confused, undefined instead of clarified and defeats the aims of the original law reform. Mr. Mercier wants to assert the fact that the new b is fairer with the possibility of certain women gaining more than 50 percent. If 13(2) or any oth clause would be interpreted to mean that discretion will favour the dependent spouse, why isn that stated openly and clearly?

Women are not striving to get all they can. Women are content with equal sharing. I feel appeal to women that they will get more under the present bill creates a false impression. It more likely that women who have no economic interest in the commercial assets would receive le under this legislation because the law is confusing and undefined. Guidelines have not been s to assure any guarantee of equal sharing.

Also, judicial decisions in the past have not considered the non-monetary contribution in t marriage equal to the monetary contribution. An assumption of equal sharing is not a guarant and this still leaves the non-earning spouse in the same precarious position as in the pa

e trend has been to award property to the title holder or to the spouse who purchased the property. ne money earned in the marriage has been considered to be money of the wage earner and not oney of both marriage partners. Women have no reason to believe that the new bill will assure er of equal sharing of commercial assets. I urge our government to guarantee women equality by niting judicial discretion.

My skepticism as to the intent of this proposal stems from some of the wide, redundant, irrelevant nd confusing clauses of Bill 38, Section 13(2). For example, clause (j) provides power for the court deal with any circumstances relating to the acquisition, disposition, preservation, maintenance, nprovement or use of any asset, allowing the judge to deem any circumstance relevant when eciding to share any commercial assets. And you wonder why we are upset. What constitutes grossly nfair and unconscionable? What does the nature of an asset have to do with equal sharing and hat length of time is a marriage required to qualify for equal sharing? Any circumstances the court eems relevant, including 10 other clauses. I can't accept these clauses, and the government's sistance that they are committed to the principle of equal sharing, as being consistent.These and her catch-all clauses only verify that the government is not taking equal sharing seriously and akes their assumption of equal sharing highly misleading. With the existence of many of the vague, nfused loopholes, the intent of the bill is meaningless.

I again urge our government to seriously amend Bill 38 to limit judicial discretion to rare hardship grossly unfair circumstances. The refusal to reform family law would be a blatant repudiation the equal sharing principle. Thank you.

R. CHAIRMAN: Would you permit questions?

S. GOLFMAN: Yes.

R. CHAIRMAN: Are there members wishing to question the delegate? If not, I thank you. Oh, r. Cherniack.

R. CHERNIACK: Yes, Mr. Chairman. Ms. Golfman, you are one of the signatories to the open tter which I referred to last night when I was talking with Ms. Corne. I want to again refer to the atement "many women feel deceived." Since I'm a member of this committee and have been volved in this problem on legislation for some time, I would like clarification from you as to what u meant. Deceived by whom? Deceived how?

S. GOLFMAN: We felt that this law would be clarified and not changed and we feel "by wide dicial discretion" the law is meaningless, according to equal sharing principles.

R. CHERNIACK: Deceived by whom?

S. GOLFMAN: Deceived by the committee that changed the law.

R. CHERNIACK: Well, let's spell it out, Ms. Golfman. I'm a member of the committee, that's why eally want to find out. Deceived by whom? I mean, how were you deceived? Who gave you an pression that there would not be any appreciable change and who made the change? You realize at I'm trying to get you to say. Name names and . . .

S. GOLFMAN: Would you like to say it for yourself, I don't have to . . .

R. CHERNIACK: Well, I know what I believe is so, but I want to know whether you . . .

S. GOLFMAN: No, I don't know. Bill 38 doesn't read the way we thought it might read, according the original law reform, and the committee that drafted that, I assume.

R. CHERNIACK: You realize that there is no committee, no formal committee, that has drafted l 38. It was presented by the Attorney-General, moved by the Attorney-General, presented by n and voted by the Conservative caucus. That's what happened. There's no committee of any rmal or legislative nature that has presented this bill. This bill carries in certain principles which u don't seem to approve of and this bill also repeals legislation passed last year. So therefore ome back to the question, when were you deceived? Because the question of family property v improvement has been in the public eye for a number of years now, starting with the Law Reform mmission, and working its way through the period of the NDP government and finally being gislated in June of 1977. And that was passed by the Legislature with five members of the nservative Party voting in favour of the property law bill and the balance voting against it. Then,

in last December, there was legislation brought in by the Conservative Government suspending th operation of that legislation. So, I really want to know, when women feel deceived do they fee deceived on the basis of what has happened from the time of the Law Reform Commission or i relation to last year's law or in relation to this proposal?

MS. GOLFMAN: We feel deceived by the present bill.

MR. CHERNIACK: Thank you. And when you say they feel deceived, how were they misled? Becaus I was never misled, I always knew what the Conservatives would do with this legislation.

MS. GOLFMAN: Well, we thought that they would just make some changes, according to th litigation, or some clarification of the bill, but we feel . . . as I said, my issue is with the judici discretion, that it's too wide.

MR. CHEIACK: My suggestion to you is that you were misled because it was not a campaign issue the law had been passed last year before the election, and during the election it was not a campaig issue. Your elected MLA was, I believe a Conservative was elected, and I don't know whether i his campaign he led you to understand that he was going to promote a change in the law tha was passed last June. Are you aware that he made any such promises?

MS. GOLFMAN: No, I'm not. I wasn't involved in it at the time.

MR. CHERNIACK: So you don't know that he ever made the promise that he would make th change.

MS. GOLFMAN: No, I don't.

MR. CHERNIACK: In your paper, you have said that you do recognize a limited discretion.

MS. GOLFMAN: Yes, I do.

MR. CHERNIACK: And there are some who would say to you that this bill provides only limite discretion.

MS. GOLFMAN: No, I would disagree with that because of the ten clauses I have stated, and th way they are worded.

MR. CHEIACK: Yes, what you are saying, you'd like to see Sections 13(1) and 13(2) deleted, an discretion limited to — and these are your words — "rare hardship or grossly unfa circumstances."

MS. GOLFMAN: Yes.

MR. CHERNIACK: And to that extent you would leave it to a judge to determine.

MS. GOLFMAN: Yes, I would. I think that would give him wide enough scope.

MR. CHERNIACK: Well, you know the scope he now has, when it comes to marital assets, is th it could be grossly unfair, or unconscionable, having regard to any extraordinary financial or oth circumstances of the spouses, or the extraordinary nature or value of any of their assets. Wou you say that that part is too broad? We are only talking about family assets, or would that b acceptable to you?

MS. GOLFMAN: Would you repeat that please? Which one is that?

MR. CHERNIACK: Repeat it? 13(1) on Page 7, at the bottom. It deals with family assets, the fam home, the car that is used by the family, the furniture, the summer home, and there they are sayi — "grossly unfair, or unconscionable, having regard to any extraordinary financial or oth circumstances." I should tell you that this wording is the same wording as we New Democrats p in last year as applying to commercial. We did not leave any discretion as far as family assets we concerned. We said that this should apply to commercial assets — the Attorney-General lifted tho words from the previous Act dealing with commercial and applied them pretty closely to family asse and then went into 13(2) dealing with commercial.

But coming back to family assets, do you feel that the wording of 13(1), if applied to commercial, ould take care of your concerns where you speak of rare hardship, or grossly unfair ircumstances.

IS. GOLFMAN: Yes.

IR. CHERNIACK: Well, then looking at 13(2), and you're not a lawyer so you're reading this from ne standpoint of what is reasonable to you, what they say there is that it shall be equal, except hen a court is satisfied that a division would be inequitable, having regard to any circumstances t all, including all those ten. Now you used the words "rare hardship or grossly unfair ircumstances". Are you suggesting that this section should read something to the effect that it hould be equal, but other than equal as the court may direct if it is satisfied that an equal division ould create rare hardship or grossly unfair circumstances?!

IS. GOLFN: Yes, I would be.

IR. CHERNIACK: I've been much easier than you have, and now I'm going to get firmer, because have been sort of suggesting that, if the Minister would change it to read that equal division would e clearly inequitable, that that would be a big improvement over all these others. But I think you're aying that's not quite enough, that it should be "grossly unfair" or "grossly and unfairly inequitable", think that that is your point.

IS. GOLFMAN: Yes, I might be a little strong there. I don't understand "unconscionable", and hat that might mean.

IR. CHERNIACK: Oh, now we come back to unconscionable as in 7, and you don't want to get volved in your opinion, because you don't know what it means.

IS. GOLFMAN: Right.

IR. CHERNIACK: You make a very good point. I suppose unconscionable would be in the onscience of the judge or either of the parties, and you don't what their . . .

IS. GOLFMAN: Yes, I don't know what that could mean, or where that could be taken, so . .

R. CHERNIACK: Would you think from your view of society's standards, that an act of adultery ould be interpreted as being a course of conduct that would invite a court to say, "This is not quitable."

S. GOLFN: Yes, I think that could happen.

R. CHERNIACK: You haven't dealt with The Maintenance Act, where really conduct is volved?

S. GOLFN: No I haven't, because I feel it's been dealt with already.

R. CHERNIACK: Thank you.

R. CHAIRMAN: Any further questions? Seeing none, thank you very kindly.
Perry Schulman. I might point out to Mr. Schulman, you are aware of our 30 minute time mit.

R. PERRY SCHULMAN: I'll try to keep it in mind, Mr. Chairman.

R. CHAIRMAN: The Clerk said you are a lawyer, that's the reason I mentioned it to you. We ve permitted a few persons in the past to go slightly over.

R. SCHULMAN: Mr. Chairman and members of the committee. I appear before you today as practising member of the bar to speak on behalf of myself, and of my brother Mark Schulman, o I think is No. 39, and will not be appearing today. I appear to speak with you about Bill 38 d to urge you to adopt Bill 38.
A year ago, when the Law Amendments Committee was considering the former Bill 61, my brother

and I appeared before the committee at a time that the proposed bill contained no provision f judicial discretion. My brother proposed a series of amendments to Bill 61 showing a need for judici discretion, giving as an example anomalies which can be created and which give rise to a nee for judicial discretion to alter in unusual cases, a provision for equal division of assets. And at th time, my brother submitted to the committee, as follows:

"The court should be given discretionary power to make adjustments in the accounting proce to relieve against anomalies and unjust results in the strict application of the Act, so that the will be an equitable equalization of the net worths of the spouses that has accumulated durir marriage in the accounting process," and he gave examples to show the need for judici discretion.

Subsequently, Bill 61 was amended to provide for some measure of judicial discretion, and urge you today that there is a need, and a very real one, for greater discretion than was allowe for in Bill 61, but I urge you too, that Bill 38 does not give as broad a discretion as the opponen of Bill 38 claim that it does.

Now, let me say first about Bill 38, and it's Point 1. of the outline of my submission, I rega Bill 38 as shorter than Bill 61, easier to understand, and to contain much simpler concepts. It my submission that the discretion section contained in Bill 38 is not nearly as different from th contained in Bill 61, as the opponents of Bill 38 wish to say.

Now, as you know, and as has been mentioned several times, Section 12 of Bill 38 contain what I regard as, a very clear and important presumption. Spouses each have the right to ha their assets divided equally between them in any of the following events or circumstances: creat clear enactment of a presumption entitling each spouse to an equal division of family assets ar of commercial assets.

Now you know that Section 13(1) in connection with family assets, shifts the onus to th non-earning or the non-productive, commercial or . . . the non-earning spouse, to show that th presumption should be rebutted, and in order to do that, the onus shifts to that person to satis the court that a division of those assets in equal shares would be grossly unfair or unconscionabl having regard to any extraordinary financial or other circumstances of the spouses, or th extraordinary nature or value of any of their assets.

And you know that in connection with commercial assets, the onus shifts as well. In order rebut the presumption of an equal division of commercial assets, the onus shifts to satisfy the cou that a division of those assets in equal shares would be inequitable, having regard to a circumstances the court deems relevant, including their paragraphs (a) to (j) dealing with that.

Now I want to stress that it's my view that the distrust of judicial discretion which is containe in these sections and which is inherent in the position of the opponents of Bill 38, is entirely unjustifie and point out that there is nothing new in the field of domestic relations law about creating presumption and having it rigorously enforced by the courts, in the absence of clear eviden justifying it being rebutted.

You will note from the outline of my submission that I am directing your attention to thr principles which arise — three of many — but three principles in domestic relations law, in whi a presumption is created and in which, as I review the case law with you, I think it will be cle to you that the courts have rigorously enforced the presumption in the absence of clear eviden justifying it being rebutted. And with that in mind, I stress my second point, that the distrust judicial discretion, which you have heard about these past few days, is simply entire unjustified.

Dealing with the first point that I deal with in paragraph 3(a), the presumption of advancemer I am sure that most of you know that there is a presumption which arises in the law of domes relations, that when any husband buys a property and puts title to the property in his wife's nam there is a presumption that he intends to make a gift to his wife, there is a presumption that i hers, the presumption is against her holding the property in trust for him. So that if he finds hims in the position the next day, that she ousts him from the house, he has no realistic chance of succe in a claim to get the title back. The situation most commonly arises in Manitoba at the prese time, where a house will be bought, and say the husband puts up the proceeds of the purcha price, and the title will be placed in the name of the husband and wife as joint tenants. The leg presumption is that he intends an outright gift to the wife, and that presumption is against her holdi title to the house in trust for the husband. Now, in the face of this presumption, many husban have, after having made that advancement or put title in the wife's name, or title to half in t wife's name, have attempted to go to court and rebut the presumption and they say, really, I rea put title in her name in trust for me, or really, I only did it to confer a benefit in the event of dea she would get the title as surviving joint tenant. I didn't intend to benefit her. The highways a strewn with the claims of husbands trying to rebut the presumption of advancement, the clair nearly always fail. The presumption is rigorously enforced by the courts.

The Supreme Court of Canada in the case of Hyman vs Hyman, has said that it would ta

lear, distinct, and precise testimony in order to establish that a trust was intended all along. The ases are rare that the courts have permitted the presumption of a resulting trust, presumption f a gift to be rebutted. That's one example. The way in which the courts have listed a lot of the ases there — In the Klemkowich case, Chief Justice Freedman, while in the Court of Queen's Bench, tressed the cogent evidence that would be needed to rebut the presumption of advancement. The upreme Court of Canada, in the Jackman case, stressed it again in the case of Fetterly versus etterly. Mr. Justice Wilson, speaking about an attempt to displace the presumption of advancement aid, "A very heavy burden rests upon a husband to rebut the presumption of advancement and o show that the conveyance in favour of the wife, although absolute in form, was not intended o operate as a gift to her but rather the wife is a trustee for the husband of the interests so conveyed o her."

The second aspect of domestic relations law to which I refer you is the presumption which arises om Section 20 of The Law of Property Act. Now this is a principle which the courts have applied, rising from a statute which, in many respects, creates a situation such as will be before the courts nder Bill 38 when it is passed. As you know, Section 19(1) of The Law of Property Act says, "All oint tenants may be compelled to make or suffer partition," — that's physical division — "partition r a sale of the land or any part thereof." Section 20, subsection (1), says: "Any person interested land in Manitoba may bring action for the partition of the land, or for the sale thereof, under ne directions of the court if the sale is considered by the court to be more advantageous to the arties interested." The word "may", "may be compelled", a discretion, you would think, the pponents of Bill 38 ould say, "Aha, the court has a broad discretion here. Not even a declared resumption spelled out there. The court can make seat-of-the-pants decisions; results are not redictable," opponents of Bill 38 would say.

That, of course, is not the way the courts have interpreted the provision of The Law of Property ct. Courts have interpreted that Section to create a presumption which is described in the case w as follows:

I refer again to the case of Fetterly versus Fetterly. The decision of Mr. Justice Wilson. The*prima acie*: "One of two joint tenants is entitled as of right to an order directing the partition or sale f the property so owned." You have two owners, the husband and wife, owners as joint tenants. here is a presumption that one or other of them, the one who applies, is entitled to an order artitioning or an order for sale of the property. "True," Mr. Justice Wilson said, "the fate of the pplication in every case lies in the discretion of the court, which discretion here, as elsewhere, ust be exercised in a judicial manner." As was pointed out by the learned Chief Justice of this ourt, Chief Justice Williams, in Klaus versus Klause, there may be cases where the order will be efused.

Further down, "precise rules which would govern or restrict the exercise of the court's discretion such cases" have not been laid down. At best," and to adopt the language of Mr. Justice Freedman, s he then was in the Klemkowich case, "the principles in accordance with which that discretion ould be exercised have not been adumbrated with finality. Granted the*prima facie* right of the pplicant to the relief asked, however, the onus is cast upon the respondent, in this case the husband, satisfy the court that it would be improper to make the order directing partition or sale, as the ase may be. The respondent may do this by evidence to demonstrate that the applicant has failed enter court with clean hands or that the claim cannot be enforced without vexation or oppression, hich latter does not extend to mere inconvenience which may be suffered by the respondent as result of the order."

And His Lordship goes on to stress several court decisions showing that despite the broad scretion which the opponents of Bill 38 would say exists in The Law of Property Act Section, "Fault wholly irrelevant to the exercise of the court's discretion in a Law of Property Act pplication..'

In the Fritz case, Mr. Justice Coyne says at Page 453, "That why they are not living together irrelevant upon this application. It is sufficient that they are joint tenants and one desires sale, artition being impractical."

In Whimmer versus Whimmer, the question of who was to blame for the unsatisfactory marital lationship is not a factor which affects the real question of whether the appellant was entitled an order for a petition or not.

In the Roblin case, the court stated at Page 158: "If a court permits its personal feelings to overn the exercise of such discretion it fails to act judicially." The principle is that in an application nder Section 20 of The Law of Property Act, the court raises a presumption that on application one of the joint tenants the property is to be partitioned or is to be sold. The onus then shifts the other side to show oppressive conduct or oppressive conduct which is interpreted to be onomic oppressive conduct before the application will be refused. The presumption is rigorously nforced. It is only in a clearly inequitable case that the court displaces the presumption and refuses e order. These orders are granted routinely in the Court of Queen's Bench and in order to reverse

that presumption you have to show an extreme case such as the wife living in the house with th children having nowhere to move. A case where we all would agree that it would be clearly inequitabl to cause the house to be sold. The kind of case, a clear inequity which it would take before a cou would find the presumption under Bill 38 in connection with commercial assets to be rebutted

Again, the case of a presumption arising in an application under Section 20 of The Law of Propert Act, presumption which is rigorously enforced by the courts.

The third presumption that I refer to is the presumption of legitimacy. An important princip in the field of domestic relations law, in the Wikstrom vs Children's Aid Society case, Mr. Justic Schultz said, ''The presumption of legitimacy in the case of a child born to a married woman of course one of the strongest presumptions known to the law. It can only be rebutted by evidenc that is unquestionably decisive to the contrary.'' This is a presumption which many an attempt ha been made by a husband in domestic litigation to rebut, one which is rarely allowed to be rebutte and practically speaking, it takes an extreme case like Welstead and Brown, where the blood typ evidence shows that it's impossible that the husband is the father of the child. It takes very stron evidence to rebut this very important presumption which arises quite often in the field of domest relations law.

Now I won't go through all of the cases, but in Comeau vs Gauthier, a judge in Ontario ha recently said, ''The presumption of legitimacy of a child is not one that is or should be easily displace nor can it be displaced by a mere balance of probabilities,'' and there are a large number of case stressing the point.

Now in light of these three examples that I have referred to from Domestic Relations Law, I urg you that there is no reason to think that the courts will not rigorously enforce the presumption equal division which arises under Section 2 of Bill 38. I think it's obvious from the decision of th Supreme Court of Canada in Rathwell, that in the face of legislation of this kind, the court will se to an equal division except in a case in which it would be clearly inequitable to do so, and alread the case law from Ontario under the newly passed statute, makes clear what the courts intend do, the way the courts intend to rigorously enforce the presumption under a section like Sectio 12. Now I won't take the time to read it; I think it's been referred to before, I believe that referen has been made to quotations by the Attorney-General in debate to certain aspects of the judgmer but this couple of sentences, it appears to me that a court may only depart from the prima fac right of a spouse to equal division of family assets if it is satisfied that one or more of the criter set out in paragraphs A to F are established, that there would be inequity in equal division unsatisfied or unconvinced. It says that the Legislature did not intend the court to be entitled exercise any broad jurisdiction to divide family assets in accordance with what an individual jud may think is fair and equitable in a particular case.

It is nothing surprising in what his Lordship said. I have shown you from three different fiel of Domestic Relations Law that that is the way with which courts deal with presumptions in fiel like this one.

The Property Law in this province is of vital importance to married persons, and in my vie that law not only should be, but is in fact now clear and precise. The rule of law now is that the is equal sharing of family assets. It is my opinion that a court should be loathe to depart from th basic rule, and should exercise its power to depart from that rule only in clear cases where inequ would result.

So, the concerns articulated by speakers for the past few days, and the criticisms levelled agair the use of judicial discretion, I think I have shown them to be unjustified and the courts are starti to show the same thing in interpreting legislation, which is like Bill 38.

Now, the other day I interpreted Miss Steinbart to suggest that the rules of construction whi have been developed by the judges for hundreds of years' require that family assets be treat differently from commercial assets. Therefore, she said, family assets must be shared equally a commercial assets, she says, must be shared unequally. Those are the principles of constructi which she says haven't been developed for hundreds of years. There is of course, no rule construction of the kind, and I know of no authority but one to support her interpretation of t section. In referring to Lord Atkins judgment in Liversidge vs Anderson, I know of only one author which might justify the suggested method of construction. ''When I use a word Humpty-Dumpty sa in rather a scornful tone, it means just what I choose it to mean, neither more nor less.'' ''T question is,'' said Alice, ''whether you can make words mean different things.'' ''The question i said Humpty-Dumpty, ''which is to be master?'' That's all. You probably will recognize that as bei an excerpt from ''Alice Through The Looking Glass'', and that is the only authority which I ha been able to find to justify the interpretation which has been placed upon the bill in the earl submission.

It's my respectful submission, that the rule which is applicable, the rule is that you look for t object of the legislation, and I think it's clear from Section 12 of Bill 38 that the intention of 38 is to recognize the wife's contribution in the home, and on the breakdown of the marriage,

ivide all assets, family assets, commercial assets in an equal way except where clear inequities vill result.

Now that Section 13, subsections 1 and 2, set up different criteria or requirements in order to ebut the presumption created by Section 12, will not prevent the court from making an equal division of all assets in nearly all cases. Reference has been made to unconscionable, grossly unconscionable, nequitable, clearly inequitable. The fact that different criteria are established in the two different ubsections in order to rebut the presumption of equal sharing under Section 12 doesn't in any vay prevent the court from nearly always saying that everything will be divided equally.

Let me refer to two matters in this regard. Now the lawyers here have all handled automobile ccident cases, and will be acting for the passenger in one car who will feel that he has a claim gainst his driver and against the driver of the other car. As you know, there are different standards et up in law to establish a claim against each of the two drivers. Against his own driver he has o meet a standard approving gross negligence in order to succeed. In suing the other driver, it's different standard, ordinary negligence. There is no reason why, in the one case, both standards an't be met. There's no reason why, in the same lawsuit, the passenger cannot recover damages gainst his driver and against the other driver. Both criteria are met in the same case. He wins oth sides of the case. There is no reason why, a wife cannot, in nearly every case except the xception, except the clearly inequitable, why she cannot, and why it isn't predictable, that she is oing to obtain an order that will see that she gets one-half of the family assets, and one-half of he commercial assets.

I direct your attention to Bill 61 for a moment, of the last session.

MR. CHAIRMAN: Mr. Schulman, can I interrupt you for a moment and tell you that your 30 minutes s up? Have you much further to go? Do you think you could wind up in five minutes?

MR. SCHULMAN: Well, perhaps ten, if I might have your indulgence.

MR. CHAIRMAN: What's the general consensus of the Committee? Agreed? Would you try and lo it in ten, please?

MR. SCHULMAN: Okay, I will. I want to just direct your attention to Section 37 of Bill 61, because ne former bill did the same thing. The former bill set up different criteria in order to rebut the resumption in the case of commercial assets as opposed to the rebutting the presumption in the ase of family assets. Section 37(1), that's subsection (1), dealing with the rebutting of the resumption which I might add isn't as clearly spelled out there as Section 12 spells it out in Bill 8, but in rebutting it in connection with family assets and commercial assets, in the first subsection ou have the criteria by reason of the extraordinary financial or other circumstances of the spouses r the extraordinary nature or value of their property.

In connection with commercial assets, subsection (2) sets up a second criteria. The second criteria connection with commercial assets, but it applies to commercial assets only, is, by reason of ne extraordinary imbalance in the relative contributions of the spouses to the marriage. So the ormer bill sets up separate criteria for commercial assets, for rebutting the presumption, and there's othing wrong — nothing unusual — about Section 13 of Bill 38, doing the same thing — Section 3 simply inserted to deal again with the unusual cases of clear inequities.

I should say that last year, before the Law Amendments Committee, a nuer of ladies appeared nd stressed the personal difficulties that they had. They were the breadwinners, they had looked fter the family, they had looked after the accumulation of assets, and the no-good husband was oing to benefit under the Act. While I haven't seen any of those people here in the last couple f days, I have heard it argued by a number of speakers, "Let's have a principle which applies everyone, let's not worry about the extreme cases, let's have a principle that applies to everyone." is my submission that there is no reason why a statute cannot be enacted which does justice everyone, not just for most of the people, and leave the exceptions to suffer the hardships.

My respectful submission is that Bill 38 makes such provision, that it's a neat provision to do stice for everyone, and justice on a basis that will satisfy everyone who has been making ubmissions before you, and everyone seated at this table irrespective of the party presented.

Now, I want to say — I'll move quickly — it's my submission that under Section 13 Sub-Section), the discretion which is invested in a court is not nearly as broad as claimed by opponents of ill 38. It's my submission that Paragraphs (a) to (j) restrict the discretion set out in the ection.

Now many people have been stressing in Section 13(2), the words "having regard to any rcumstances the court deems relevant" and it has been suggested that anything goes, but that ection ends including, and it lists Paragraphs (a) to (j), and I direct your attention to the residuary

circumstance set out in Paragraph (j). "Any other circumstance relating to the acquisition, dispositio preservation, maintenance, improvement, or use of any asset." Now, it's my submission that th residuary paragraph, Paragraph (j), on real principles of construction, limits the discretion veste in Subsection (2), and the word 'including' is to be given a restrictive definition. In that regard, refer you to the Court of Appeal decision in the Regina vs. Loblaw Groceteria's case; and I ref you to the decision of Mr. Justice Schultz. With respect, I do not think these cases justify the inclusic he draws as far as the use of the word 'includes' in Section 3(22)(b) is concerned. The word 'include is susceptible of different shades of meaning, sometimes of enlargement, sometimes of restrictio In some instances it is used to express the idea that the thing in question constitutes a part on of some other thing, or as implying that something else has been given beyond the general languag which precedes it. In other instances, it is used to express the idea that that which is enumerate or effected is the only thing included, and to this use applies the maxim 'inclusio unius est exclus alterius,' meaning the inclusion of one thing is the exclusion of another. And expressio unius e exclusio alterius, meaning the expression of one thing is the exclusion of another. And from Re vs. Beru, quoting from the Dilworth case, "But the word 'include' is susceptible of anoth construction, which may become imperative if the context of the Act is sufficient to show that was not merely employed for the purpose of adding to the natural significance of the words expressions defined. It may be equivalent to mean and include, and in that case it may afford a exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attache to these words or expressions."

So, it's my submission to you, that the residuary and the restrictive wording of (j), "any oth circumstance relating to," and so on, indicates a restrictive meaning to includes, and Paragrapl (a) to (j) restrict the exercise of discretion under 13(2), and it isn't an unlimited discretion. Condu therefore is not, as I heard suggested, a part of (a) to (j) and it is not within the court's judici discretion to take into account, and you saw from the cases I cited earlier under The Law of Proper Act, that even if the court could look at conduct, it wouldn't, because it doesn't in The Law Property Act applications, where you're seeking to petition or divide property, just like here on th breakdown of the marriage. You are seeking to divide the assets accumulated during the marriag The criticism of the courts and of the way in which the courts have exercised their discretion ju is entirely unreasonable and totally unjustified.

Now, in light of all these factors, it's my submission to you that when and if Bill 38 is passe the case will be rare where the presumption of equal division of family assets and commercial asse will be overturned. There will be cases where it's necessary, for example 13(2)(a), "the unreasonab impoverishment by either spouse of the family assets." The husband borrows money in the busine — well, okay, the husband borrows money on the security or in relation to a family asset ar squanders it gambling. It may well be appropriate for the court to say that this is a case of cle inequity, if there's an equal division. The wife should have more.

And look at the situation under Paragraph (g), where "either spouse has assets to which th Act does not apply by reason of their having been acquired by way of gift or inheritance, and th value of those assets." So you have a couple, the husband runs the business and the wife, durir the course of the marriage, inherits a substantial amount of money. It's a one-man business, ar considering that she has inherited a substantial amount of money, it may well be clearly inequitab to require that that she keep the $250,000 or the $1 million inheritance, and he be forced to dispo of the business so that his wife can receive half of the equity in the business. There will be case but they will be rare, when the presumption of equal division will be overturned, but it's n submission, that with a clear presumption as in contained in Section 12 of Bill 38, that the outcon of litigation will be predictable. We will be able to advise our clients with considerable certain as to what their rights are, and what is likely to happen court, and with the situation where th outcome of litigation is predictable, the likelihood of settlement has to be increased, and the amou of litigation has to be substantially decreased.

That's my submission, and I would just like to say one thing in closing. This period of 18 montl of debate on the family legislation has been unique in my experience, and I know in the experienc of many members of the bar. It has provided us with a rare opportunity to get involved in discussio about laws that affect a fair number of people, and certainly for my part, and I know that mai other lawyers have greatly enjoyed the opportunity to take part in the debate and the discussio of this here before the Law Amendments Committee and just the ongoing discussions that ha taken place.

That's my submission. I'm sorry, Mr. Chairman, that I went on so long.

MR. CHAIRMAN: Mr. Schulman, will you permit questions?

Mr. Mercier.

MR. MERCIER: Mr. Schulman, I thank you for your brief, as I thank all others who have appe

before the committee.

I take it you would subscribe to the principle that the objective of the legislation should be that there should be equal sharing of all assets acquired during the marriage between spouses with the exception of limited rare cases?

MR. SCHULMAN: Yes.

MR. MERCIER: And that is your interpretation of the legislation?

MR. SCHULMAN: Very definitely.

MR. MERCIER: One other question. In the last few days there has been raised by a number of people, and I disagree with their interpretation, but would you give me your opinion as to whether or not the provisions of The Marital Act, and particularly the definition of 'marital home' takes away any rights of a person under The Dower Act?

MR. SCHULMAN: Not at all. The definition of homestead under The Dower Act is not changed at all. The rights under The Marital Property Act will be in addition to the rights that exist under The Dower Act, and there's no change — I must say I've heard it suggested on the radio by one member of the committee that the inference was there that the position was altered. But no, the definition of 'homestead' in The Dower Act is not being changed at all. What's happening here is, there are additional rights being created..

MR. MERCIER: Thank you very much, Mr. Schulman.

MR. CHAIRMAN: Mr. Cherniack .

MR. CHERNIACK: Thank you, Mr. Chairman. Mr. Schulman, you will agree that The Dower Act does not give to the spouse that doesn't have any ownership in the land, doesn't give any ownership to that spouse.

MR. SCHULMAN: No, it's interpreted as being an inchoate right, the right to prevent sale or mortgaging of the property and the right to live there for the rest of their life and the right to one-third of the estate. I think it's increased under the . . .

MR. CHERNIACK: It will be to one-half.

MR. SCHULMAN: Yes.

MR. CHERNIACK: But it does not pass title?

MR. SCHULMAN: Dower rights do not pass title.

MR. CHERNIACK: All right. Now, Mr. Schulman, you spoke of the rare opportunity that one has to participate. I guess one has to thank the democratic process in Manitoba, which doesn't exist in other provinces, for people such as you to come and speak to a committee of legislators before they pass the legislation, and I think that we can pay tribute to that tradition that has been established in this province.

MR. SCHULMAN: Well, I have certainly found it very rewarding personally, to be able to express my views in this matter.

MR. CHERNIACK: I want to extend an invitation to make it even more rewarding for you, because I felt that you had given us an extremely learned and academic lecture. Academic in the sense that the law has not been passed, and you have not been called upon to exercise your legal knowledge, use your legal knowledge to interpret the law, but you still have an opportunity to indicate to us how to clarify the law to remove any semblance of doubt so that there need not even be the justification that you have given for dealing with a case of presumption.

MR. SCHULMAN: Okay, but it is more than academic because I have been practicing for about 41-½ years and I have tried to give you the benefit of my experience, so it is more than academic. I am trying to be practical in my interpretation of Bill 38.

MR.CHERNIACK: You misunderstood my use of the word "academic," because I said that the law has not yet been passed, so we are dealing with it in a theoretical vein and I invite you to help us improve the law so that we can make it more practical based on your experience and knowledge and that is what I meant in terms of "academic." So it is not a pejorative term at all, it was descriptive. Therefore I would like to deal with your brief.

Firstly, the very first point you make is that the bill is shorter, as if to imply that the shorter the better, and I will later deal with Section 13(2) and I will probably ask you then, as I do now, if that Section 13 were shorter, would that make it better.

MR. SCHULMAN: Well, I have heard these suggestions that you have made as to ways that Section 13(2) would be improved and my recollection of them is that by cutting out (a) to (j), you would simply truly expand the area of judicial discretion. I think Section 13(2), (a) to (j), directs the court's attention to important points and those are the points that the court ought to zero in on in interpreting the Section.

MR. CHERNIACK: Good, then we will come back to 13(2) as we go along. But I am talking about shorter and I am wondering whether you wouldn't recognize that one reason that this bill is shorter than the other is that the immediate vesting has been removed completely and therefore a number of sections become redundant.

MR. SCHULMAN: Well, it is shorter because — yes, that part is gone but one complicated concept which creates impractical problems has been eliminated. Therefore it is shorter, simpler to understand and simpler to apply.

MR. CHERNIACK: But you talk about people who oppose Bill 38 and I think you will agree that Bill 38 is different from the past legislation in several very meaningful ways and this is one of them, the immediate vesting aspect.

MR. SCHULMAN: My opinion is that Bill 38 is not very different at all from Bill 61.

MR. CHERNIACK: Well, then what about immediate vesting?

MR. SCHULMAN: Well, there is no provision for immediate vesting but there are two things. First of all, it seems to me that in view of The Dower Act provisions there is no real need for immediate vesting, and secondly; on that, it is true that Bill 61 seemed, well it makes provision for immediate vesting, but that which is given is taken away in Section 37(1), because did you realize that the discretion which Bill 61 vested in the court allowed the court to take away the instant vesting. So I wonder whether practically speaking Bill 61 really had an effective or a meaningful kind of instant vesting. You give it one day and some day down the road there is a discretion to take away.

MR. CHERNIACK: That is very interesting, Mr. Schulman. You have just told us that similar wording in Bill 38 will make it extremely unlikely for the court to disturb the principle of equal sharing and then you are saying that the immediate vesting in last year's legislation can be taken away by court under Section 37, which has similar wording.

Now let me go further, Mr. Schulman. You said The Dower Act provision is there. You have agreed already that the The Dower Act is only a preventative, a veto power, in the main and doesn't come into effect until death.

MR. SCHULMAN: Well, it is in force while they are living together. The place can't be sold or the place can't be mortgaged.

MR. CHERNIACK: Veto power is what I said. I don't know the difference.

MR. SCHULMAN: Yes, okay. It is an inchoate right.

MR. CHERNIACK: All right. Now The Dower Act applies only to the home.

MR. SCHULMAN: As defined.

MR. CHERNIACK: As defined. It does not cover the family car. . .

MR. SCHULMAN: No, no, no.

MR. CHERNIACK: . . . it does not cover the furniture. It does not cover the summer home, whereas the legislation which is now on The Statute Book does, doesn't it? For immediate vesting. . .

MR. SCHULMAN: You mean Bill 61?

MR. CHERNIACK: Yes. The Act, the. . .

MR. SCHULMAN: Well, yes, there was, subject to the discretion being exercised at a later date to undo it, there was immediate vesting of the other family assets, yes.

MR. CHERNIACK: You will agree that the wording of Section 37 in the old Act is such as to make it extremely unlikely that that would be taken away.

MR. SCHULMAN: Well, there would have to be the unconscionable, yes.

MR. CHERNIACK: I mean as unlikely at least as in this present bill.

MR. SCHULMAN: Okay, yes.

MR. CHERNIACK: And more so, and we'll come to that too, Mr. Schulman. You speak about these presumptions and I am not going to debate that with you. When you dealt with the presumption on joint tenancy you quoted the statement that fault was not to be involved or to be considered in I forget which of these decisions.

MR. SCHULMAN: Well it's the Law of Property Act cases. Yes.

MR. CHERNIACK: Yes, that is right. I want you to state again, which I think you stated before, that you do not consider any possiblility that fault would be considered at all under 13(2). You did say that. . .

MR. SCHULMAN: In my opinion fault is not a relevant consideration under Section 13(2).

MR. CHERNIACK: Do you recognize that a court may not agree with you in that and find that fault is.

MR. SCHULMAN: Well, I think based on the case law the word "including" has a restrictive definition.

MR. CHERNIACK: And because "including" does not mean broadening, then you are saying that you can't conceive of a court using the question of fault or conduct — I have extended the term to conduct — to be a factor in making a decision under 13(2) to vary the presumption of equal sharing.

MR. SCHULMAN: I don't expect a court to find fault.

MR. CHERNIACK: You don't expect a court to find fault. That is the reason why I invited you to help us improve it. If it is clear that it is not intended that a court should, can we improve the wording to make sure that a court will not even consider for a moment whether or not your expectations will be realized or not?

MR. SCHULMAN: Well, you know, arguments will be made on many matters, but I am saying based on the case law that I have read, the proper construction of including is a restrictive one and fault is not relevant, just like it isn't under The Law of Property Act.

MR. CHERNIACK: All right. On the presumption, would you remind me of the rule of Russell and Russell. Was there a presumption in Statute Law as to the legitimacy of a child or was it a presumption that was built up over the years, that a child should not be bastardized? Isn't that the Russell case?

MR. SCHULMAN: Well a presumption was in relation to the bastardization of a child, yes.

MR. CHERNIACK: Yes, which was common law, I believe. I don't think it was Statute Law.

MR. SCHULMAN: I think it was common law and The Evidence Act was amended afterwards tc try and get around Russell and Russell, and despite the amendment the courts rigorously have applied the presumption.

MR. CHERNIACK: I was looking for that section and now I think it must be in The Canada Evidence Act, because I didn't find it in our own Evidence Act.

MR. SCHULMAN: Well, which section are you looking for?

MR. CHERNIACK: The Russell and Russell rule. It is not important, but you said The Evidence Act tried to get around the rule of Russell and Russell, and I didn't find it in the Manitoba Act.

mr. SCHULMAN: Oh, I think it is there.

MR. CHERNIACK: You think it is in the Manitoba Act. So you are saying that in spite of the fac The Evidence Act tried to get around it, it didn't succeed? Because the presumption was sc overpowering.

MR. SCHULMAN: That was the court's interpretation, yes.

MR. CHERNIACK: Yes. Which seems to imply that the court has imposed its own standards or the question of Russell and Russell.

MR. SCHULMAN: No, no.

MR. CHERNIACK: Let me just finish the thought. Which may be a reflection of the moral standards accepted by the court to determine that it would be wrong, unfair — much stronger words than that — for a parent to declare that his or her child is not legitimate.

MR. SCHULMAN: I don't think that is what the court was doing.

MR. CHERNIACK: Well, would you clarify?

MR. SCHULMAN: The court just said that the amendment was not clear enough to accomplish what it was said was trying to be accomplished.

MR. CHERNIACK: But I am trying to establish with you that the rule itself came about in common law by a court applying a standard on the question of legitimacy. It wasn't an act of any Legislature of any jurisdiction, that said that. It was maybe the Bible or at least the common law.

MR. SCHULMAN: Yes.

MR. CHERNIACK: And that is where I am suggesting that we do have judicial standards that made a rule and then became very rigid about it. And when you say there was a change in The Evidence Act, which I remember but I haven't located it, the court said it wasn't clear enough, that that's not clear that that is really what was intended.

MR. SCHULMAN: I agree. I don't think it was clear enough either.

MR. CHERNIACK: I see. All right.

You mentioned in 4, the Silverstein case, the Rathwell case, you do not refer to — is it the Fedon case?

MR. SCHULMAN: Well, I know of the case.

MR. CHERNIACK: But that was the most recent case of our own Court of Appeal.

MR. SCHULMAN: But that was under the law prior to the enactment of Bill 38. I was trying to interpret for you Bill 38.

MR. CHERNIACK: So the Silverstein case does not have a presumption of equal sharing.

MR. SCHULMAN: It certainly does in the case of family assets.

MR. CHERNIACK: I know, but they were dealing with commercial, weren't they? The court was?

MR. SCHULMAN: No, the court was at that point dealing with family assets.

MR. CHERNIACK: All right, it is not that important as to whether you and I are right. I think it was dealing with commercial, but. . .

MR. SCHULMAN: No, that judgment had two different aspects and the interpretation that I referred you to was with respect to family assets.

MR. CHERNIACK: Now, your point 5. Subsections (1) and (2) of Section 13 set up different requirements, but you assure us that this will not prevent a court from making an equal division. You are answering Miss Steinbart, are you? I mean I never had any doubt that the court had a right to make an equal division. I am concerned as to whether or not the court was being invited to make a difference as between its standards under (1) and (2). But you are just saying what is right in the legislation, the court shall find equal division unless it is satisfied to the contrary.

MR. SCHULMAN: Yes.

MR. CHERNIACK: Yes. So that is self-evident really.

MR. SCHULMAN: It wasn't self-evident to earlier speakers.

MR. CHERNIACK: Yes, but it is to you and it is to me. But you then did point out Section 37 of the former legislation or the existing legislation and 13 here, and you said that there was a distinction there between family and commercial assets. I agree. I think that under family assets there was no discretion.

MR. SCHULMAN: Certainly there was under 37(1).

MR. CHERNIACK: Except in these very extraordinary cases. Under 37(2) you said that there is not much difference, I think you said. But 37(2), which deals with commercial only — doesn't it – only deals with assets acquired before May 6th. It does not deal with what comes on. It is self-apparent on the face of it, isn't it?

MR. SCHULMAN: Well my point was that it sets up an additional standard in dealing with commercial assets. You are right, commercial assets acquired before May 6th, 1977.

MR. CHERNIACK: You recognize what that date represents?

MR. SCHULMAN: Oh yes.

MR. CHERNIACK: And it represents what people may have done not in contemplation of this legislation, and I tell you, although I think it is self-evident, self-apparent, that it was brought in to counter the arguments in favour of unilateral opting-out. Otherwise, if there was unilateral opting-out, there would have been no need for 37(2). I mean isn't that the only reason why the legislation would have involved itself with dealing with a subsection that affected nothing after an acquistion. . .

MR. SCHULMAN: Well, actually there had been some debate a year ago on whether it should be May 6th or whether it should go back a number of years, and there's been considerable discussion on that.

MR. CHERNIACK: Right. And the argument against retroactivity was the same argument in favour of unilateral opting out.

MR. SCHULMAN: I don't remember there being a connection.

MR. CHERNIACK: All right. You will agree that 37(2) is limited . . .

MR. SCHULMAN: Oh, yes.

MR. CHERNIACK: . . . to assets acquired before a certain date.

MR. SCHULMAN: Commercial assets acquired before May 6th, yes.

MR. CHERNIACK: So that the imbalance suggested there had to relate to a factor prior to Ma 6th and could not relate to the future.

MR. SCHULMAN: No, it concerned assets acquired before, the factors might have taken place a any time.

MR. CHERNIACK: By reason of the extraordinary imbalance and the relative contributions of th spouses to the marriage, you would say then that that would continue but relate only — but w agree — relate only to assets acquired before it was contemplated that this legislation would b passed.

MR. SCHULMAN: Yes.

MR. CHERNIACK: Yes. Now you gave us, Mr. Justice Schultz's opinion and your opinion and th fact that "including" means "limited to". Would you distinguish please the difference in effec between this Section 13(2) which says, "All taken into consideration," — I'm trying to remembe it before, I haven't found it yet — "All the factors that the court thinks should be considered includin the following." You're saying that limits it "to the following," that's your interpretation.

MR. SCHULMAN: Yes.

MR. CHERNIACK: How does that differ from the section we used in our legislation which saic "Shall take into account the other factors and no others." That's in, I believe, The Maintenanc Act.

MR. SCHULMAN: The Family Maintenance Act?

MR. CHERNIACK: Yes. I believe it's in The Maintenance Act rather than the . . . Well, the existin Maintenance Act. Section 5(1). "In determining what is reasonable a judge shall consider the followin factors and no others." What would you say is the difference in interpretation between using tha wording, "the following and no others," and the wording which you support as saying, "having regar to any circumstances including." What is the difference in . . .?

MR. SCHULMAN: Well, I think they mean the same thing. Let me point out the section does nc say, as we very often see, "including, without restricting the generality of the ." foregoing," whic shows an expanse intention.

MR. CHERNIACK: Now you say they really mean the same thing.

MR. SCHULMAN: Yes.

MR. CHERNIACK: And I assume you accept the fact that it is desirable that they should mea the same thing.

MR. SCHULMAN: Yes.

MR. CHERNIACK: Well then, would it satisfy my concern and not in any way adversely influenc your concern if we said, "Shall consider the following and no other circumstances;" in th 13(2).

MR. SCHULMAN: Well, I'm satisfied that my clients' rights are protected as it reads now, if tha will satisfy you, well that will be your point.

MR. CHERNIACK: But since you're not here on behalf of any client, I assume, other than th interests of justice . . .

MR. SCHULMAN: Yes.

MR. CHERNIACK: . . . then you've heard, there have been many presentations here in the last few days where there is grave concern about the interpretation of this Section. You are reassuring, could you not be more reassuring by agreeing that since it's the same effect that it would satisfy the concerns of many if it said, "Having regard to the following circumstances, or any of the following circumstances and no others."

MR. SCHULMAN: Well, I think the point is made already.

MR. CHERNIACK: But you do agree that my wording will not change the intent, as you read if, of 13(2).

MR. SCHULMAN: I don't think your wording would change it.

MR. CHERNIACK: All right. And you also argue that conduct, you don't see how conduct could be a factor.

MR. SCHULMAN: No.

MR. CHERNIACK: Would it be helpful to those who have concerns to say that in consideration, in considering the factors of 13(2), "conduct of the parties shall not be considered."

MR. SCHULMAN: I don't see any need to put that in. I mean, it's simply not a part of the Section.

MR. CHERNIACK: No, but if that is the case and if that is the way it should be, do you see any damage to your point of view if we say, we lay people who are not such learned lawyers as you are.

MR. SCHULMAN: Well, you're a very well respected member of the Bar so . . .

MR. CHERNIACK: Well, I say we lay people, we're in this capacity here as legislators, if we say that we insist that it ought to say that, to make it absolutely clear beyond any shadow of a doubt, would that damage the section as you see it?

MR. SCHULMAN: I think that would be less relevant than the other one, or less necessary than the other one that you suggested. I don't even think there's any room for . . .

MR. CHERNIACK: Then the other is more necessary than this. We're playing with words, aren't we, Mr. Schulman.

MR. SCHULMAN: . . . I don't think there is any room for doubts on the subject of fault being relevant.

MR. CHERNIACK: So that you would insist that your point of view should influence the wording in this legislation and that therefore anyone who has any point counter to yours, but agrees with you as to intent, should not be recognized in the legislation, as being irrelevant.

MR. SCHULMAN: I'm sorry, I didn't understand what you said.

MR. CHERNIACK: All right, I will repeat it. I will say that since you and other people appear to want this section to mean the same thing, and the other people don't quite see the interpretation as you see it, but want the same thing, and they would like to see in it that no other factor should be considered and that conduct, for sure, should not be considered, would you deny them the opportunity to say so in the legislation just to doubly and triply ensure the fact that their concern is met?

MR. SCHULMAN: I don't think they've been denied an opportunity to say anything. They've had quite a full opportunity.

MR. CHERNIACK: Well, Mr. Schulman, now we are playing with each other because I told you earlier that we here, around this table, have an opportunity to actually change the wording.

MR. SCHULMAN: Yes.

MR. CHERNIACK: Well, then we are the ones . . .

MR. SCHULMAN: I don't think that provision is necessary at all.

MR. CHERNIACK: Would you please answer me precisely. Do you see any harm to the point c view if it does say that? Would it damage in any way the intent as you expressed it to sa that?

MR. SCHULMAN: Well, the rules of construction in effect teach us that you don't throw in word that really don't add anything to the Section.

MR. CHERNIACK: Can you explain the extent to which it will hurt the intent?

MR. SCHULMAN: Well, look, I've told you I feel it's not necessary and I really don't see that there' anything to be added to that.

MR. CHERNIACK: All right. Now, Mr. Schulman, I want to ask you about 13(2)(g). Now we're nc talking law. I think you've been talking law up to now. But now you got involved in a policy questior Do you believe that in the principle, the presumption of equality in division of assets acquired durin a marriage based on — I assume you accept the concept that both spouses to a marriage contribut equally to the marriage are entitled to equal distribution.

MR. SCHULMAN: Yes.

MR. CHERNIACK: That whether or not one of the spouses inherited any vast sums of money shoul have any effect on that spouse's right to share equally in the assets acquired and earned and brougl together during the marriage. Now that's not a legal question I'm asking you.

MR. SCHULMAN: Okay, well what's the question?

MR. CHERNIACK: My question is: Do you justify the thought in (g) that an inheritance should negat the right of one of the spouses to share equally in the assets acquired during the marriage presumab because they each contributed equally to the acquisition of that asset?

MR. SCHULMAN: Given a one-man business, an incorporated business, one man, I think that might be a clearly inequitable case for a wife who has inherited a lot of money to receive, in a early payment, one-half of the equity in the business. I think (g) is a very proper inclusion.

MR. CHERNIACK: Mr. Schulman, I don't know in this room whether it's very popular to hear yc say "one-man" business, but I think people understand. I think people understand you to indica a one-person business and therefore are you not negating the presumption that they are each entitle to share equally in commercial assets, and suddenly you're saying a one-person business whe indeed it is in the concept of the entire legislation a family-owned business.

MR. SCHULMAN: I think it might be clearly inequitable to just ignore the inheritance and mal an equal division in that case.

MR. CHERNIACK: If you thought otherwise, then you would not include (g) would you? If you thoug that an inheritance should have no effect on the equal distribution of these assets, you would n include (g) would you?

MR. SCHULMAN: If I thought there was something in the Section I either wouldn't be here o would be making a different submission.

MR. CHERNIACK: Well, let me reword my question. The only reason that you see for (g) is create that possibility that an inheritance, inherited from someone outside of the marriage coup altogether, should have an effect on the presumption of equal distribution.

MR. SCHULMAN: And prevent a clear inequity, yes.

MR. CHERNIACK: Thanks, Mr. Chairman.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Schulman, first I would like to go back to your answer to Mr. Mercier, and I believe that the committee member that you made reference to was probably myself on the radio, and I want to indicate to you, if you were referring to my comments on the radio you must have misunderstood those comments. I would like to pursue a line of questioning relating to my concern in respect to The Marital Property Act.

Traditionally, The Dower Act provision has been for the homestead to be 320 acres, correct?

MR. SCHULMAN: I believe so.

MR. PAWLEY: And that Dower provision, the homestead, does not give any right of ownership to a spouse?

MR. SCHULMAN: It's an inchoate right.

MR. PAWLEY: Now insofar as The Planning Act of Manitoba is concerned, are you familiar with the terms of The Planning Act of Manitoba?

MR. SCHULMAN: I know parts of it but I'm not familiar with all of it.

MR. PAWLEY: Are you aware, Mr. Schulman, that anywhere outside of the City of Winnipeg, in order for a split of title to take place, a transfer of property, in a sum total of less than 80 acres, that approval is required of the Planning Authority?

MR. SCHULMAN: Well, I know there are provisions for obtaining approval, yes.

MR. PAWLEY: So that must come from either the municipality and from the provincial planning office of the Department of Municipal Affairs. Are you aware of that?

MR. SCHULMAN: Well, I don't remember the exact provisions, no.

MR. PAWLEY: Now, would you be prepared to concur if I indicate to you that is . . .

MR. SCHULMAN: Well, I agree there is an authority that you have to get an approval from.

MR. PAWLEY: Now if I could refer you then to the legislation before us. The definition of marital property, 1(e), is property — and I'm abbreviating this for you — property that may reasonably be regarded as necessary to the use and enjoyment of the residents. In other words, as I understand the new definition that has been discovered for marital property, now, as compared to last year, that the marital property in a farmstead situation is no longer 320 acres, as it was in last year's Marital Property Act, but is now the house plus an acre or two surrounding that house. Would that be a reasonable assumption on my part?

MR. SCHULMAN: The definition is changed, yes.

MR. PAWLEY: Yes, so that there is much less acreage, an acre or two or three, just what can be considered as necessary to use and enjoyment of the property. I would interpret that to include the lawn and the garden only immediately surrounding the . . .

MR. SCHULMAN: Well, on the other hand, given a proper case, it might be a lot more. I don't know if it will be 320 acres but it might be.

MR. PAWLEY: But not 320 acres.

MR. SCHULMAN: It might be.

MR. PAWLEY: Well then, are you suggesting then that we are not simply dealing with an acre or two around the house?

MR. SCHULMAN: Not necessarily.

MR. PAWLEY: Are you interpreting this to be much wider and broader, that it could include u to 320 acres, up to a quarter section of land? I'm asking you that because I believe that's not th government's intention to have such a broad interpretation of marital property here.

MR. SCHULMAN: What is reasonably necessary will depend on the individual confronted with th situation.

MR. PAWLEY: Well, so that you're saying it depends upon the judge's discretion in each individu case?

MR. SCHULMAN: No, no, it depends on the facts of the case.$

MR. PAWLEY: Well now, Mr. Schulman, you would agree with me that an interpretation of min that this would include only the house and an acre or two surrounding the house would not b an unreasonable interpretation. You might argue against that interpretation but it would not be a unreasonable interpretation for me to have placed on this definition. Is that right?

MR. SCHULMAN: Okay, yes.

MR. PAWLEY: Now, Mr. Schulman, we heard last night a farm wife advise us that in her individu case the farm home was placed right in the centre of the quarter section. We also have, as I indicate earlier, the problem of having to obtain approval to split out title. Now, Mr. Schulman, would yo be prepared to agree with me that the value of a farm house which by location or by prohibitio of law cannot be transferred would be worth very very little?

MR. SCHULMAN: I really can't comment on values at all.

MR. PAWLEY: Well, you would be prepared to agree with me that the value of such would b only a small fraction of what 320 acres would be.

MR. SCHULMAN: Well, there are many factors that go into value and I don't think that just fror the factors there . . .

MR. PAWLEY: But, Mr. Schulman, I'm only asking you to apply some common sense knowledg of what the situation would be and surely you would agree with me that what is happening her in relating to a house and an acre or two around that house, a farmstead, would be reducing th value very very substantially from 320 acres including the house.

MR. SCHULMAN: I'm sorry, Mr. Pawley ' in each case where I am confronted with values, I wi consult an appraiser or someone with some expertise in the field. I simply can't comment o that.

MR. PAWLEY: Well, Mr. Schulman, you'd agree that it is commonly understood that farm acreag is worth money, would you not?

MR. SCHULMAN: Land is worth money, yes.

MR. PAWLEY: Yes, and therefore there's been a reduction in value. . .

MR. SCHULMAN: Well, that may be . . .

MR. PAWLEY: . . . by reducing the family asset to only the house and immediate propert surrounding that house.

MR. SCHULMAN: If that's your experience, that's fine, but I really can't comment on that.

MR. PAWLEY: Mr. Schulman, would it not be much more reasonable to provide for the marit home to represent 320 acres, the same area that is defined in The Dower Act and has been th traditional definition of homestead, rather than for us to be getting into all this uncertainty as t how much is included and whether property can be sold or not sold, or that some might be sol much easier than other because of location . Would it not be much easier to define the amoun of acreage that we mean by the term marital home?

MR. SCHULMAN: I don't think that's necessary especially since we're creating new rights in addition to The Dower Act.

MR. PAWLEY: Well then who is going to define exactly what we mean by this marital home. You feel this is quite clear and easily interpreted, the definition of marital home in the legislation before us. It requires no change, is that what you're saying, Mr. Schulman?

MR. SCHULMAN: Yes, that's right.

MR. PAWLEY: And you don't see any injustice or inequity in this situation at all?

MR. SCHULMAN: I think the bill is quite fair.

MR. PAWLEY: But you acknowledged to me that you're not familiar with The Planning Act and you're not familiar with the value of farm lands and farm homes and their relationship one to the other.

MR. SCHULMAN: That's right, I'm not.

MR. PAWLEY: So how can you then say that this is quite proper, this definition without being aware of that basic background?

MR. SCHULMAN: I act for people who live in the city and I act for people who live outside of the city and I'm satisfied that their rights are well protected.

MR. PAWLEY: But you've never had to deal with this definition, Mr. Schulman, in the past. We haven't passed this legislation yet. So how can you be so sure when you're not familiar with the terms of The Planning Act and you're not familiar with farm values, that there wouldn't be some inherent problems in this clause.

MR. SCHULMAN: I don't see an inherent problem but given a spouse and the facts concerning the needs in relation to the house and given access to an appraiser, I'll have no problem interpreting this section.

MR. PAWLEY: And even if the law said that the farmstead could not be sold, you see no problem.

MR. SCHULMAN: No problem.

MR. CHAIRMAN: Mr. Pawley, could I ask you if you could ask questions to the person who has appeared as a delegate rather than trying to debate with him? Or cross-examine the person?

MR. PAWLEY: Well, Mr. Chairman, I wasn't aware that I was debating with Mr. Schulman.

MR. CHAIRMAN: It appears to me that you're trying to debate the definitions with him.

MR. PAWLEY: I don't feel Mr. Schulman requires any support from you, Mr. Chairman. He's doing very well.

MR. CHAIRMAN: I don't think he needs any support. I'm thinking of time more than anything. He has given you answers to questions and you keep throwing the same type of question back at him hoping he'll change his answer.

MR. PAWLEY: Well, Mr. Schulman, we may return to that because I think that the area is even more unclear.

I would like to deal with the Silverstein case. You make reference to the Silverstein case and would you agree that in the Silverstein case the presumption of gift was in fact over-ridden, the very presumption of gift that you made reference to was over-ridden in the Silverstein case.

MR. SCHULMAN: If you can direct me to that particular part of the judgment.

MR. PAWLEY: I would direct you to Page 37. I don't know whether you have the same report

of the judgment as I have. Possibly then I could deal with the wording of the judgment. The wordin of gift, by the way, in the Ontario legislation is somewhat similar to ours under R(g) and the cou in the Silverstein case stated: "It seems to me that the Legislature in using the word gift obvious intended that it was a gift from someone other than the other spouse. If gift in that Section is t be considered as including a gift from the other spouse, then the Legislature would have perpetrate the artificial exercise of attempting many years later to determine the intention of a happily marrie couple who were not contemplating a subsequent marriage breakdown when they bought their famil home. I'm convinced that the Legislature intended to end that artificial exercise, not perpetrate i Accordingly, it is my interpretation of that clause that the word "gift" means a gift from someon other than the other spouse."

MR. SCHULMAN: I agree the judge said that but I thought he said "perpetuate" rather tha "perpetrate."

MR. PAWLEY: Well, Mr. Schulman, would you, taking this wording of R(g), would you be of th view that in the proposed legislation before us, that gift would not include a gift from the husban to the wife, as the judge found same to be the case in the Silverstein case?

MR. SCHULMAN: From someone other than the spouse, yes, I think so.

MR. PAWLEY: So would you suggest that we ought to amend (g) if in fact we wish to make clear that gift could include a gift from a spouse?

MR. SCHULMAN: I really don't think an amendment of that kind is necessary. That's how I rea it.

MR. PAWLEY: You don't feel that it should include a gift then from a spouse.

MR. SCHULMAN: I beg your pardon?

MR. PAWLEY: You don't feel from a policy point of view that it should include a gift from spouse.

MR. SCHULMAN: Oh, I'm sorry. All I was saying is that I interpret (g) to be someone other tha a spouse.

MR. PAWLEY: Mr. Schulman, if you are correct in your statement that you see no reason wh a wife cannot, in nearly every case under this legislation receive one-half of the family assets, one-ha of the commerical assets — you indicated that you felt it would be very predictable the outcome that exceptions would be rare — then could you advise me why we could not in fact use the sam wording in 13(1) that is used for family assets as we do in 13(2) for commercial assets? Why d we have to utilize ten different factors in 13(2)?

MR. SCHULMAN: From the very nature of some commercial assets, I think it becomes desirabl to have separate provisions. What I have in mind is the inherent problems in valuing some kind of commercial assets.

MR. PAWLEY: I understand these factors though to go to the determination, not so much c evaluating, but assisting the court in ascertaining whether an equal division would b inequitable.

MR. SCHULMAN: Yes.

MR. PAWLEY: So why could we not content ourselves with the wording in Section 13(1) and there are some factors that should be utilized in assisting us in evaluating the assets, simply relat those factors in a separate section dealing with evaluation rather than including them in 13(2) whe we list factors that are supposed to assist us in determining whether to vary the equa sharing?

MR. SCHULMAN: I suppose the reverse might be done and (1) might be blended with (2) by th same reasoning. Again, Bill 61 made a distinction between commercial assets acquired before Ma 6th, 1977 and family assets acquired before May 6th, 1977.

R. PAWLEY: But the discretion was very very limited in those instances, you must cknowledge.

R. SCHULMAN: I must say I don't think it went far enough.

R. PAWLEY: Mr. Schulman, did you say it should be more limited?

R. SCHULMAN: No, that's not what I said. I think that Section 37 leaves room for injustice being eated and that there is room for increasing the judicial discretion.

R. PAWLEY: Mr. Schulman, if I could return us to the farm situation again, the farmer and his ife in dealing with 13(2) and the farmer has the farm machinery in his name. The farm lands have een handed down from generation to generation; the livestock is in the husband's name. Do you el it would be unreasonable for the court to examine the assets according to factor (h), the nature the assets, and make a determination which would vary the equal division?

R. SCHULMAN: I'm sorry, the nature of the assets is one of the factors but I don't understand ur point in relation to the farm situation.

R. PAWLEY: Well, how do you define "nature of the assets"? What does "nature of the assets" ean to you? How would it be used in your view, the wording, "the nature of the assets"?

R. SCHULMAN: Well, the farm situation that you outlined, to me would be one kind of nature assets.

R. PAWLEY: Yes. Well, would that concern you then, Mr. Schulman, if . . . and I would want point out to you that if we could again return to the Silverstein case and the Ontario legislation, at the wording that is used in 13(2) is practically the same in the Ontario legislation as it is here cept that here we have added (a), (b), (h), and (i), and I think the important factor that has been dded here that is not in existence in Ontario, in the Siverstein determination, according to their atute, is this very item, the nature of the assets. So you would agree then that the court could ery well examine the fact that the farm had been handed down from generation to generation, randfather to son and then on to the grandson, as a factor that could weigh in the determination s to equal division?

R. SCHULMAN: Actually, I thought you were speaking of the farm asset in terms of the physical rm and the contribution that farm wives make to the operation of the farm.

R. PAWLEY: I'm referring to clause (h), the nature of the asset, that they could examine the ssets.

R. SCHULMAN: Yes, okay, that's right. The nature of the asset, yes.

R. PAWLEY: Whether it was, say farm machinery or farm lands handed down generation to eneration and determine that by the very nature of the assets, that they could examine the assets, hether it was say, farm machinery, or farmlands handed down generation to generation, and etermine that by the very nature of the assets that they were of a nature that would warrant a vision other than equal.

R. SCHULMAN: My problem in dealing with your question is that your example, wouldn't that volve some assets . . . I get the impression the assets would have been acquired before the arriage, and we're not dealing with . . . The facts of your case do not fit the. . .

R. PAWLEY: Well, not necessarily the farm machinery. If I could take the farm machinery, they uld have very well been purchased during the course of the marriage, or the livestock, and even e property could have been sold from the father to the son at a very cheap price, certainly not heritance, but it's not unusual in farm situations for farmlands to be sold at less than market value father to his son.

R. SCHULMAN: Okay. So what's your question now?

R. PAWLEY: My question to you is, do you see the nature of the assets, that factor being utilized legal counsel in determining whether assets of that nature should be divided equally or a variation

of same?

MR. SCHULMAN: Well, I agree that's a factor to be taken into account by the court, but that ver factor might well lead the court to conclude that there ought to be an equal division as oppose to rebutting the presumption. But it's a factor which is there and it's something properly to b considered.

MR. PAWLEY: Well, have you any idea why this particular factor would be added when it's n in the Ontario legislation? I don't know where, the Attorney-General will have to enlighten us, whe each came from. But it's not in the Ontario case and it certainly wasn't a factor that was considere in the Silverstein case insofar as the division of the family assets there. Have you any idea wh the nature of the assets should be added to our legislation in Manitoba?

MR. SCHULMAN: Well, I think the example that you have given shows perhaps why it's a fact properly to be taken into account. But where exactly, you know, I certainly can't account for i having not drawn the Act how can one say where it came from. It would be nice to think that th Legislature of Manitoba is going to' and I believe that it's in the process of enacting legislatic which is better than the legislation which is in Ontario. Perhaps the Ontario Legislature will ne year amend their Act to draw upon Bill 38, I don't know.

MR. PAWLEY: Mr. Schulman, I don't want to be unfair with what you've told me, but you see to be confirming what really are my fears, that that particular factor will be used by a court i determining equal division, insofar as farm assets are concerned because of their very nature.

MR. SCHULMAN: Well, it will be looked to, and it may very well provide the reason why the cou won't reverse the presumption, but it's relevant, certainly.

MR. PAWLEY: So if we deleted (h), the nature of assets would not be there for the court to consid and thus it would be less likely that the presumption would be overridden. Would that b correct?

MR. SCHULMAN: Well, where I disagree with you, with respect, is that I think that the nature the assets is a factor which will have a reverse effect, the reverse of what you are suggesting. think the nature of the assets may well lead the court to say, no, this is not a case of clear inequit there should be an equal division. So, you see it as. . .

MR. PAWLEY: Mr. Schulman, we're starting out from an equal presumption. These factors a utilized in order to override that presumption, are they not?

MR. SCHULMAN: To override or decide not to override.

MR. PAWLEY: Mr. Schulman, I won't pursue that further because you have your opinion and have mine, and I can only see it very clearly as a factor to be utilized, to assist the court in decidin whether or not the equal sharing presumption should be overriden or not.

MR. SCHULMAN: Well, okay, I don't agree with you, I'm sorry.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: Mr. Schulman, you raised some points regarding The Dower Act, and I don't hav Hansard, I don't have your statements here in front of me, but I think you said that the matt of immediate sharing is dealt with in part, or at least the spouse's share is protected in The Dow Act, and you've made reference to The Dower Act.

MR. SCHULMAN: Yes.

MR. PARASIUK: Is that correct? Is my understanding correct?

MR. SCHULMAN: Spouses have rights at present under The Dower Act. Yes.

MR. PARASIUK: So you are indicating that since there isn't immediate sharing in Bill 38, that that no great problem, because The Dower Act does provide spouses with rights.

MR. SCHULMAN: Yes, that's correct, yes.

MR. PARASIUK: Okay, thank you. Now, would you agree with these statements, " that The Dower Act is a poor substitute for The Marital Property Act because it doesn't apply to all the assets that The Marital Property Act does, and because there are easy ways to get out of it." Also, there's another statement, "There are many loopholes under The Dower Act which are not present in The Marital Property Act." Do you agree with those statements?

MR. SCHULMAN: Well, you read them rather quickly, but I don't think . . . No, I don't agree with the impression that I got from you reading. . .

MR. PARASIUK: Well, I'll read them more slowly then. "I submit that The Dower Act is a poor substitute for The Marital Property Act, because it doesn't apply to all the assets that The Marital Property Act does, and because there are easy ways to get out of it." That's one quote.

MR. SCHULMAN: The easy ways to get out of what?

MR. PARASIUK: The Dower Act.

MR. SCHULMAN: How do. . .

MR. PARASIUK: Well, can I read the other quote and then I'll come back to that?

MR. SCHULMAN: Okay.

MR. PARASIUK: Secondly, "There are many loopholes under The Dower Act which are not present in The Marital Property Act," and then first of all under Section 16(1), in the case of a marriage made before 1964, if the spouse leaves a lifetime income of $6,000 a year to his other spouse, he does not have to leave 50 percent of his estate.

MR. SCHULMAN: I think that $6,000 is being increased to $15,000 under the new bill.

MR. PARASIUK: Okay. Still it's $6,000 to $15,000. The reason why I read you those quotes, Mr. Schulman, is tha5 they are made by Mark Schulman, your brother, who made those same statements to this Committee, Statutory Regulations and Orders, on Wednesday, June 4th of 1977, and when he made those statements, he said he was making them on behalf of you and himself. Now I understand that today you have come before us, and I'm no lawyer, but you have come before us and you have said you are making statements on behalf of Mark Schulman and yourself.

MR. SCHULMAN: Yes.

MR. PARASIUK: Maybe I misunderstood you. Could you explain this contradiction in statements that you have made a year ago, with statements and assurances that you are giving us today? There seems to be a complete 180 degree reversal.

MR. SCHULMAN: Well, I don't think so. Mark was speaking about a proposed bill which provided for 50-50 division with no judicial discretion at all. That form of the bill was substantially changed because of the hard work of the Law Amendments Committee and many people, and I'm speaking today about a different piece of legislation. Now if you show me a contradiction, I'll try to fix that.

MR. PARASIUK: Well, it's somewhat contradictory when you assure the members of this Committee that immediate sharing is not really a problem, although it's omitted in Bill 38. It's not really a problem because in fact, spouses are protected under The Dower Act. That's what I asked you before and you said that understanding is correct. I then take a look at this statement made by your brother on behalf of yourself, and it says that The Dower Act is a poor substitute for The Marital Property Act because it doesn't apply to all the assets that The Marital Property Act does and because there are easy ways to get out of The Dower Act, and there are examples of how one can get out of The Dower Act. So, a year ago you said that The Dower Act doesn't provide that type of protection; today, you say that The Dower Act does provide protection and does allay the concerns that people have, that immediate sharing has been omitted from Bill 38.

MR. SCHULMAN: Well, I said earlier that it's not necessary in relation to real property and I have

acknowledged that there's no instant vesting in connection with personal property family asset So to that extent it goes, you know, there's nothing covering that aspect in The Dower Act, certainl The Dower Act just concerns the realty.

MR. PARASIUK: In your estimation, that since The Dower Act is inadequate, and since it's a po substitute for The Marital Property Act, do you think that there should be immediate sharing family assets in Bill 38?

MR. SCHULMAN: Oh, you haven't referred me to any examples to show that it's a po substitute.

MR. PARASIUK: Well, I am quoting the exact words verbatim of your brother, who has presente this on behalf of yourself. I'm not in a position to document his particular argument I quoted you. Presumably you and he jointly prepared this presentation a year ago, so you would have tl justification to make that type of a statement a year ago. As I said, I'm not a lawyer. What I ar I do understand contradictions and it seems to me that this a glaring contradiction, and I am ju trying to understand how the fears that people have, that 50-50 vesting immediately has been take out of Bill 38, how those will be allayed by references to The Dower Act on the part of yourse when a year ago. . .

MR. SCHULMAN: You would have to refer me to the examples that were given before I wou agree there was any inconsistency.

MR. PARASIUK: Well, I would ask you then to take another look at the presentation of your broth to this Committee last June 1st, and take a look at it in the light of your statements which w be recorded in Hansard, and I certainly would hope to have that opportunity as well when the writte text comes out of your statements. I will look at them and I will compare them to the statemen that were made a year ago.

MR. SCHULMAN: Did you find any inconsistency with respect ho a broadening of judici discretion?

MR. PARASIUK: No, you argued for the broadening of judicial discretion then.

MR. SCHULMAN: Okay.

MR. PARASIUK: And I'm not particularly raising that. I have just raised this particular one in th you brought in the reference to The Dower Act yourself. I really wasn't that well acquainted wi The Dower Act and that's why I thought it would be pertinent for me to raise that point.

MR. SCHULMAN: Actually, my comments were made in response to question from a member the Committee.

MR. PARASIUK: Do you think that discretion, the judicial discretion, allowed in 13(1) is the san as the judicial discretion allowed in 13(2) of Bill 38?

MR. SCHULMAN: I think the standards are slightly different, if that's what you mean.

MR. PARASIUK: Yes. Well, the reason why I say that, is that I think that Mr. Mercier asked y if you basically agreed that this Act provides for the 50-50 sharing of assets acquired during marriage, and I think your answer was, "Yes, I do." And now, my difficulty with that is, that I thi there is a difference; there is a difference in the way this law applies to family assets and the w it applies to commercial assets, and I have yet been able to get a clear enough reason as to w this distinction should exist, if in fact the principle is 50-50 sharing of assets. And it would stri me that if that principle is truly pursued, that you would have the same wording for both. Now am just speaking as a layman when I raise that and you've made a legal presentation. Can y give me any indication why you would want different wording for these categories of assets, especia since some people place some items in one category, and other people place the same items the other category, like pension or insurance?

MR. SCHULMAN: Well, as I see it in either instance, the occasion will be rare when the presumpti is displaced. There is no practical difference between them, although I agree that the wo "inequitable" means something slightly different from the word "unconscionable."

MR. PARASIUK: Do you think it would make a great deal of difference to this Act if one used he same wording for the judicial discretion allowed for family assets and that for commercial assets? Vould it make any difference if the exact same wording was utilized?

MR. SCHULMAN: I think that the Act is quite fair as it is.

MR. PARASIUK: Well, I'm sorry, I was just asking for your opinion as to whether in fact it would nake any difference. We've had a lot of contradictory statements as to what the Act presently says nd I was just asking whether, in your estimation, in your learned opinion, the Act would be different in fact the same wording was given to judicial discretion for family assets and for commercial ssets?

MR. SCHULMAN: Well, I've agreed that the word "inequitable" is slightly different from the word unconscionable", so if a change like that was made there'd be a slight difference.

MR. PARASIUK: Also, I wasn't around here last June 1 to hear the various comments on Bill 61, ut I notice that there were some statements here — most of the statements were for corrections n the Act — and you've provided, I think, a detailed analysis of the Act from your particular erspective. I had to leave the room for a few minutes and I was wondering if there are any parts n the Act that you feel could be strengthened? For example, we've had groups come forward saying nat Section 11 of Bill 38 should be changed, and that is that the value of an asset situated outside f Manitoba "shall" be taken into consideration, and an accounting and division under Part II, instead f "may" be taken into consideration. Those are suggestions that have come from lay people who ave come before this committee. Again, in your learned opinion, do you think that that change 'ould be a good change?

IR. SCHULMAN: I don't think the change is necessary.

IR. PARASIUK: Okay. You don't have to provide any reasoning for that.

IR. SCHULMAN: I'm sorry. I thought you caught the point that Mr. Cherniack made. -(Interjection)—

IR. CHERNIACK: I will refer to it Mr. Schulman.

IR. PARASIUK: I find that you haven't made any suggestions with respect to Bill 39, The Family laintenance Act. Would you be prepared to answer any questions on that particular piece of gislation?

R. SCHULMAN: If you allow me one minute to get the Act. I'll try.

R. PARASIUK: Okay. Again, the former bill, or the bill that's on the Statute Books right now, ut the proclamation has been suspended, didn't, I'm told by people on both sides of the House, eal properly with the whole question of enforcement of maintenance. I look at this bill and I find at Bill 39 doesn't properly deal with the question of enforcement of maintenance, and since I take that you have had some experience in this particular legal area, do you agree with that? Do you ink that the problem of enforcement of maintenance orders is not dealt with by this legislation id still remains a void?

R. SCHULN: Well, my experience is, that since the Queen's Bench has been referring the aintenance orders to the Family Court Enforcement Office, that the collection process is significantly nproved, and I don't agree with you as to the extent of the need for a provision.

R. PARASIUK: Okay. The reason why I raise that is that people have come forward over and er again indicating that 75 percent of maintenance orders aren't enforced. One of the government nisters says it's with deep regret that this legislation doesn't deal with enforcement of maintenance ders, and I look at that type of evidence and I wonder whether, in fact, it's not possible to improve ll 39 so that possibly the enforcement of maintenance orders increases from 25 percent to say percent, or 60 percent, or 75 percent. And I'm wondering whether, in fact, there's any legal way which that might be done. We've had recommendations for example from various people presenting iefs that Section 25, Subsection (1) be changed, and the change would be substituting "shall" "may" require the person against whom it is made to deposit a specific amount in court, or

to enter into a bond. Now, that case I think has been made quite well by a nuer of people representir different groups, and from different parts of Manitoba, and I'm wondering again, in your learne opinion, whether that would be an improvement?

MR. SCHULMAN: No, I think that would be a step backward. Why would you assume that a husbar is not going to pay? Why wouldn't you give him an opportunity first and if he doesn't pay leav an element of discretion there, because if he pays why tie up an unnecessary amount of mone or a bond? At the present time, even under The Wives and Children's Maintenance Act, there provision for a putting up of security, and it's . . .

MR. PARASIUK: Well, Mr. Schulman, maybe it does come down to a difference in presumptic . . .

MR. SCHULMAN: Are you saying that the husbands who have substantial assets in Manitoba ai not paying and are getting away without paying? I don't think those are the situations which giv rise to the statistics, whatever they are. Surely the husbands who are not paying are people wh don't have the assets, and requiring a bond isn't going to improve the situation at all.

MR. PARASIUK: Mr. Schulman, we had a very moving presentation by someonen, who was th child in a separatio where she claimed, and I had no reason to disbelieve her, that her father d have sufficient assets to pay maintenance but that he didn't, and that her mother didn't have th wherewithal really to pursue the collection of maintenance. When you hear a specific case like thi come forward, and when you hear the statistical evidence this brought . . .

MR. SCHULMAN: What do you mean by wherewithal? If the man has assets there is provisic under the laws that now stands to realize the maintenance.

MR. PASIUK: Well, she apparently never had her maintenance realized.

MR. SCHULMAN: Well, did she go to a lawyer? Did she go to the Enforcement Office, did sh do anything at all to enforce it?

MR. PARASIUK: I don't know whether in fact she had the financial means to go to a lawyer an get legal assistance.

MR. SCHULMAN: Did she apply for legal aid?

MR. PARASIUK: I don't think legal aid existed when that case happened.

MR. SCHULN: Well, even in those days members of the bar were assisting people who couldn afford to pay.

MR. PARASIUK: Well, you had asked me, "Why would I presume that someone wouldn't pa maintenance?" I said tuat the statistical evidence is such that I have the indication that 75 percei of maintenance orders aren't paid. I presume that 75 percent of these cases will not be paid unles there's something on the horizon that would change that.$

MR. SCHULMAN: Are there means in all those cases?

MR. PASIUK: I'm not sure now, you see . . .

MR. SCHULMAN: Are the husbands in the province?

MR. PARASIUK: Well, the reason why I raise that is that I'm asking if there's any way in whic this can be enforced? It seems to be a problem. I perceive it as a problem, Mr. Sherman perceive it as a problem, just about everyone else who has come before us has perceived it as a proble . I'm asking you if you perceive it as a problem?

MR. SCHULMAN: Yes, there's a problem in that a nuer of people don't have assets, and the wi isn't able to realize the order against them.

MR. PARASIUK: So you can see no way in which that problem can be dealt with legislation.

MR. SCHULMAN: But legislating isn't going to provide them with the assets and is not going to help the spouses to collect.

MR. PARASIUK: I don't have any statistical information on this matter to determine whether in act those people who aren't paying the maintenance orders have assets or not .

MR. SCHULMAN: Well, isn't that kind of a material . . .

MR. PARASIUK: No, I'm saying that that is an important point. I understand that the Attorney-General has an in-House Task Force that is looking into this matter, and I'm pretty sure hat by the time we finish with Law Amendments, and with clause by clause review, he'll be in a position to give us that information, because as I said, I'm not a lawyer and I don't have that information, it's difficult to get. I was just wondering if you had any further information, seeing as how so many other people had presented this as a problem that should be dealt with, and conceivably could be dealt with only in part — only in part I recognize — by strengthening this legislation with espect to enforcement of orders?

MR. SCHULMAN: Well, in what way? Making the word "may" into "shall" is not going to advance he wives who don't collect one cent.

MR. PARASIUK: What it won't do, I gather, is advance the maintenance if, in fact, there is no unds to pay the maintenance, but I do gather that, in some cases, people have had the assets nd have not paid maintenance, and I guess that is the factual piece of information that will have o await Mr. Mercier to present, to determine whether, in fact, that's the case or not. Your presumption s that if the assets are there maintenance orders are paid. My presumption, from the evidence have received so far, is that that isn't necessarily the case.

MR. SCHULMAN: Well, okay. Neither of us has the statistics.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Shulman, do I understand you to say — I was distracted for a moment – dealing with the enforcement of orders of maintenance Section 25(1), where an order made under his Act "may require" the person, do you consider that that really means "shall require" the person?

MR. SCHULMAN: No.

MR. CHERNIACK: Does not?

MR. SCHULMAN: No.

MR. CHERNIACK: The court does not have to?

MR. SCHULMAN: That's right. The court can quite properly let a man prove that he's going to comply with the order and make the payments. And after all, there are very many husbands in Manitoba who do make all the payments under the orders that are made against them, and more besides.

MR. CHERNIACK: Can we move now to Section 11 of Bill 38, and I asked you, sort of on the ide and I don't think on the record, Section 11 reads, "The value of an asset situated outside f Manitoba may be taken into consideration." Do you say that means "may" or means shall"?

MR. SCHULMAN: Well, "shall".

MR. CHERNIACK: You say that in this section the word "may" means "shall".

MR. SCHULMAN: Yes, the context indicates that.

MR. CHERNIACK: Would it damage the sense of it if the word were changed to "shall"?

MR. SCHULN: Well, I think it would be unnecessary.

MR. CHERNIACK: But would it strengthen it? Would it strengthen the interpretation if the wor "shall" replaced the word "may"?

MR. SCHULN: I don't think it would make any difference.

MR. CHERNIACK: All right. Well, that answer is similar to others you have answered in relatic to 13, so I accept your interpretation as being your interpretation.

MR. SCHULN: That's all it is.

MR. CHERNIACK: Mr. Schulman, can we move back to marital home? I did want to get your leg expertise on that. When it says that the family residence includes only the portion that may reasonab be regarded as necessary to the use and enjoyment of the residence. Could you elaborate on yo understanding of what that means and take into account a residence on a farm?

MR. SCHULN: Well, a client would come in and give me the facts of his situation, or her situatio and one could interpret it, but just to interpret it in the vacuum, no.

I mean, what is negligence, what is reasonable? You can't define it, but given a set of fact you know.

MR. CHERNIACK: And yet, you would say, well what are the circumstances, and I would say there a barn 100 yards away from my house — I assume that you would say well that cuts out the bar or would you say that?

MR. SCHULMAN: The barn may well be part of it.

MR. CHERNIACK: Would that be reasonably necessary to the use and enjoyment of th residence?

MR. SCHULMAN: That depends what you are going to use the barn for, I mean . . .

MR. CHERNIACK: The barn is normally used for farm animals, as I understand it.

MR. SCHULMAN: Well, people use it for other purposes.

MR. CHEIACK: Well, I'm saying a barn used for farm animals. To me that's obviously not reasonable use and enjoyment of the residence, it could not reasonably be considered to b necessary to the use and enjoyment of the residence.

MR. SCHULN: Okay.

MR. CHERNIACK: Do you agree with me?

MR. SCHULMAN: In that case, yes. If the barn is used for commercial purpose it probably wouldr be part of the marital home. That doesn't mean that the land around it wouldn't be, but the bai itself, no.

MR. CHERNIACK: Are you suggesting the possibility that the land around the barn could b considered by a court to be reasonably for the use and enjoyment of the residence?

MR. SCHULMAN: It might be.

MR. CHERNIACK: The reason I'm asking you that, Mr. Schulman, is that you have uncertainty describing these factors and yet you were so definite in describing the way a court would use i discretion under 13.

MR. SCHULMAN: Well, I think the courts have demonstrated the way they deal with presumptio and the standard required to rebut presumptions.

MR. CHERNIACK: And under the marital home definition, it would be a question again for th court to make decisions.

R. SCHULMAN: It would be a question of fact.

R. CHERNIACK: No, it would be a question of how the court would view the facts presented it to decide what is reasonable.

R. SCHULMAN: If it went to court, yes, but if settled, no. I mean, if the lawyers . . .

R. CHERNIACK: Mr. Schulman, you don't go by the law on the assumption that it will be settled, ou go by the law to determine what a court would do, don't you?

R. SCHULMAN: I assess what the court will do and then proceed to settle on that basis, es.

R. CHERNIACK: Right. And you've already indicated, I believe, to Mr. Pawley that you can envision e possibility that a court would say that 320 acres of land might reasonably be considered necessary the use and enjoyment of the residence.

R. SCHULMAN: I said it's possible, yes.

R. CHERNIACK: Yes. Mr. Schulman, I'm sorry to ask you this question and ye with a great deal respect for you, I feel bound to ask the question because of some things you said referring to ny client'' and I would like to clear the record. Am I correct in assuming that you are not representing ny particular client or any particular vested interest in this Legislation?

R. SCHULMAN: No, I'm appearing to express the opinions of myself and my brother.

R. CHERNIACK: Thank you, I'm glad we got it clear because . . .

R. SCHULMAN: There's no question I'm not . . .

R. CHERNIACK: . . . you did make reference to "it will not affect my client adversely," and I anted to make sure that you had no interest in this other than as a lawyer and as a citizen.

R. SCHULMAN: No, none at all.

R. CHERNIACK: Thank you.

R. CHAIRMAN: Mr. Corrin.

R. CORRIN: Mr. Schulman, I'm certainly pleased to hear that the law firm of Schulman and chulman is participating, although of course the firm is known throughout the city and indeed erhaps the province as being both qualified, reputable and of exceedingly high standards and this of course, attested by your presence amongst the ranks of the benchers of the Law Society Manitoba. But also, and moreover, other honours and accolades —(Interjection)— Yes, I was tting to that. This gentleman before us is the chairman, recently appointed, of the Manitoba Police ommission and your brother, I believe, is one of the directors, recently appointed, of Manitoba egal Aid Service. So I have some questions which you, and you alone, perhaps in your capacity chairman . . .

R. SCHULMAN: May I make one point before you go on, please?

R. CORRIN: Before you hear the question? Go ahead.

R. SCHULMAN: I have appeared before Law Amendments; I've made a submission on The Jury t in previous years and we've appeared before the Law Amendments Committee last year as dicated and my effort to assist has nothing to do with the matters that you referred to.

R. CHAIRMAN: Mr. Corrin, I might point out as chairman of the committee that we have now en dealing with Mr. Schulman for two hours and ten minutes. He surpasses Alice Steinbart's record a mile. We are here to deal with bills, primarily The Family Maintenance and Marital Property t and not really how good a solicitor Mr. Schulman is or how bad a one he is, or what his past ack record is. Could you please get to your question as quickly as possible?

MR. CORRIN: I'll get to my question, Mr. Chairman, certainly with as much . . .

MR. CHAIRMAN: Mr. Mercier on a point of order.

MR. MERCIER: On a point of order, we have had appear before us now I believe something lil 30 delegates. It is probably fairly well known that some of them are closely associated with variou political parties. I have made no attet whatsoever to bring that into the discussion and I reser Mr. Chairman, any suggestion by the Member for Wellington that there is some particular associatic with the government because of an appointment.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I would like to speak to Mr. Mercier's point of order. I don't kno why this sudden protesting. Mr. Corrin made no reference at all to Mr. Schulman's politics. I dor know what Mr. Schulman's politics are and Mr. Corrin didn't make any suggestion. So I think th he protests too loudly.

MR. CHAIRMAN: He made reference to appointments that Mr. Schulman and his brother hav received from the government.

MR. CORRIN: But excuse me, to the point of order, Mr. Chairman, we do live in a free socie and frankly I'm quite pleased that Mr. Schulman, having this sort of appointment, would have th courage of his conviction and be present here today because what the Attorney-General has no suggested could happen, he seems to think that I suggested it, but I did not. But what he is concerne about, and he's evinced that concern by being so defensive, virtually paranoid, with great suppo from you, Mr. Chairman, I might note. There seems to be an undue concern about the hour sudden and there's concern about Mr. Schulman's physical well-being and state because of some two hou and ten minutes before the committee. I would submit to you that Mr. Schulman is not defensiv on this subject and the reason he's not defensive is because he has nothing to be ashamed o he has nothing to hide. Mr. Schulman is pleased to be with us and I will direct my question him and I'm sure that he didn't read the sort of innuendo into my question or to my prelimina remarks that the Attorney-General did.

MR. MERCIER: He doesn't have the experience that we have here.

MR. CORRIN: Mr. Schulman, dealing with the matter that's germain and before the committe in my past experience and I'm sure in yours as practicing lawyers, I've found that the law, althoug it's certainly important, the law relative to domestic affairs certainly being important, is not un itself, or in itself, sufficient to deal with the types of problems that prevail within society as a whol I would ask you to address yourself to the particularly pernicious problems that evolve fro matrimonial disputes that involve the calling of police or the intercession or intervention of provinci police forces. I have found over the years, I might tell you, quite good reason to be concerne about the nature and quality of the police in dealin with these types of problems. I've found ve many cases involving my own clients that when, for instance, a stricken wife perhaps who has calle the police because she is complaining of being beaten by her husband. In such circumstances th police very often are indifferent, they're seemingly indifferent, callous, they very often fall back o the old line that they can't assist because it's a matrimonial dispute and I know that this seem to be almost a rule of thumb in this province. The police forces refuse to help women in thes circumstances because they don't want to get involved. They've been told by higher authority th they shouldn't get involved.

MR. SCHULMAN: At the same time, the judges are available 24 hours a day and if a prom application was made you can get an order just anytime of the day or night to ease a pressir problem of that kind.

MR. CORRIN: Perhaps you could illuminate us further in that respect or expand because certair it's possible, I suppose it's possible, if a woman had recourse to a lawyer during the wee hou of the morning, it is hypothetically possible that an interim order might be able to be received with the city, but I know of no such opportunities that are available in rural Manitoba or in Northe Manitoba and I would imagine that this type of problem is just equal, well at least of equal severi in rural and northern posts as it is in urban, southern Manitoba.

R. SCHULMAN: Well, I believe that there are judges in those parts of the province too and I ink that orders would be available at any time of the day or night in a proper case.

R. CORRIN: Well, surely you jest. I mean, I don't know whether you're being facetious now or it.

R. SCHULMAN: No, not at all.

R. CORRIN: Maybe you're taking cues from the Attorney-General and I know you're responsible him under The Provincial Police Act. —(Interjection)— Is this a point of order or is the Minister Housing just blowing off?

R. CHAIRMAN: Mr. Johnston.

R. JOHNSTON: Mr. Chairman, the member just said that maybe you're taking cues from the torney-General. Now this is getting rather ridiculous. The member should know better than that. he says he's an attorney he should know better.

R. CHAIRMAN: Mr. Corrin, would you continue your questioning.

R. CORRIN: Yes, I'll continue, Mr. Chairman, thank you. Mr. Schulman, you're telling us that you n't see any problem in a woman who is aggrieved perhaps being the victim of a beating in Northern Rural Manitoba, you don't feel that there is any reason to be concerned because she could apply an interim order, as it were, at any time of the day or night.

R. SCHULMAN: I didn't say there is no problem, but I said there are remedies open which are ten not resorted to and which people ought to look to. I'm not saying that that will necessarily ver every case but there is a remedy which isn't being fully used.

R. CORRIN: Well, would you be willing to accept as fact that members of the police force who end on these sorts of situations are, as it were, in the front line. They can exercise their powers intercession because they have the authority of the state behind them to conciliate differences ht at the front line, at the battle front, and it's because of that that I'm especially concerned at those people have special training, that they be people who have been given the opportunity educate themselves in the psychology of these types of problems and be put in a position to ervene effectively in an affirmative, positive way when they do, when they are called to attend on such circumstances.

R. SCHULMAN: I'm sure we can all benefit from greater training and education, them as ll.

R. CORRIN: Well, exactly, Mr. Schulman, and that's why I was so pleased to see you here because u, of course, under The Provincial Police Act, have the power to recommend to the torney-General minimum standards for the selection and training of policemen; you can assist the development of police education at the post-secondary school level; you can establish programs d methods designed to create both a public understanding of police functions, and as well to omote and improve police relationships with the community. I'll tell you, in this latter regard, very any women feel very very much aggrieved when a policeman comes to her home late in the evening, a result, as I said, of a complaint respecting a beating from her husband and the policeman ys, "I'm sorry ma'am I can't do a thing for you, this is a matrimonial dispute," and walks ay.

Now there was a case in Winnipeg last year where such a situation arose. The policeman walked ay and by morning that lady was dead. Now, I ask you, I ask you whether it's enough to say at an interim order is available. If a person is in a remote outpost and a policeman attends, in ose circumstances, upon a family that is in the midst of that sort of acrimonious activity, would u not agree with me that possibily if we did give special training to the police forces that provide vices in those communities, we might not only save lives but save marriages and, after all, under e Family Maintenance Act, I believe that we have a very special and I think almost a sacred section at requires reconciliation efforts to be made by the court, and I would hope by all other people o assist the court, and that would include the Attorney-General, policemen and the Chairman the Manitoba Police Commission.

t. SCHULMAN: Well, as a lawyer, I think you will agree with me that there are very many cases

too when the police in fact do remove the husband from the house and materially assist the coolin down of the situation.

MR. CORRIN: Yes, but what I'm asking you is, have you found this to be a problem and if yc agree with me that it could be a problem, will you make recommendations to the Attorney-Gener as it is within your jurisdiction and capacity to do, in order to ameliorate this problem?

MR. SCHULMAN: Well, frankly, I'm here as a lawyer and I prefer to restrict my submission to m daily practice of law, and incidentally, I've learned a lot here today and if I can use it in other way that's fine, but I want to restrict my answers to my experience as a lawyer.

MR. CORRIN: Well, if you don't wish to share your experience with us, I suppose that's your privileg Thank you.

MR. CHAIRMAN: Mr. Mercier.

MR. MERCIER: Just one question, Mr. Schulman. Perhaps I can confirm this later on. Is there nc under The Income Tax Act related to capital gains taxation, a definition of principal place of residenc relating to farms that has some similarities to the definition used in this legislation and in the Provinc of Ontario? If you're not familiar with it, fine.

MR. SCHULMAN: I'm sorry, I'm not conversant enough with the subject.

MR. CHAIRMAN: Are there any further questions to Mr. Schulman? If not, I thank you ve kindly.

MR. SCHULMAN: Thanks very much.

MR. CHAIRMAN: To the members of the committee, there was a Mrs. Turner who drove in fro Kenora to make a presentation this afternoon. Unfortunately it's 5:30 and . . .

MRS. TURNER: Mr. Chairman, I just have one page.

MR. CHAIRMAN: One page, all right. Then is it the wish of the committee that we'll stay beyor 5:30? (Agreed)

Thank you, Mrs. Turner, for making the effort to come in.

MRS. TURNER: Thank you. I did bring in copies on Friday. I hope you have them.

MR. CHAIRMAN: My wife tells me it's raining at Kenora today so . . .

MRS. TURNER: The heavens are weeping.

I'm really here to reiterate the stand I took at the public hearings on the 12th of Decembe 1977. If you haven't got a copy I did put in at the beginning that I'm past and interim acting-chairma for Human Rights, United Nations Association in Canada, nationally. I am not speaking for the loc branch. They haven't had time to meet on this.

I'm also Chairman of the Ad Hoc Committee for the International Year of the Child. And a l of what we are talking about has a bearing on children.

Last December I stated how disappointed I had been to read on Human Rights Day, the 10 of December, that the Government of Manitoba appeared to be about to rescind the three Ac pertaining to Family Law in Manitoba.

You must be aware of the many instruments at the United Nations which are designed to ensu equality for all. Not only is the Charter itself concerned this this, but it was followed by the Univers Declaration of Human Rights, 30 years ago this year.

I quote particularly from Article 16, at the end of the first section, "Men and women are entitle to equal rights after marriage, during marriage, and at its dissolution." And the same thing ha been made into a legal form under the Article 23 of the Convenant on Civil and Political Right Section (4) states, "Party to the present covenant shall take appropriate steps to ensure equali of rights and responsibilities of spouses as to marriage and during marriage and at its dissolutio In the case of dissolution, provision shall be made for the necessary protection of a children."

Now this has a bearing on the Manitoba Government, because in 1971 I requested them consider the U.N. Covenants on Economic, Social and Cultural Rights as well as those on Civil ar

olitical Rights, which Canada could not ratify at the U.N. without provincial accord because of the NA Act. Manitoba led the way in ratifying these, though it wasn't until 1976 that all the other ovinces agreed. But having done so, we should be prepared to follow their precepts. To wit, the ual rights for women in marriage.

Manitoba has also led Canada and most of the rest of the world, even including Great Britain, allowing women to vote. For a time it looked as if such foresight was again being demonstrated relation to Family Law, as people across Canada looked at us with envy. Now that the Acts are eing emasculated, others look with concern and hope that they will be allowed to stand.

One major concern is the problem of collecting maintenance. Have we not progressed in the teen years since I was present at the Senate Hearing on Divorce, where this was under discussion. reference to Mr. Schulman's previous presentation, the main point then was about men leaving e province and the women not having enough money to follow and fight. They had to move to e other province in which the husband was residing.

This affects the well-being of many of our children as well as that of the parties to a separation, d much time has been devoted to the study of alternative measures that might be taken.

As to "fault", it is rarely the fault of the child when a couple separates, and children should ot be expected to testify against either perent.

As to "assets", surely sharing throughout a marriage and not only at the time of its breakdown ould reinforce the concept of equality, whether these assets are in the home or in business.

It is my sincere hope that Bills 36 and 39 be framed in such a way as to take care of these sue and not brush through before the summer recess. They are too important to be treated lightly d I do not think that Manitoba women, who make up some 50 percent of the electorate, will st content to see their rights ridden over roughshod.

Respectfully submitted. Thank you, Mr. Chairman.

R. CHAIRMAN: Would you permit any questions? Mrs. Turner, would you permit questions?

RS. TURNER: Certainly.

R. CHAIRMAN: Are there members of the Committee that wish to ask Mr! Turner any questions? r. Parasiuk.

R. PARASIUK: Yes, you do raise the problem of collecting maintenance. Other people have said at that really isn't a horrible problem, but you confirm that the great majority of opinions brought efore us that that is a problem and was raised as a problem 15 years ago. I am wondering if ou have any suggestions as to what might be done to improve the collection of maintenance.

RS. TURNER: Mr. Schulman was pointing out that some men do not have the assets sufficient provide maintenance. It would seem to me that some kind of central fund could be put into working - I don't know whether this could work like Autopac or something, but the analogy is there — hich could be drawn upon in cases where people could not afford to pay.

R. PARASIUK: Do you also think that the court or that the State would be better able to pursue meone who did have assets but wasn't making payments, than an individual might have. Do you ink. . .

RS. TURNER: I would suggest that if it was the government's money, that they would make sure at they went after the man in question and collected.

R. PARASIUK: Thank you.

R. CHAIRMAN: Mr. Cherniack.

R. CHERNIACK: Mrs. Turner, I am sorry, it took me a little while to find your presentation of st December 12th, mainly because then as today you are quite concise and therefore it took me while to find it.

I see that, you know, quotes on Page 159 of Hansard — "Excuses have been given about the rding of the Acts, minor difficulties occur in most legislation and none of us are adverse to having b-amendments made from time to time as need arises. Excuses have been given about confusion er taxation involving the Federal Government. Apparently the latter does not feel that there would ve been any great problem. Protestations have been made that the intent of the Act will not be anged. I hope these are sincere."

Now, Mrs. Turner, you have not indicated whether or not you have made a study of this legislation

to see whether the protestations you have interpreted as being that the intent will not be change have in fact been changed in a material way, and I would like to know whether you believe th is the case.

MRS. TURNER: I am afraid this is the case and I think one of the main problems in the wordi obviously came up today with Mr. Schulman, that there is still a lot of waffling in the wording. V don't seem to progress particularly on this.

MR. CHERNIACK: I would just like to run through them quickly . I don't want to keep you, Mı Turner. I really must leave myself, but I am anxious to do it very quickly.

Immediate sharing is no longer in the legislation. Is that a matter of concern?

MRS. TURNER: It is a matter of concern and so is the "no-fault" being removed.

MR. CHERNIACK: "No-fault" in maintenanceThere is now an element of fault that would affe the amount of maintenance, and since you are dealing mainly with maintenance, would you thi that's a matter for concern.

MRS. TURNER: I would say so.

MR. CHERNIACK: Then there is the discretion involved . You had the benefit of hearing M Schulman, who is a competent lawyer, indicate that he saw that there was a difference betwe inequity and unconscionable, and therefore he saw a distinction between the way family assets wou be treated as compared to commercial. Could you comment quickly on say, family assets? Shou there be a discretion at all on the equal division of family assets, even to the extent of this bei something unconscionable involved? I remind you the previous legislation did not make th provision.

MRS. TURNER: Speaking from the point of view of the children, I would say that it would be wis to have equal sharing irregardless.

MR. CHERNIACK: This bill, as did the former Act, provides that each parent is responsible f the care of the children, but I think what you are assuming is that no matter which parent has custo of the children that parent should have equal division.

And finally, do you see any important distinction between the way commercial assets shou be treated as compared with family assets?

MRS. TURNER: Well, certainly if the wife has been involved all along as a partner in the marria and in the business, I think she is entitled to an equal share.

MR. CHERNIACK: I must make a distinction. You say, "and in the business." Now suppose a w is the spouse of a salaried person who has pension rights. Under the proposed legislation, thc pension rights are commercial assets and the spouse does not have a right to share equally w them to the same degree as in family assets.

MRS. TURNER: But during the time when he was amassing that pension, she was doing work equal value in the home.

MR. CHERNIACK: Thank you very much, Mrs. Turner.

MR. CHAIRMAN: Any further questions? If not, thank you very kindly Mrs. Turner.

MRS. TURNER: Thank you for allowing me to come.

MR. CHAIRMAN: The Committee will recess until 8:00 p.m.